APPEAL NO. 950448

On November 14, 1994, a contested case hearing was held in (city), Texas, with (hearing officer) presiding as the hearing officer. The hearing was held under the provisions of the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq*. (1989 Act). With respect to the issues at the hearing, the hearing officer determined that the average weekly wage (AWW) of the appellant/cross-respondent (claimant) is $574.88; that the claimant does not have silicosis but is suffering from an occupational disease, mixed dust pneumoconiosis (MDP), with a date of injury of (date of injury); that the claimant has not suffered disability as a result of his occupational disease; and that the first impairment rating (IR) assigned by (Dr. W) was invalid and did not require dispute under Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 130.5(e) (Rule 130.5(e)) because it was based on a misdiagnosis and because Dr. W did not use 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 requests that we reverse the hearing officer's decision and render a decision that the claimant suffers from silicosis and MDP, that he has had disability since (date of injury), and that he is entitled to impairment income benefits (IIBS). The respondent/cross-appellant (carrier) requests that we reverse the hearing officer's decision that the claimant is suffering from an occupational disease of MDP, but affirm the decision in all other respects. In his response the claimant requests that we affirm the hearing officer's determination which the carrier appealed. In its response the carrier requests that we affirm the hearing officer's determinations that the claimant is not suffering from silicosis, that he does not have disability, and that Dr. W's first IR is invalid.

DECISION

Affirmed.

The claimant is 34 years old. He testified that he has never smoked. He began working for the employer in 1977 when he was 16 years old. He stopped working for the employer in (month year), and has not worked since that time. He testified that the first year of his employment with the employer, he worked as a sandblaster and that he wore a hood with three holes in it while sandblasting. He said it was not an air-supplied hood. He said he worked six days a week, 12 hours a day. Items sandblasted were described as tanks, commercial rods, and manifolds. He said he sandblasted outdoors and had to get inside of large tanks to sandblast them. He said he could not see while sandblasting inside of a large tank because of the dust. He said the hood did not keep the sand out of his mouth and nose and that sandblasting created a cloud of dust. He said he used sand and flint to sandblast.

The claimant testified that in August 1978 he began working for the employer as a coater and that as a coater he used an air gun to spray powder onto heated surfaces to paint them. He said he coated tanks, pipes, and manifolds. He continued his coating job until (month year). He said that during the period he was a coater, he cleaned the sand off of items he was to coat that had been sandblasted and that he used an air hose to do this

and that if it was a large tank, he would get inside the tank and take the sand out with his hands. He said that while he was a coater he also sandblasted about once a month. He said that sometimes he would work Sundays and there would be no one other than himself to do the sandblasting in order for him to do the coating work. He testified that he wore a "3-M paper mask" while cleaning and coating and that on very few occasions he wore a mask that had two filters. He said the masks were not air-supplied. He said coating was done inside a building with six doors, no windows, and three exhaust fans. He also said that when coating was done powder was everywhere, including the floor, walls, and on his clothes, and that powder would be flying around. He said the fans removed only a little of the powder from the building. Photographs showed a cloudlike formation around the claimant and a coworker while coating at the employer's. He said the type of coating he used the most was called "Corvel" and that he also used "134" coating powder.

The claimant testified that in (month year) he had not been feeling well for about 10 months so he sought medical attention. He said he went to several doctors who thought he had a chest infection or bronchitis and that he then started seeing Dr. W. He said that on August 20, 1992, Dr. W told him that because of his work history he probably had silicosis. He is still treating with Dr. W. The claimant testified that he has tightness in his chest, shortness of breath, lung pain, upper back and bone pain, and that all of his joints hurt. He said that he gets tired very easily, even if he is only walking. He said Dr. W took him off work in (month year) and didn't want him working anywhere. He said his symptoms are getting worse.

(BM), whose family owns the employer, testified that "Corvel" is made of a number of different chemicals and that it has ten percent free silica and that the material data safety sheet (MSDS) on that product warns that inhalation of silica can cause silicosis. BM testified that the pictures introduced by the claimant did not accurately represent the conditions in the building while coating was being done.

