APPEAL NO. 041649
FILED AUGUST 30, 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 was held on June 8, 2004. The hearing officer determined that: (1) the respondent/cross-appellant (carrier) did not waive its right to dispute the impairment rating (IR) assigned by the first designated doctor, Dr. H; and (2) the appellant/cross-respondent's (claimant) IR is not ripe for adjudication, as no valid IR has yet been assigned. The claimant appeals the hearing officer's decision, asserting that the carrier waived its right to dispute the IR assigned by Dr. H because it did not diligently pursue its dispute and paid first quarter supplemental income benefits (SIBs). Alternatively, the claimant asserts that Dr. H's report is entitled to presumptive weight. In its response, the carrier argues that the waiver issue is not a proper issue and, in the alternative, urges affirmance. The carrier cross-appeals the IR determination, essentially asserting that the hearing officer erred by not adopting the report of the second designated doctor, Dr. R, subject to the low Dr. X. The claimant responds, contending that Dr. H's report is correct and Dr. R's report is not based on his condition at the date of maximum medical improvement (MMI).

DECISION

Affirmed, in part, and reversed and rendered, in part.

The parties stipulated that the claimant sustained a compensable injury to his right shoulder and low back, on _____. An MRI revealed a tear in the right rotator cuff, with buckling of the supraspinatus tendon over the cuff and a shoulder impingement. The claimant underwent surgery to repair his right shoulder injury on May 16, 2000, and again on November 14, 2000. The parties agreed that the claimant's low back injury was limited to a lumbar sprain/strain and that the condition resolved as of August 2, 2001. The medical records indicate that the claimant continued to experience low back pain through that date.

The parties stipulated that the claimant reached MMI on July 8, 2001. On May 10, 2001, the claimant was examined by Dr. X and certified with a 6% IR for loss of range of motion (ROM) in the right shoulder under the Guides to the Evaluation of Permanent Impairment, third edition, second printing, dated February 1989, published by the American Medical Association (AMA Guides). The claimant disputed the rating and Dr. H was appointed as designated doctor. Dr. H examined the claimant on July 6, 2001, and certified the claimant with a 20% IR, comprised of 10% for loss of shoulder ROM and 12% under Table 17, page 45 of the AMA Guides. In a report dated August 6, 2001, the carrier's peer review doctor opined that Dr. H failed to properly round the measurements for the claimant's right shoulder ROM and misapplied Table 17 of the AMA Guides.

On August 9, 2001, the carrier filed a Request for Benefit Review Conference (BRC) (TWCC-45) disputing Dr. H's report. On August 29, 2001, the Texas Workers' Compensation Commission (Commission) denied the carrier's request for a BRC and sent a request for clarification to Dr. H, directing him to respond to the peer review doctor's report. Dr. H did not respond. In September 2001, the carrier became an impaired carrier. It appears that no further attempts were made to contact Dr. H, at that time.

The carrier conceded that it paid benefits in accordance with Dr. H's report. The claimant subsequently filed an application for first quarter SIBs. On August 29, 2002, the Commission issued a Notice of Entitlement to SIBs for Quarter No. 1, for the period of September 2, 2002, and continued through December 1, 2002. There is no TWCC-45 in evidence disputing entitlement to the first quarter, and the claimant represents that the carrier paid first quarter SIBs.

Commission Dispute Resolution Information System notes, in evidence, indicate that the issue of the claimant's IR was reasserted on or about September 24, 2003, in conjunction with subsequent quarters of SIBs. Despite further repeated attempts, Dr. H failed to respond to the Commission's request for clarification. The Commission, then, appointed Dr. R as the designated doctor. Dr. R examined the claimant on May 4, 2004, and certified a 14% IR, comprised of 7% for loss of ROM of the right shoulder, 3% for loss of lateral flexion and extension of the lumbar spine, and 5% under Table 49 (II)(B) for an unoperated medically documented injury with a minimum of six months documented pain and recurrent muscle spasm. The designated doctor found that the claimant's forward lumbar flexion and extension did not meet validity criteria, noting inconsistency with the straight leg raise test.

WAIVER ISSUE

We first address the carrier's assertion that the waiver issue is not a proper issue. Specifically, the carrier argues that the issue is not proper "in that no legal authority was cited to support the assertion that the carrier is barred from pursuing its dispute of the first designated doctor's assignment of [IR]." Our review of the record reveals that the waiver issue is predicated, at least in part, upon Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 130.102(g) (Rule 130.102(g)) and our decision in Texas Workers' Compensation Commission Appeal No. 960321, decided April 2, 1996. The carrier's assertion that the waiver issue lacks a legal basis, therefore, is without merit.

The hearing officer did not err in determining that the carrier did not waive its right to dispute Dr. H's IR certification. The claimant argues that "the carrier has not diligently pursued its dispute of the [IR], has paid the first quarter of SIBS and therefore, the rating of Dr. [H] became final on the passage of the first quarter of SIBS." Under Rule 130.102(g), if there is no pending dispute regarding the date of MMI or the IR prior to the expiration of the first quarter, the date of MMI and the IR shall be final and binding. The preamble to the rule makes clear that "[t]his provision will not apply to any situation where a party has raised a dispute prior to the first quarter of [SIBs]."

24 TexReg 408 (January 22, 1999); *see also* Texas Workers' Compensation Commission Appeal No. 031470, decided July 22, 2003 (affirming that the carrier did not waive its right to dispute the IR, where the carrier filed a TWCC-42 disputing IR prior to first quarter SIBs but later paid first and second quarter SIBs). The evidence shows that the first quarter of SIBs began on September 2, 2002, and continued through December 1, 2002. The carrier filed its TWCC-45 on August 9, 2001, disputing Dr. H's certification. In view of the applicable law and the evidence presented, the hearing officer properly concluded that the carrier did not waive its right to dispute the claimant's IR. Cain v. Bain, 709 S.W.2d 175, 176 (Tex. 1986).

