APPEAL NO. 020380
FILED APRIL 3, 2002

This appeal arises pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act). Following a contested case hearing held on January 16, 2002, the hearing officer resolved the disputed issues by determining that the appellant's (claimant) impairment rating (IR) is 12% based on the hearing officer's revision of the 15% IR determined by the designated doctor; that the claimant is not entitled to supplemental income benefits (SIBs) for the first quarter, September 19 through December 18, 2001; and that the carrier is entitled to contribution from a prior injury in the proportion of 66.67%. The claimant has requested our review of these determinations, asserting they are erroneous. The respondent (self-insured) urges in response that we affirm the 12% IR and, in the alternative, that if we reverse that determination based on the hearing officer's having revised the IR, we either remand for the designated doctor to redetermine the IR or adopt the 0% assigned by the self-insured's doctor. The self-insured also urges that we affirm the SIBs determination since the claimant does not have an of IR of 15% or greater and did not make a good faith attempt to obtain employment commensurate with his ability to work, and that we affirm the amount of contribution found by the hearing officer, commenting that it is "within the range of possible contribution amounts" supportable by the evidence.

DECISION

Reversed and remanded.

The claimant testified that on _____, while working for the self-insured, he sustained injuries to his left shoulder and low back when he was knocked down by the force of water flowing through a hose at a fire hydrant; that he was treated by Dr. R, a neurosurgeon, subsequently underwent low back surgery, and eventually returned to work; and that on _____, he again injured his left shoulder and low back at work. According to Dr. R's initial report on the latter injury, that injury occurred when the claimant was struck on the left shoulder and back by an electronic vehicle gate. Dr. R diagnosed lumbar sprain and left shoulder injury (later clarified to be left shoulder strain) and released him to return to regular work as of September 24, 1999. However, Dr. R subsequently imposed work restrictions which continued on into the following summer. A February 27, 2001, report from Dr. R stated the diagnosis as left shoulder strain and lumbar root irritation syndrome. The claimant indicated that he did not have any surgery following the later injury.

SIBs Issue

Concerning entitlement to SIBs for the first quarter (September 19 through December 18, 2001), the claimant did not introduce an Application for [SIBs] (TWCC-52). The hearing officer's discussion of the evidence states that the qualifying period was from June 7 through September 5, 2001. The claimant testified that he visited the Texas

Rehabilitation Commission (TRC) and was sent to a local college which apparently did not accept him for courses; that the TRC subsequently sent him to some hospital for testing; that an employment agency sent him to work for one day shoveling dirt; that he contacted the Texas Workforce Commission (TWC) and pursued job leads from that agency to no avail; and that he looked for work every week "from June to September." The claimant could not testify to the dates of any of these activities. The documents he introduced from the TWC reflected no dates of contact with the claimant during June 2001. In Finding of Fact No. 11, the hearing officer found that the claimant failed to document a job search during every week of the qualifying period and our review of the record does not disclose error in that finding. The documentation introduced by the claimant did not reflect that he looked for employment commensurate with his ability to work every week of the qualifying period. *See* Section 408.142 and Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 130.102(d)(5) and §130.102(e) (Rule 130.102(d)(5) and Rule 130.102(e)) which address the criteria for entitlement to SIBs, including the requirements that the claimant have an IR of 15% or greater and that he provide sufficient documentation of his searching for employment every week of the qualifying period. Because we are reversing and remanding on the IR determination, we refrain from acting on the SIBs issue since a change in the IR, should that occur, would affect the dates of the qualifying period.

IR Issue

For impairment from the _____, injury to the left shoulder and to the low back, which required spinal surgery, Dr. O assigned a 13% IR and his Report of Medical Evaluation (TWCC-69) reflected Dr. R's agreement with that IR. Dr. O's December 4, 1997, narrative report reflected that the 13% IR consisted of 10% for the surgically treated lumbar spine lesion based on Table 49 II E of the Guides to the Evaluation of Permanent Impairment, third edition, second printing, dated February 1989, published by the American Medical Association (AMA Guides); 0% for lumbar spine neurologic loss and range of motion (ROM) loss; and 3% for left shoulder ROM loss. The February 23, 2001, TWCC-69 of Dr. O, who performed an independent medical examination for the self-insured for the _____, injury, assigned an IR of 0%. The parties stipulated that the claimant reached maximum medical improvement (MMI) from that injury on November 7, 2000.

