APPEAL NO. 080966-s
FILED SEPTEMBER 5, 2008

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 June 9, 2008. With regard to the only issue before her, the hearing officer determined that the appellant (claimant) has a 14% whole body impairment rating (IR).

The claimant appealed, contending that she has an 18% IR as assessed by Dr. S, the designated doctor. The file does not contain a response from the respondent (self-insured).

DECISION

Reversed and rendered.

It is undisputed that the claimant sustained a compensable neck and right shoulder injury on _____. The hearing officer noted that the parties agreed on the record at the CCH that the claimant reached maximum medical improvement (MMI) on February 26, 2007, as certified by Dr. S, the designated doctor. The only issue in dispute was the claimant's IR. Section 408.125(c) provides that the report of the designated doctor shall have presumptive weight, and the Texas Department of Insurance, Division of Workers' Compensation (Division) shall base the IR on that report unless the preponderance of the other medical evidence is to the contrary, and that, if the preponderance of the medical evidence contradicts the IR contained in the report of the designated doctor chosen by the Division, the Division shall adopt the IR of one of the other doctors.

Dr. S in a report dated July 20, 2006, initially stated that the claimant was not at MMI. Subsequently, Dr. S examined the claimant on February 26, 2007, and in a report dated March 6, 2007, Dr. S certified the agreed on date of MMI of February 26, 2007, and assessed a 13% IR based on an 8% impairment for the right shoulder and 5% impairment for the neck for Diagnosis-Related Estimate (DRE) Cervicothoracic Category II: Minor Impairment, pursuant to 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). Dr. S noted that he did not have the operative report (for the right shoulder surgery). Dr. S commented that a February 17, 2006, MRI of the cervical spine showed minimal disc degenerative changes at multiple levels. With regard to the neck injury, Dr. S diagnosed cervical sprain/strain and cervical muscle spasms. Dr. S's findings on physical examination included "[t]enderness and guarding was noted in the lower cervical paraspinal muscles right greater than left" and "[t]here were full ranges of motion in the cervical spine by clinical observation." In calculating the DRE Cervicothoracic Category II 5% IR, Dr. S commented that the differentiator present on

examination was guarding. Dr. S requested additional medical records regarding the right shoulder.

In a report dated July 27, 2007, Dr. S again certified the February 26, 2007, MMI date and changed his IR to 18% based on a 14% impairment of the right shoulder (which has not been appealed) and 5% impairment for DRE Cervicothoracic Category II: Minor Impairment for the neck based on the differentiator of guarding.

Dr. M, a self-insured's peer review doctor, in a peer review report dated November 2, 2007, indicated agreement with Dr. S's 14% impairment for the right shoulder but said that because the claimant had "full active cervical motion" that was "inconsistent with a quoted differentiator in that such guarding or spasm should in fact limit active cervical motion and result in a 'non-uniform loss of range of motion [ROM]' as indicated in AMA Guides on page 109."

Subsequently, the claimant was examined by Dr. G for a post designated doctor evaluation/required medical examination on November 28, 2007. Dr. G notes "normal [ROM] of the neck in all six planes." Dr. G, in addressing the cervical injury, diagnoses a cervical strain and comments: "For the cervical spine, using Table 73 on page 110 of the Guides [claimant] falls into DRE Impairment Category I and has 0% whole person impairment. She has no muscle spasm, guarding or objective signs of radiculopathy." Dr. G certified a MMI date of February 26, 2007, and assessed an 11% IR based on the right shoulder injury.

Dr. M's and Dr. G's reports were sent to Dr. S. In a response to a letter of clarification dated February 14, 2008, Dr. S stated that there was indeed muscle guarding on the date of his examination and that:

> There is nothing in Table 71, or elsewhere on page 109 of the Guides Fourth Edition, fourth printing that indicates both guarding and non uniform loss of [ROM] must be present.

The hearing officer, in the Discussion portion of her decision, commented:

> . . . both logic and the other medical evidence indicate that Claimant can not have guarding while exhibiting a normal [ROM], and it therefore appears that [Dr. S] erred in placing Claimant in a DRE Category II, and in awarding her a five per cent rating for her cervical sprain. However, the fourteen per cent component of the [IR] assessed by [Dr. S] remains intact, and it is within the spirit of [28 TEX. ADMIN. CODE § 130.6(b)(5)] (Rule 130.6(b)(5)) to adopt a rating. Although the cited Rule specifically addresses uncertainty regarding the extent of a compensable injury, and although the claim injury clearly does extend to and include Claimant's neck, the fact that there is a dispute about the severity of that neck injury renders it reasonable to apply this Rule in the manner referenced above.

The hearing officer made the following findings of fact regarding the claimant's cervical injury.

> 9. Claimant's normal cervical [ROM] precluded [Dr. S's] finding of guarding.
>
> 10. As [Dr. S] could not properly find cervical guarding in view of Claimant's normal cervical [ROM], [Dr. S] erroneously placed Claimant in DRE II and assessed her as having a five per cent whole body [IR] as to her cervical spine.
>
> 11. The eighteen per cent whole body [IR] certified by [Dr. S] has been overcome by a preponderance of the medical evidence contained in the record of the [CCH].
>
> 12. The fourteen per cent whole body [IR] [Dr. S] certified regarding only Claimant's compensable shoulder injury has not been overcome by a preponderance of the medical evidence contained in the record of the [CCH].