IMPAIRMENT RATING

As stated above, the claimant contends that Dr. H's IR certification is entitled to presumptive weight. Underlying the claimant's argument is the assertion that the Commission abused its discretion by appointing Dr. R as the second designated doctor. It is well settled that the Commission can appoint another designated doctor in circumstances where the first designated doctor cannot or will not complete the process of determining the IR. *See, e.g.*, Texas Workers' Compensation Commission Appeal No. 941635, decided January 23, 1995; Texas Workers' Compensation Commission Appeal No. 011607, decided August 28, 2001. It is undisputed that Dr. H failed to respond to numerous requests for clarification from the Commission concerning his impairment certification. Under these circumstances, we cannot conclude that the Commission abused it's discretion in appointing Dr. R as a second designated doctor. Morrow v. H.E.B. Inc., 714 S.W.2d 297 (Tex. 1986).

The carrier asserts that the hearing officer erred by placing the burden of proof on the carrier. We have held that the party who seeks to overcome the designated doctor's report has the burden of proof. Texas Workers' Compensation Commission Appeal No. 022333, decided October 28, 2002. The record reflects that the carrier disputed Dr. H's original IR certification as well as Dr. R's certification, to the extent it includes a rating for the low back. Accordingly, we perceive no error.

The hearing officer erred in determining that the claimant's IR is not ripe for adjudication, as no valid IR has yet been assigned. The hearing officer essentially found that Dr. R's IR certification is against the great weight of the medical evidence because it did not rate the claimant's loss of shoulder ROM on July 8, 2001, the date of MMI, but measured the loss of ROM on May 4, 2004, the date of his examination. Rule 130.1(c)(3), which became effective March 14, 2004, provides that "[a]ssignment of an [IR] for the current compensable injury shall be based on the injured employee's condition as of the MMI date considering the medical record and the certifying examination." The rule has been interpreted to mean that the IR shall be based on the condition as of the MMI date and is not to be based on subsequent changes, including surgery. *See* Texas Workers' Compensation Commission Appeal No. 040313-s, decided April 5, 2004. Applying this standard, the Appeals Panel affirmed a hearing officer's decision, in Texas Workers' Compensation Commission Appeal No. 041413, decided July 30, 2004, wherein the designated doctor rated the claimant's ROM

impairment as of the date of his examination, which was more than one year subsequent to statutory MMI. In that case, the Appeals Panel noted that "[i]t would be a practical impossibility for any doctor to assess impairment for loss of ROM on a specific date that has since passed." Accordingly, the fact that Dr. R measured the claimant's loss of shoulder ROM subsequent to the date of MMI does not, under the evidence presented here, render his IR certification invalid.

The hearing officer also found that Dr. R's lumbar ROM measurements, invalidating lumbar flexion and extension, were inadequate because Dr. R did not take more than three (up to six) lumbar flexion and extension measurements in accordance with the AMA Guides, page 71. We have said that the language in the AMA Guides on the number of retests is "permissive" and we have affirmed where the designated doctor indicated why a retest was not indicated. *See*, Texas Workers' Compensation Commission Appeal No. 941299, decided November 9, 1994; Texas Workers' Compensation Commission Appeal No. 970264, decided March 31, 1997; Texas Workers' Compensation Commission Appeal No. 981384, decided August 10, 1998. Upon review of the evidence, it is apparent that Dr. R invalidated the claimant's forward lumbar flexion and extension based on the straight leg raise test, pursuant to the AMA Guides, page 89. Accordingly, we do not agree that further lumbar ROM testing is required.

Section 408.125(e) provides that the report of the Commission-designated doctor shall have presumptive weight and the Commission shall base the IR on that report unless the great weight of the other medical evidence is to the contrary. We have previously discussed the meaning of "the great weight of the other medical evidence" in numerous cases. We have held that it is not just equally balancing the evidence or a preponderance of the evidence that can overcome the presumptive weight given to the designated doctor's report. Texas Workers' Compensation Commission Appeal No. 92412, decided September 28, 1992. We have also held that no other doctor's report is accorded the special, presumptive status accorded to the report of the designated doctor. Texas Workers' Compensation Commission Appeal No. 92366, decided September 10, 1992; Texas Workers' Compensation Commission Appeal No. 93825, decided October 15, 1993. We view the contrary medical evidence, including the report of Dr. X, as representing a difference in medical opinion, which does not rise to the level of the great weight of the medical evidence contrary to Dr. R's IR certification. Additionally, we do not believe that Dr. R's rating for the low back must be "carved out," as asserted by the carrier. Accordingly, we reverse the hearing officer's IR determination and render a new decision that the claimant's IR is 14% as certified by Dr. R.

The hearing officer's decision and order is affirmed with regard to the waiver issue and reversed and rendered with regard to the IR issue.

The true corporate name of the insurance carrier is **TEXAS PROPERTY & CASUALTY INSURANCE GUARANTY ASSOCIATION for Reliance National Indemnity Company, an impaired carrier** and the name and address of its registered agent for service of process is

MARVIN KELLY, EXECUTIVE DIRECTOR
9120 BURNET ROAD
AUSTIN, TEXAS 78758.

_____
Edward Vilano
Appeals Judge

CONCUR:

_____
Judy L. S. Barnes
Appeals Judge

_____
Margaret L. Turner
Appeals Judge