The April 3, 2001, TWCC-69 of Dr. K, the designated doctor, states the MMI date as November 7, 2000, and assigns a 15% IR. Dr. K's accompanying narrative report states that "[n]o information was provided concerning the extent of his prior injury and the [IR] he received for it"; that the diagnosis is "(1) lumbar sprain (2) [status post] prior L4-5 disc surgery [and] (3) L shoulder sprain"; and that the IR is 15%. Dr. K further states that the Texas Workers' Compensation Commission (Commission) "did not request contribution or apportionment and this report is based on the findings today"; that "[f]or the diagnosis of lumbar sprain after L4-5 disc surgery from diagnosis related findings, page 73, Table 49, section II, Line E he qualifies for 10% WPI"; that there were no neurological findings that qualified for impairment"; that "from lumbar [ROM] findings . . . he qualifies for 4% WPI"; that combining the 10% rating with the 4% rating yields a 14% rating; that the left shoulder qualifies for a 1% rating; and that the combined rating results in a 15% IR.

The self-insured introduced a "peer review" report from Dr. B, dated April 16, 2001, stating that it was error for Dr. K to include the 10% rating from Table 49 II E because the claimant's lumbar spine surgery followed the earlier spinal injury, not the injury being rated for impairment.

Responding to a letter of April 26, 2001, from the Commission, Dr. K stated that he has never been provided with the medical records of the claimant's earlier low back injury; that "if he was awarded 13% in '96, I feel that a rating of 13% for the '96 low back injury that required surgery and a rating of 14% for the low back injury to a back in '99 that had previously been injured is very consistent"; that "[f]or one percent additional impairment is only five degrees of less bending in one direction"; that the claimant was "very consistent and did his best"; and that the claimant had a lot of pain in performing the examination and had objective findings of palpable muscle spasms. Dr. K further stated that "[a]s you can see from my report the prior failed back surgery diagnosis related findings was included"; that he (Dr. K) was not asked to find the contribution (from the prior injury); that "since no prior records were provided, he [the claimant] was rated from his current findings which included his prior back surgery"; that "it would seem reasonable that the prior award would be excluded from the rating that I provided"; that he understands that determining contribution is the function of the Commission; and that "I will leave my determination as submitted." There is no indication in the record that further effort was made by the Commission to provide Dr. K with the records of the earlier injury and to communicate further with him concerning the limiting of his evaluation to the impairment from the _____, injury.

Not appealed is the hearing officer's finding that "[t]he designated doctor determined that the Claimant had a 15% [IR] based on 10% from Line II.E. of Table 49 of the Guides for a specific disorder of the low back, 4% for loss of [ROM] in the low back, and 1% for the impairment to the left shoulder." The claimant does challenge the following findings:

Findings of Fact

6. The designated doctor erroneously assigned a 10% impairment from Line II.E. of Table 49 of the Guides, which is designated for a claimant having undergone spinal surgery, because the Claimant had not undergone surgery for his compensable back injury. The designated doctor's findings and comments in his narrative showed that he found all the criteria of Line II.C. of Table 49 of the Guides without surgery, which is a 7% [IR] instead of 10%.

[No Finding of Fact No. 7 was made.]

8. Using the appropriate 7% rating from Line II.C. of Table 49 of the Guides yields a combination of percentages to 12% as the Claimant's correct [IR].

Table 49 II provides ratings for "intervertebral disc or other soft tissue lesions." Table 49 II E provides for a 10% rating for a surgically treated lumbar disc lesion with residuals and Table 49 II D provides for 8% without residuals. Table 49 II C provides a 7% rating for a lumbar spine lesion "[u]noperated, with medically documented injury and a minimum of six months of medically documented pain, recurrent muscle spasm or rigidity associated with moderate to severe degenerative changes on structural tests, including unoperated herniated nucleus pulposus, with or without radiculopathy" while Table 49 II B provides for 5% where there are "none-to-minimal degenerative changes." Table 49 II A provides for 0% for unoperated lesions with no residuals.

The version of Section 408.125 in effect for this claim provides in Section 408.125(e) that the Commission shall base the IR on the report of the designated doctor unless the great weight of the other medical evidence is to the contrary in which case the Commission shall adopt the IR of one of the other doctors. As noted, the only other IR for the _____, injury in evidence is the 0% IR from Dr. O. In his February 23, 2001, narrative report, Dr. O states that the claimant was treated conservatively for the _____, injury; that "x-rays and MRI scans did show post-surgical changes at L4 / L5 from a previous injury to the back but no evidence of recurrent disc herniation, spinal canal stenosis, or other problems; and that "[h]e has 5/7 positive Waddell's signs." Dr. O goes on to explain in detail how he arrived at 0% ratings for both the left shoulder and the low back including 0% under Table 49 II A.

