APPEAL NO. 033193
FILED FEBRUARY 3, 2004

This appeal arises pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act). A contested case hearing (CCH) was held on October 15, 2003, with the record closing on November 12, 2003. The sole issue at the CCH was the respondent's (claimant) impairment rating (IR). The hearing officer concluded that the claimant has a 20% IR based upon the report of the designated doctor selected by the Texas Workers' Compensation Commission, Dr. W. The appellant (carrier) filed a request for review, arguing that the IR of Dr. W was not valid; that the great weight of the other medical evidences overcomes the rating of the designated doctor; and that the 20% IR assessed for gait derangement did not have underlying support detailing the evidence used to arrive at the 20%. The carrier additionally argues that it was error for the hearing officer to determine the claimant's IR based on the report of Dr. W when he determined Dr. W improperly applied the Guides to the Evaluation of Permanent Impairment, fourth edition (1st, 2nd, 3rd, or 4th printing, including corrections and changes as issued by the American Medical Association prior to May 16, 2000) (AMA Guides). The appeal file does not contain a response from the claimant.

DECISION

Affirmed.

The parties stipulated that the claimant reached maximum medical improvement on January 30, 2002; that on July 3, 2003, Dr. W found the claimant to have a 22% IR; that on April 10, 2002, Dr. Wi, a referral doctor, found the claimant to have an 8% IR. Dr. W assessed a 22% IR combining a rating of 20% for moderate severity gait derangement and a 3% impairment for medial meniscectomy in Table 64.

The hearing officer determined that the claimant's IR was 20% rather than the 22% assigned by Dr. W because Dr. W improperly combined an IR assigned for gait derangement with impairment assigned in Table 64 for the meniscectomy procedure the claimant underwent, contrary to the AMA Guides. In a report dated July 28, 2003, Dr. K, a carrier-selected doctor who performed a required medical examination, opined that Dr. W made an error in his evaluation as a designated doctor. Dr. K contended that the AMA Guides require the use of more specific methods than Table 36 gait derangement whenever possible in estimating impairments. Additionally, Dr. K's written records as well as his testimony at the CCH disagreed with Dr. W's placement of the claimant in the category of moderate severity gait derangement.

In a letter of clarification dated October 16, 2003, the hearing officer asked Dr. W to justify combining sections 3.2b and 3.2i as well as detail the pathologic findings to support placement of the claimant in the moderate severity of gait derangement. In his response, Dr. W stated that his opinion did not change and that the claimant appeared

to have a very serious and significant permanent impairment as a result of the work-related injury. In the report dated July 3, 2003, in which Dr. W assessed a 20% impairment for gait derangement he noted that the claimant was using a cane at the time she came to see him and indicated that the locking of her knee had become so severe and her pain so excessive that she uses crutches a good bit of the time. Dr. W opined that the claimant's lower limb impairment from gait derangement is moderate and should qualify for impairment of 20%.

The hearing officer concluded that the impairment given for the gait derangement was simply a disagreement between doctors and that Dr. K's opinion was not sufficient to overcome the presumptive weight afforded the report of the designated doctor. The carrier argues that the hearing officer erred in unilaterally assigning an unsupported portion of the designated doctor's IR. In its appeal, the carrier asserts: "[w]ithout the underlying support detailing the evidence used to arrive at the 20%, the 20% assessment fails."

The AMA Guides provide on page 3/75 under section 3.2b that the lower limb impairment percents shown in Table 36 should stand alone and should *not* be combined with those given in other parts of section 3.2. The hearing officer correctly found that the IRs for gait derangement should not be combined with other IRs for the lower extremity.