On (date of injury), Dr. W reported that the claimant has probable silicosis and cannot work around dust, sandblasting and painting. He also stated that the claimant is severely limited in tolerance of physical exertion and should not work at the present time. A lung biopsy was performed which Dr. W felt was consistent with a diagnosis of subacute silicosis. (Dr. A) reviewed the biopsy at Dr. W's request and he reported on January 31, 1993, that the biopsy was consistent with silicosis and MDP. He further reported that the tissue section microanalysis showed a markedly elevated concentration of inorganic particulates, including metal particles, aluminum silicates, silica, miscellaneous silicates, and gypsum. He described the types of metal particles found and stated "these very high concentrations of metals are the most unusual finding in [claimant's] lung tissue. Other types of particles are also elevated above background, but the silica concentration, notably, is not elevated to the range seen in most cases of silicosis."

In a narrative report dated July 29, 1993, Dr. W reported that the claimant has accelerated silicosis and MDP, that he reached maximum medical improvement (MMI) on

June 30, 1993, and that his IR is "60% or significant." He also said that the claimant is capable of returning to work in a position of light to moderate activity, but that under no circumstances is he allowed to do a job in which he would be exposed to "the dusty trades, specifically to free silica sandblasting." In an undated TWCC-69 form which is date stamped as being received by the carrier on September 22, 1993, Dr. W reported that the claimant reached MMI on June 30, 1993, and referred to an attached report for the IR. However, the attached report is a narrative report for a different claimant and in it Dr. W assigns that claimant a 75% IR. In another narrative report dated May 17, 1994, Dr. W reported that the claimant has a "mild impairment of the whole person at a roughly 25% impairment according to the [AMA Guides]."

On November 1, 1993, (Dr. F) examined the claimant at the request of the carrier and he reported that the claimant's radiograph would be considered compatible with very mild simple silicosis, but he said he would defer giving an opinion until he could review the claimant's medical records and tests. (Dr. WI) examined the claimant on December 3, 1993, and he reported that he did not see evidence of "abnormalities related to prior industrial exposures," and that the claimant had "excellent preservation of lung function." However, he noted that he did not have the reports of the lung biopsy.

(Dr. B) examined the claimant at the request of the carrier and he reported on June 13, 1994, that the claimant's pulmonary function tests were completely normal and that chest x-rays showed no signs of silicosis. He had (Dr. H) perform a microscopic examination of the claimant's lung biopsy and Dr. H reported that "the [claimant] has inhaled sufficient dust to produce a minimal degree of pneumoconiosis." He further stated that he did not believe the claimant could be considered to be physically impaired, but that the claimant should not be further exposed to dust. He concluded that the claimant has "[MDP] (sandblaster), minimal severity." Dr. B concluded in his June 13th report that the claimant has no evidence of clinical silicosis or asthma and that the claimant has zero percent impairment. He further stated:

> There is absolutely no medical or physical reason that he should not be able to carry out a full vigorous life, including hard manual labor. The only restriction would be that he should probably not continue to work in an Industrial Environment, to be on the long-term safe side. Since, by microscopic examination, [claimant] has inhaled sufficient dust over 15 years to produce a minimal degree of subclinical pneumoconiosis. This is very unlikely to ever cause him any physical problems, unless he continues to exposed [sic] himself to a very dusty environment, in the future, over a long period of time.

Dr. B completed a TWCC-69 form in which he reported that the claimant reached MMI on May 31, 1994, with a zero percent IR. He stated on the form that the claimant "never had disability or impairment."

The parties represented that the Texas Workers' Compensation Commission selected (Dr. N) as the designated doctor. He reported on September 23, 1994, that information on the claimant's lung biopsy was not available to him. He further reported that the claimant's pulmonary function tests and chest x-rays were within normal limits, that he does not think that the claimant has silicosis, that the claimant is not suffering from a sufficient loss of pulmonary function or other complications to prevent him from working, that the claimant should avoid future exposure to silica and other dusts, that the claimant had reached MMI, but he could not say when that occurred, and that the claimant has a zero percent IR. He stated that "[a]lthough this patient almost certainly has had significant silica exposure he does not appear to have parenchymal lung disease at this time."