The Appeals Panel has approved the correction by hearing officers of mere mathematical errors in IRs and indeed has itself made such corrections. *See, e.g.*, Texas Workers' Compensation Commission Appeal No. 950472, decided May 8, 1995, and Texas Workers' Compensation Commission Appeal No. 950838, decided July 5, 1995. The Appeals Panel has also approved the deletion of ratings for noncompensable body parts from the IR determinations of designated doctors. *See, e.g.,* Texas Workers' Compensation Commission Appeal No. 941732, decided January 31, 1995, where the hearing officer deducted from the IR assigned for compensable neck and back injuries the rating assigned for a noncompensable ganglion cyst in the wrist and the Appeals Panel affirmed, noting that it was not necessary in that situation to return to the designated doctor to make that change.

The hearing officer states in his discussion that "the only appropriate rating from Table 49 would be Line II.B. or II.C. since the doctor identified muscle spasms and residuals"; that the only difference between Line (II) (B) and Line (II) (C) is that the latter "adds moderate/severe degenerative changes, which could include a herniated disc, with or without radiculopathy"; that Dr. K's narrative noted that an MRI found no herniation but that the claimant "definitely had radiculopathy into both legs"; and that by his comments, Dr. K "obviously would have assigned his specific disorder rating from Line II.C. instead of Line II.B. except for his misconception about rating the surgery." The hearing officer then stated that "[i]n strictly ministerial function, without substituting his own opinion, this Hearing Officer may rework the math for the designated doctor, using 7% from Table 49" which combines with 4% for ROM loss to yield 11%, which combines with 1% for the shoulder for

a total a IR of 12%. Dr. K's narrative report does state that the claimant "was evaluated with a lumbar MRI which identified post surgical changes at L4-5, no disc herniations and no spinal canal stenosis." Dr. K does not state that the claimant has radiculopathy extending into both legs but does state that the claimant "did not have surgery, work hardening, or pain management for this injury." In our view, the hearing officer has impermissibly involved himself in the determination of the IR and has substituted his lay judgment for the medical judgment of Dr. K. The hearing officer has determined that had Dr. K not "incorrectly" assigned a 10% rating under Table 49 (II) (E) for a specific disorder of the lumbar spine, he would have assigned a 7% rating under Table 49 (II) (C) for a specific disorder of the lumbar spine from the injury being rated, together with the 4% rating for loss of ROM and no impairment for sensory or motor loss. The hearing officer reaches this conclusion by extrapolating various observations he feels were stated in Dr. K's reports. As we have noted, some of those observations were stated by Dr. K and some were not.

The decision in Appeal No. 941732, *supra*, noted that in Texas Workers' Compensation Commission Appeal No. 94646, decided July 5, 1994, the Appeals Panel stated that "there is no provision in the 1989 Act for picking and choosing parts of the designated doctor's report." Our decision observed that in that case, as well as in Texas Workers' Compensation Commission Appeal No. 94696, decided July 13, 1994, and Texas Workers' Compensation Commission Appeal No. 94692, decided July 5, 1994, the Appeals Panel remanded where hearing officers "decided to reject a portion of the IR assigned by a designated doctor for a claimant's compensable injury and accept as not against the great weight of the other medical evidence the remaining portion of the IR assigned for the compensable injury." Here, the hearing officer, while rejecting Dr. K's 10% rating under Table 49 (II) (D), went on to determine a specific spinal disorder rating he surmises Dr. K would have assigned had he correctly rated the low back injury under Table 49. We find this an impermissible intrusion by the hearing officer into the medical judgment of the designated doctor which requires our reversal.

The Appeals Panel has recognized that a designated doctor evaluating a compensable spinal injury is not required to assign a rating for a specific disorder under Table 49 even though a rating for loss of spinal ROM from the compensable injury is assigned. As we wrote in Texas Workers' Compensation Commission Appeal No. 960811, decided June 6, 1996, citing Texas Workers' Compensation Commission Appeal No. 951921, decided December 11, 1995, the decision to include or not include a rating for a specific spinal disorder under Table 49 represents a matter of medical opinion as to whether the compensable injury being rated has resulted in permanent impairment to a claimant's discs or soft tissue. In Appeal No. 960811, the designated doctor assigned a 0% rating for the lumbar spine under Table 49 because he did not find a current abnormality significant enough to support a disc problem diagnosis. In Texas Workers' Compensation Commission Appeal No. 950391, decided April 20, 1995, the claimant was assigned a 5% IR for loss of spinal ROM but no rating was given under Table 49 for cervical and lumbar spine disorders. The designated doctor in that case, who diagnosed "lumbar strain and contusion," responded to the hearing officer's inquiry that he did not

assign impairment under Table 49 because there were "no objective abnormalities in these areas." The Appeals Panel also noted that Table 49 (II) (A) provides a rating of "0" for lumbar soft tissue lesions "unoperated with no residuals"; that Section 408.122(a) provides in part that a claimant "may not recover impairment income benefits [IIBs] unless evidence of impairment based on an objective clinical or laboratory finding exists"; and that Section 401.011(23) defines impairment as "any anatomic or functional abnormality or loss existing after [MMI] that results from a compensable injury and is reasonably presumed to be permanent." Thus, Dr. K, upon reconsideration of the rating for the _____, lumbar spine injury, could decide to assign any of the ratings under Table 49 (II) or none at all, based on his assessment of the entirety of the _____, injury.

