APPEAL NO. 040620
FILED MAY 11, 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 February 19, 2004. The hearing officer determined that the appellant/cross-respondent's (claimant) impairment rating (IR) is 18% as certified by the Texas Workers' Compensation Commission (Commission)-appointed designated doctor, and that the claimant did not have disability from August 1, 2001, to March 23, 2003, resulting from the compensable injury sustained on _____. The respondent/cross-appellant (self-insured) appealed the IR determination, essentially asserting that the designated doctor does not have the requisite training and expertise to serve as designated doctor in this case, and that the designated doctor misapplied 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. The claimant appealed the disability determination on sufficiency of the evidence grounds. The appeal file does not contain a response from the self-insured.

DECISION

Affirmed in part and reversed and rendered in part.

The parties stipulated that the claimant sustained a compensable injury on _____, and that she reached statutory maximum medical improvement as of March 23, 2003.

We note that the self-insured calls into question the qualifications of the designated doctor for the first time on appeal. The designated doctor's qualifications to serve as such for this claim was not an issue at the CCH, nor was it raised by the self-insured at that time. As such, any objections the self-insured may have had as to the qualifications of the designated doctor have been waived and will not be addressed further.

On appeal, the self-insured asserts that the designated doctor improperly applied the AMA Guides in awarding the claimant an 18% IR based upon the Range of Motion (ROM) model. The self-insured asserts that the claimant's proper IR under the AMA Guides is 10% utilizing the Diagnosis-Related Estimates (DRE) Lumbosacral model Category III. We note that the only Report of Medical Evaluation (TWCC-69) in evidence, which actually gives a certification of IR, is the designated doctor's TWCC-69 dated June 4, 2003, awarding an 18% IR.

We cannot agree with the carrier's assertion that the hearing officer erred in determining that the claimant's IR is 18% as certified by the designated doctor. Commission Advisory 2003-10B(2)(c) states "[h]ealth care providers may utilize the

[ROM] or other methodology if indicated (as with any condition in the 4th Edition Guides) that most accurately reflects the [IR] evident for each injured worker." We have previously held that a designated doctor may utilize the ROM model as opposed to the DRE model if the designated doctor gives a specific explanation as to why he or she does so. *See* Texas Workers' Compensation Commission Appeal No. 033280, decided February 11, 2004; Texas Workers' Compensation Commission Appeal No. 031874, decided September 5, 2003; and Texas Workers' Compensation Commission Appeal No. 031865, decided September 5, 2003.

Through a letter of clarification dated June 26, 2003, the designated doctor was asked why he chose to use the ROM model as opposed to the DRE model. In his response, the designated doctor stated:

> My reasoning for not [sic] using the ROM model in this instance is due to the fact that [claimant] did not fit neatly into one of the DRE Lumbosacral categories. She has a verified radiculopathy as Category III describes, but also a history of muscle guarding and pain present as Category IV requires. My opinion is that the distance between 10% (cat. III) and 20% (cat. IV) is too great and the ROM model seems to be a fair and equitable approach, at least in this case.

In his Statement of the Evidence, the hearing officer stated:

> The designated doctor here assigned the claimant an 18% IR using the [ROM] model rather than the [DRE] model. Although the [self-insured] disputed the appropriateness of this procedure, the [AMA Guides] do provide for the use of the ROM model in cases where the injury does not "fit" into the DRE-based categories. The designated doctor explained how such was the case here, and the explanation was reasonable; given the deference accorded to the designated doctor in such matters, the explanation was sufficient and the procedure acceptable.

The facts of this case are similar to those in Appeal No. 033280, *supra*, where we affirmed the hearing officer's determination to give presumptive weight to the designated doctor who chose to utilize the ROM model because he felt that the DRE model did not give "total justification to the patient." In Appeal No. 033280, we stated:

> Based on the designated doctor's use of this hedging language, the hearing officer determined that the designated doctor did not believe that the DRE Category II rating reflected the true nature of the claimant's impairment that resulted from her compensable injury. The hearing officer's interpretation of the designated doctor's response in that regard is a reasonable interpretation. In Texas Workers' Compensation Commission Appeal No. 032317-s, decided October 2, 2003, we reversed and rendered a new determination that the claimant's IR was 20%, which had been calculated by the designated doctor using the ROM model as a

> differentiator after the designated doctor determined that the claimant's IR that had been determined under the DRE model did not accurately reflect the true nature of his impairment from the compensable injury. The designated doctor's use of the ROM model in this instance is similar to the designated doctor's decision to use the ROM model in Appeal No. 032317-s, except that he actually calculated the IR under the ROM model rather than using it as a differentiator, which he was entitled to do under the language of the AMA Guides. Thus, under the reasoning of Appeal No. 032317-s, the designated doctor did not err in turning to the ROM model to determine the claimant's IR based upon his belief that the IR determined under the DRE model did not encompass the claimant's impairment and the hearing officer likewise did not err in giving presumptive weight to the designated doctor's report and determining that the claimant's IR is 16%.