In Texas Workers' Compensation Commission Appeal No. 94646, decided July 5, 1994, the Appeals Panel held that a hearing officer should either find that the great weight of the other medical evidence is not contrary to the report of the designated doctor and adopt the IR of the designated doctor or not use the designated doctor's IR, and that a hearing officer should not pick and choose parts of the designated doctor's IR report. However, there have been limited circumstances where the Appeals Panel has affirmed a hearing officer's recalculation of a designated doctor's IR. For example, in Texas Workers' Compensation Commission Appeal No. 941732, decided January 31, 1995, a hearing officer resolved an issue of whether a ganglion cyst of the right wrist was part of the compensable injury by determining that it was not, and then resolved the IR issue by excluding from the designated doctor's IR the impairment that was assigned for the right wrist, which left the impairment that was assigned for the compensable back and neck injury. The Appeals Panel noted in that decision that the case did not involve rejection by the hearing officer of a portion of the IR assigned by the designated doctor for the compensable injury, and that, since the right wrist was found not to be part of the compensable injury, it should not have been assigned any impairment and that the impairment assigned for the wrist was easily separated from the IR assigned for the compensable back and neck injury. Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 130.6(d)(5) (Rule 130.6(d)(5)) now provides for multiple certifications of MMI and IR from the designated doctor that take into account the various interpretations of the extent of the injury.

Another example of where recalculation of a designated doctor's IR by a hearing officer has been affirmed by the Appeals Panel is where the designated doctor has

made a mathematical error in the calculation of the IR, such as an error in the use of the combined values chart of the AMA Guides. *See* Texas Workers' Compensation Commission Appeal No. 011597, decided September 7, 2001.

In Texas Workers' Compensation Commission Appeal No. 94181, decided March 24, 1994, the designated doctor in that case, certified a 14% IR for the employee's back injury. In reaching that IR the designated doctor used Table 50, apparently in an effort to apportion impairment between abnormal range of motion (ROM) and ankylosis notwithstanding that his computerized ROM measurements determined that the employee had a 13% loss of lumbar motion. The Appeals Panel noted that the edition of the AMA Guides applicable in that case did not provide for combining impairment factors for both ankylosis and ROM, found no support in the AMA Guides for the designated doctor's methodology, and reversed and rendered a new decision that the employee's IR was 22% by combining (using the combined values chart) the 10% specific spinal disorder impairment from Table 49, as found by the designated doctor, with the 13% ROM impairment as found by the designated doctor.

In the instant case, upon the determination that Dr. W improperly combined a rating from Table 64 with his rating for the lower limb impairment from gait derangement, the error was readily correctable. The hearing officer simply disregarded that portion of Dr. W's IR, which was improperly combined contrary to the AMA Guides. The hearing officer's action was not the exercise of a medical judgment but rather accurately applied the AMA Guides to Dr. W's data.

Whether the great weight of the other medical evidence was contrary to the opinion of the designated doctor is basically a factual determination. Texas Workers' Compensation Commission Appeal No. 93459, decided July 15, 1993. Section 410.165(a) provides that the hearing officer, as finder of fact, is the sole judge of the relevance and materiality of the evidence as well as of the weight and credibility that is to be given to the evidence. Garza v. Commercial Insurance Company of Newark, New Jersey, 508 S.W.2d 701, 702 (Tex. Civ. App.-Amarillo 1974, no writ). An appeals-level body is not a fact finder and does not normally pass upon the credibility of witnesses or substitute its own judgment for that of the trier of fact, even if the evidence would support a different result. National Union Fire Insurance Company of Pittsburgh, Pennsylvania v. Soto, 819 S.W.2d 619, 620 (Tex. App.-El Paso 1991, writ denied). Although there is conflicting evidence in this case, we conclude the hearing officer's decision on the issue of IR is supported by sufficient evidence and is not so against the great weight and preponderance of the evidence as to be clearly wrong and unjust. Cain v. Bain, 709 S.W.2d 175, 176 (Tex. 1986).

We affirm the decision and order of the hearing officer.

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

JEFF W. AUTREY
400 WEST 15TH STREET, SUITE 710
FIRST STATE BANK TOWER
AUSTIN, TEXAS 78701.

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Margaret L. Turner
Appeals Judge

CONCUR:

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Gary L. Kilgore
Appeals Judge

DISSENTING OPINION:

I respectfully dissent. The designated doctor clearly erred in combining two subsections of the applicable AMA Guides and claimed he was correct when asked for clarification. I believe the fairest resolution, to both parties, would have been to remand for the appointment of a second designated doctor, in light of Dr. W's refusal to properly apply the AMA Guides and other problems with his report.

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Thomas A. Knapp
Appeals Judge