

APPEAL NO. 021103
FILED JUNE 24, 2002

This appeal arises pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act). A contested case hearing was held on April 10, 2002. The hearing officer determined that the respondent's (claimant) impairment rating (IR) cannot be decided based on the evidence in the record, as the record does not contain a valid designated doctor's report, and that the IR issue in dispute is returned to the field office for the appointment of a second designated doctor. The appellant (carrier) appealed, arguing essentially that the hearing officer erred in determining the IR issue and in remanding the case for the appointment of a second designated doctor. The carrier asks for adoption of its required medical examination (RME) doctor's IR. The claimant filed a response, urging affirmance.

DECISION

Reversed and rendered.

It is undisputed that the claimant suffered a compensable injury to his back on _____, while lifting an estimated 80 pounds of soil into a customer's truck. The parties stipulated that the claimant reached maximum medical improvement (MMI) on April 9, 2001.

The carrier's RME doctor, Dr. KN, in a Report of Medical Evaluation (TWCC-69) and narrative, both dated August 30, 2000, certified that the claimant was at MMI with a 13% whole body IR, based on a 2% impairment for lumbar lateral range of motion (ROM), and 11% impairment for a specific disorder of the spine from Table 49 Section (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). Apparently, the claimant disputed the RME doctor's IR, and a designated doctor, Dr. KL, was appointed by the Texas Workers' Compensation Commission (Commission) to assess the claimant's IR. Dr. KL's narrative report dated October 17, 2000, states that the claimant had not reached MMI, and, therefore, an IR could not be assigned. The claimant was then evaluated by his treating doctor, Dr. KT, and in a TWCC-69 and narrative dated June 28, 2001, Dr. KT certified that the claimant reached statutory MMI with a 33% whole body IR, based on a 25% lumbar ROM, and 10% for a specific disorder from Table 49 Section (II)(E), according to the AMA Guides. On August 29, 2001, the claimant had a surgical procedure, "lysis of adhesions from the sacral approach and left-sided transforaminal injection of steroids onto the left L5 nerve root sleeve" to the back. Thereafter, the designated doctor, Dr. KL, evaluated the claimant, and in a TWCC-69 and narrative, both dated September 18, 2001, Dr. KL certified that the claimant reached MMI on April 9, 2001, with a 30% whole body IR, based on a 16% lumbar ROM, 11% for specific disorder from Table 49 Section (II)(F), and 7% for neurological assessment.

The carrier disputed Dr. KL's IR assessment pursuant to the carrier's peer review doctor, Dr. C, who questioned Dr. KL's narrative report. The Commission sent Dr. C's peer review to the designated doctor, asking the doctor if Dr. C's report "changes your prior findings as to [claimant's] [IR]." Dr. KL promptly replied (within five days), addressed Dr. C's report, and concluded, "I do not see anything to justify a change or reduction in the impairment awarded to this [claimant]." Dr. KL's response was sent to Dr. C, who wrote a second peer review report, dated November 14, 2001, complaining that Dr. KL had not defined the end point in the straight leg raise (SLR) test and that Dr. KL had not performed the SLR in both the sitting and supine positions. Dr. C also questioned Dr. KL's sensory motor exam. The Commission, by letter dated December 11, 2001, sent Dr. C's report to the designated doctor requesting response to the following "question." "Please see attached peer review from [Dr. C] for your review." Dr. KL responded by letter report dated December 14, 2001, describing how he performed the SLR test and stating that the "test is positive when the straight leg cannot be raised painlessly." Dr. KL discussed his motor and sensory deficit findings and asserted that testing was done in accordance with the 3rd Edition of the AMA Guides rather than the 4th Edition.

Section 408.125(e) provides that the report of the designated doctor chosen by the Commission is given presumptive weight and the Commission shall base its determination on that report unless the great weight of the medical evidence is to the contrary. Under Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 130.6(i) (Rule 130.6(i)) and Texas Workers' Compensation Commission Appeal No. 013042-s, decided January 17, 2002, the designated doctor's responses to requests for clarification made by the Commission are also afforded presumptive weight.

Based on these exchanges and Dr. C's testimony, the hearing officer made the following findings:

FINDINGS OF FACT

4. Although asked to clarify his report several times, [Dr. KL] refused to satisfactorily explain how is [sic, he] assessed the Claimant's [IR], in that:
 - a. He refused to provide an explanation of the end point he used when he stopped the Claimant's straight leg test.
 - b. He did not understand that to verify an injured worker's performance on the straight leg, the injured worker should also perform a sitting straight leg test; hence, he did not perform a sitting straight leg test.
 - c. He was unable to provide an explanation of the impairment he assessed for an alleged sensory loss

which was not independently confirmable through diagnostic tests.

5. The designated doctor's report is clearly wrong; the evidence in the record does not contain a valid designated doctor's report.

Our review of the evidence indicates that Dr. KL, in his response of December 14, 2001, did provide an explanation of the end point that he used when he stopped the SLR test. With regard to finding 4.b., we would note that neither the AMA Guides nor Appeals Panel decisions require both the supine and sitting SLR. See Texas Workers' Compensation Commission Appeal No. 001894, decided September 25, 2000. Dr. KL explained why he did not do the sitting SLR. Regarding finding 4.c., Dr. KL explained that electrodiagnostic testing for motor and sensory deficits is not required under the AMA Guides in use for this case as opposed to the use in the 4th Edition. The hearing officer's finding that the "designated doctor's report is clearly wrong" is not supported by the evidence and is against the great weight and preponderance of the evidence.

Our review of the medical evidence is that there is a difference of medical opinion between Dr. C, who did not examine the claimant, and the designated doctor. The record reflects that the apparent difference between the designated doctor, the treating doctor, and the RME doctor's narrative reports are matters of medical judgment regarding whether measurements should be invalidated. Under the circumstances, the designated doctor's opinion prevails. Section 408.125(e).

We reverse the hearing officer's determination that the claimant's IR cannot be decided based on the evidence in the record, as the record does not contain a valid designated doctor's report, and that a second designated doctor be appointed. We render a new decision that the claimant's IR is 30% as assigned by the designated doctor.

The true corporate name of the insurance carrier is **ASSOCIATION CASUALTY INSURANCE COMPANY** and the name and address of its registered agent for service of process is

**HAROLD FISHER
PRESIDENT
3420 EXECUTIVE CENTER DRIVE
SUITE 200
AUSTIN, TEXAS 78731.**

Thomas A. Knapp
Appeals Judge

CONCUR:

Robert E. Lang
Appeals Panel
Manager/Judge

Michael B. McShane
Appeals Judge