The hearing officer cites Rule 130.6(b)(5) as authority to accept Dr. S's 14% IR for the right shoulder injury while rejecting his 5% IR for a DRE Cervicothoracic Category II: Minor Impairment for the neck. Rule 130.6(b)(5) dealing with designated doctor examinations for MMI and/or IR provides:

> (5) When the extent of the injury may not be agreed upon by the parties (based upon documentation provided by the treating doctor and/or insurance carrier or the comments of the employee regarding his/her injury), the designated doctor shall provide multiple certifications of MMI and [IR]s that take into account the various interpretations of the extent of the injury so that when the Division resolves the dispute, there is already an applicable certification of MMI and [IR] from which to pay benefits as required by the Act.

There was no extent of the injury issue in this case as it was undisputed that the compensable injury included a cervical injury. A dispute of the severity of the injury, as indicated by the hearing officer, does not authorize use of Rule 130.6(b)(5) to allow a hearing officer to pick and choose which portions of a designated doctor's report to accept or reject. The hearing officer erred as a matter of law in applying Rule 130.6(b)(5) in this case.

While the Appeals Panel has approved the correction by the hearing officer of a mere mathematical error in an IR (*see* Appeals Panel Decision (APD) 040863, decided May 24, 2004) and has, in a limited situation, approved the deletion of a rating for a noncompensable body part from the IR determination of a designated doctor (APD 941732, decided January 31, 1995), there is no provision in the 1989 Act for picking and choosing part of the designated doctor's assigned IR for the compensable injury. In

APD 050729-s, decided May 23, 2005, the Appeals Panel cited APD 002295, decided November 15, 2000, which held that a hearing officer erred by giving partial presumptive weight to the report of a designated doctor, noting that the report cannot be adopted on a piecemeal basis. In this case there was no mere mathematical error in the assignment of the IR and it was undisputed that the compensable injury included the cervical spine. We hold that the hearing officer erred by accepting only the 14% IR the designated doctor's assigned for the claimant's compensable right shoulder injury and rejecting the portion of the IR assigned by the designated doctor for the compensable cervical injury.

DRE Cervicothoracic Category II: Minor Impairment description and verification on page 104 of the AMA Guides states that the history and findings are compatible with a specific injury and include intermittent or continuous muscle guarding observed by a physician, nonuniform loss of [ROM] (dysmetria, differentiator 1, Table 71, page 109), or nonverifiable radicular complaints. Table 71, on page 109 of the AMA Guides lists DRE Impairment Category Differentiators. Number 1 is entitled Guarding and states:

1. Guarding

> Paravertebral muscle guarding or spasm or nonuniform loss of [ROM], dysmetria, is present or has been documented by a physician. Radicular complaints that follow anatomic pathways but cannot be verified by neurologic findings belong with this type of differentiator. [Emphasis added.]

While Dr. M, the peer review doctor, opines that full active cervical motion "is inconsistent with a quoted differentiator in that such guarding or spasm should in fact limit active cervical motion and result in a 'non-uniform loss of [ROM]' as indicated in AMA Guides on page 109," we do not find support for that proposition in the AMA Guides. The above quoted portion of Table 71, page 109 states "muscle guarding or spasm or nonuniform loss of [ROM]." By placing the word "or" between guarding, spasm and nonuniform loss of ROM we read those terms in the disjunctive. We read the Guarding portion of Table 71 to say guarding can be used as a differentiator if guarding or spasm or nonuniform loss of ROM is present or has been documented by a physician, not that all three items of guarding, spasm and nonuniform loss of ROM must be present or documented by a physician before it can be used as a differentiator. Dr. M appears to agree that had there been some active cervical loss of ROM then guarding could be used as a differentiator even in the absence of spasms. We hold that the hearing officer's finding that the claimant's normal cervical ROM precluded Dr. S's finding of guarding is not supported by the AMA Guides or the evidence.

The hearing officer goes on to state that in the event it is determined that the proposed approach to Dr. S's IR is impermissible, then it would be appropriate to determine that the claimant has an 11% IR as indicated by Dr. G. The suggested finding that the claimant's IR is 11% for the right shoulder is inconsistent with the hearing officer's unappealed finding that the 14% whole body IR Dr. S certified,

regarding only the claimant's compensable shoulder injury, has not been overcome by a preponderance of the medical evidence.

Accordingly, we reverse the hearing officer's determination that the claimant has a 14% whole body IR as a result of her compensable injury of _____, as being so contrary to the great weight and preponderance of the evidence as to be clearly wrong and manifestly unjust. We render a new decision that the claimant's whole body IR is 18% as certified by Dr. S, the designated doctor.

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

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

_____
Thomas A. Knapp
Appeals Judge

CONCUR:

_____
Veronica L. Ruberto
Appeals Judge

_____
Margaret L. Turner
Appeals Judge