For this reason, we are compelled to reverse Findings of Fact Nos. 6 and 8, and Conclusion of Law No. 3 which states that the claimant's IR is 12%. We remand for the hearing officer to seek further clarification from the designated doctor, and at this juncture we call attention to the provisions of 130.5(d). The designated doctor should be provided with all the pertinent medical records including those from the prior injury as well as those from the _____, injury, and the imaging films and reports. The designated doctor should be instructed to rate all the permanent left shoulder and lumbar spine impairment he finds from the _____, injury, and should be advised that the _____, injury may include aggravation of the earlier injury. In Texas Workers' Compensation Commission Appeal No. 94602, decided June 17, 1994, The Appeals Panel stated as follows:

> It is well settled that in rendering an [IR] under the 1989 Act, a doctor is to provide a rating only for the compensable injury and, in so doing, the doctor must determine, under his medical judgment, what the compensable injury is. [Citation omitted.] In Appeal No. 931098, we acknowledged that '[w]here the compensable injury in question is to the same area of the body and involves the same type of injury and amounts to an aggravation or exacerbation of an earlier injury or condition, the lines become somewhat blurred.' However, we have held that the effects of a prior injury should not be discounted in the assessment of an impairment for a current injury. [Citations omitted.]

The hearing officer may also request an opinion from the designated doctor concerning the apportionment of the impairment he finds between the 1996 and the 1999 injuries; however, the designated doctor should be cautioned against making any deduction from his IR for impairment he would attribute to the 1996 injury since it is the task of the Commission to determine the amount of contribution, if any. The hearing officer should also provide the parties with the opportunity to comment on Dr. K's clarifications and then should make such further findings and conclusions in the case as may be appropriate.

Contribution Issue

In evidence is a form entitled Carrier's Request for Reduction of Income Benefits Due to Contribution (TWCC-33) which reflects that the self-insured requested the Commission to order a reduction in the claimant's IIBs and SIBs by 90% for the effects of contribution from the prior compensable injury of _____, described as "left shoulder" and "operated back," for which the claimant was assigned an IR of 13%. The Commission's Order of May 9, 2001, ordered the reduction of IIBs and SIBs by 73%. The hearing officer's Finding of Fact No. 14 states as follows:

> 14. The Claimant [sic] took a 73% reduction on the amount of [IIBs] paid to the Claimant for 45 weeks, as approved by the Commission. The proper contribution, based on the Claimant's prior compensable injuries to his shoulder and low back, is 66.67% of the [IIBs], based on the correct current [IR] of 12%.

In his discussion of the evidence the hearing officer explains his determination of the amount of contribution from the prior compensable injury to the impairment from the later injury as follows:

> There is no particular impact of the lesser 1999 low back injury on the more serious ____ back injury. Also, there is no particular impact of the lesser 1999 shoulder injury on the more serious ____ shoulder injury. Therefore, the 7% from Table 49 and the 1% for the shoulder, as awarded by the designated doctor, are consumed in contribution. The Carrier may take a reduction for those percentages. However, there was no low back [ROM] percentage for the ____ injury. Therefore, there is no contribution for the 4% awarded by the designated doctor for the 1999 low back injury. The Carrier is entitled to 2/3 contribution, or 8% of the 12% [IR].

Because we are reversing the hearing officer's determination of the claimant's IR, we must necessarily reverse Finding of Fact No. 14 and the hearing officer's determination of the contribution issue since it is grounded, at least in part, on the 12% IR determined by the hearing officer.

We reverse the hearing officer's determinations of the IR and contribution issues and remand for such further development of the evidence and findings of fact and conclusions of law as may be appropriate.

Pending resolution of the remand, a final decision has not been made in this case. However, since reversal and remand necessitate the issuance of a new decision and order by the hearing officer, a party who wishes to appeal from such new decision must file a request for review not later than 15 days after the date on which such new decision is received from the Commission's Division of Hearings, pursuant to Section 410.202. *See* Texas Workers' Compensation Commission Appeal No. 92642, decided January 20, 1993.

The true corporate name of the insurance carrier is **(SELF-INSURED)** and the name and address of its registered agent for service of process is

MAYOR
(ADDRESS)
(CITY), TEXAS (ZIP CODE).

Philip F. O'Neill
Appeals Judge

CONCUR:

Robert E. Lang
Appeals Panel
Manager/Judge

Thomas A. Knapp
Appeals Judge