Whether or not the designated doctor's explanation as to why he utilized the ROM model as opposed to the DRE model was sufficient presented a question of fact for the hearing officer to resolve. Given the evidence presented in this case, we cannot say that the hearing officer erred in giving the designated doctor's 18% IR certification presumptive weight. The hearing officer's determination that the claimant's IR is 18% as certified by the designated doctor is supported by sufficient evidence and is not so against the great weight and preponderance of the evidence as to be clearly wrong or manifestly unjust. Cain v. Bain, 709 S.W.2d 175, 176 (Tex. 1986).

The hearing officer erred in determining that the claimant did not have disability from August 1, 2001, to March 23, 2003. Disability is defined as the inability because of a compensable injury to obtain and retain employment at wages equivalent to the preinjury wage. Section 401.011(16). We have long held that a claimant who is unable to return to his or her preinjury job is not required to actively seek employment or prove that there is no employment available. Equally well accepted is the concept that the compensable injury need only be a cause of the inability to obtain and retain employment at wages equivalent to the preinjury wage.

In determining that the claimant did not have disability for the above-mentioned time period, the hearing officer stated the following:

> The evidence as to [claimant's] alleged disability is conflicting at best, but the preponderant opinion appears to be that there is no observed pathology that would account for the severity and the duration of the claimant's asserted symptoms. There is, in short, no significant change between the evidence presented here and that presented at an earlier [CCH] on the question of claimant's disability, at least not such as would call for a different outcome here.

The "earlier" CCH that the hearing officer references was held on July 20, 2001, before this same hearing officer, and the issues were compensability and disability. The

decision and order from the July 20, 2001, CCH was placed into evidence by both parties. In that decision and order, the hearing officer determined that the claimant sustained a compensable low back injury, and had disability from March 19, 2001, to April 26, 2001, only. We note that extent of injury was not an issue at that CCH, and the hearing officer made no findings of fact or conclusions of law regarding the exact nature of the claimant's compensable injury. However, in his Statement of the Evidence it is clear that the hearing officer limited the claimant's period of disability because he believed that the compensable injury was merely a "soft-tissue injury."

We have reviewed the voluminous medical records which were submitted into evidence at the CCH now under review. We note that most of those records were generated as a result of treatment and consultations which occurred after the September 20, 2001, CCH. We find no support in the record for the hearing officer's comment that "the preponderant opinion appears to be that there is no pathology that would account for the severity and the duration of the claimant's asserted symptoms." To the contrary, the "preponderant opinion" appears to support the claimant's testimony that she has been, and is, unable to perform her preinjury job due to the lingering effects of her compensable injury. In evidence are numerous off work slips, diagnostic reports, medical reports, as well as a physical therapy initial evaluation dated December 27, 2002, supporting the claimant's assertion of disability. The physical therapy evaluation reveals that given the claimant's restrictions, she would be unable to perform her preinjury job. The opinion which most closely supports the hearing officer's statement was rendered by the self-insured's peer review doctor on February 17, 2003, and he does not believe that the claimant sustained any kind of "significant" injury. The peer review doctor concludes his report by commenting that the claimant should have a functional capacity evaluation and be returned to work in "some capacity" or be referred to the Texas Rehabilitation Commission for retraining.

We can only conclude that the hearing officer based his disability determination on the belief that the claimant's compensable injury was truly a minor soft-tissue injury. Neither the medical records, nor the claimant's 18% IR, support this belief. We find that the hearing officer's disability finding is in direct conflict with his finding that the designated doctor's 18% IR certification is not against the great weight of the other medical evidence. We further find that the hearing officer's determination that the claimant did not have disability from August 1, 2001, to March 23, 2003, is so against the great weight and preponderance of the evidence as to be clearly wrong and manifestly unjust. Cain, *supra*.

The hearing officer's determination that the claimant's IR is 18% is affirmed. The hearing officer's determination that the claimant did not have disability from August 1, 2001, to March 23, 2003, is reversed and a new decision is rendered that the claimant did have disability from August 1, 2001, to March 23, 2003.

The true corporate name of the insurance carrier is **(a certified self-insured)** and the name and address of its registered agent for service of process is

CT CORPORATION
350 NORTH ST. PAUL STREET, SUITE 2900
DALLAS, TEXAS 75201.

_____
Daniel R. Barry
Appeals Judge

CONCUR:

_____
Judy L. S. Barnes
Appeals Judge

_____
Margaret L. Turner
Appeals Judge