In a detailed report dated November 4, 1994, Dr. W, the claimant's treating doctor, diagnosed silicosis, arthralgias, Raynaud's Phenomenon, positive antinuclear antibody, and progressive lung deterioration. He explained that pneumoconiosis is dust in the lungs causing disease, specifically scarring, and that silicosis refers to a specific type of pneumoconiosis caused by inhalation of small particles of silica which can by pass the lungs defenses and lodge in the air sacs. He provided an in depth basis for his diagnosis of silicosis and questioned the differing opinions from other doctors. He also stated that "[w]ith regard to my report of 7-29-93 in determining 60% impairment, at that time I was not aware of the [AMA Guides] and used my own criteria." He further reported that under the AMA Guides the claimant has a 60% IR, ten percent based on joint-related problems and immunologic problems and 50% based on lung function deterioration. Dr. W stated that "[i]n this particular case, the silica is associated with metal particles, as these are the particles being blasted free from the surface of tanks, pipes, and manifolds to cleanse them prior to application of a primer."

The issues at the hearing were: (1) whether the claimant sustained a compensable injury in the form of an occupational disease on (date of injury); (2) whether the claimant has had disability; (3) whether the first certification of MMI and IR by Dr. W on July 29, 1993, became final under Rule 130.5(e); and (4) what is the claimant's AWW. The parties stipulated as to the claimant's AWW. Neither party has challenged the hearing officer's findings that the carrier received a TWCC-69 form on September 22, 1993, which certified that the claimant had reached MMI, that at the time the carrier received that form it had already received the correct narrative report for the claimant, and that the carrier did not dispute Dr. W's findings of MMI and IR within 90 days.

The carrier contends that the hearing officer's finding that the claimant has abnormally high levels of metallic dust particles in his lungs due to his work for the employer and the conclusion that the claimant is suffering from an occupational disease, MDP, with a date of injury of (date of injury), are against the great weight and preponderance of the evidence and are not based on reasonable medical probability. We disagree. Dr. W explained that the metal particles found in the claimant's lungs are particles which were blasted free from items the claimant sandblasted. The claimant's testimony provided sufficient evidence of exposure to dust at work. There is ample medical evidence from Drs.

W, A, B, and H to support the hearing officer's conclusion that the claimant has an occupational disease in the form of MDP. We note that contrary opinions from Drs. WI and N were made without benefit of the reports of the lung biopsy, and that Dr. F deferred his opinion pending receipt of records and test results. We conclude that the challenged finding and conclusion are supported by sufficient evidence and are not so contrary to the overwhelming weight of the evidence as to be clearly wrong and unjust. Cain v. Bain, 709 S.W.2d 175 (Tex. 1986).

The claimant contends that the hearing officer erred in finding that he has MDP instead of finding that he has silicosis and that he has been able to obtain and retain employment at wages equivalent to his preinjury wage at all times since (date of injury). The claimant further contends that the hearing officer erred in concluding that he is not suffering from silicosis, that he has not suffered disability as a result of his occupational disease, and that he has not accrued income benefits as a result of his occupational disease of MDP. There is much conflicting medical evidence on the question of whether the claimant suffers from silicosis, MDP, or both. Drs. W and A believe that the claimant suffers from both silicosis and MDP, whereas Drs. B and H diagnose only MDP. With regard to disability, while all doctors who opined on the issue believe that the claimant should not be exposed to any more dusty environments, there is conflicting evidence as to the claimant's ability to work. The claimant testified to the effect that he is unable to work and Dr. W reported at one point that the claimant was not to work and later reported that the claimant can only perform light to moderate work. However, Dr. N believes that the claimant is not suffering from a sufficient loss of pulmonary function to prevent him from working, and Dr. B is of the opinion that the claimant has never had disability and that he can perform hard manual labor. We conclude that the challenged findings and conclusions are supported by sufficient evidence and are not so contrary to the overwhelming weight of the evidence as to be clearly wrong and unjust. Cain v. Bain, *supra*.

Rule 130.5(e) provides that "[t]he first [IR] assigned to an employee is considered final if the rating is not disputed within 90 days after the rating is assigned." The hearing officer basically found and concluded that the first IR assigned to the claimant, which was the "60% or significant" rating assigned by Dr. W on July 29, 1993, did not become final under Rule 130.5(e) notwithstanding the carrier's failure to timely dispute the rating because the rating was invalid for the reasons that Dr. W did not use the AMA Guides in determining the rating and he made a clear misdiagnosis of the claimant's condition. The claimant challenges these findings and conclusions.

In regard to a misdiagnosis, we stated in Texas Workers' Compensation Commission Appeal No. 93489, decided July 29, 1993, with respect to Rule 130.5(e) that "if an MMI certification or [IR] were determined, based on compelling medical or other evidence, to be invalid because of some significant error or because of a clear misdiagnosis, then a situation could result where the passage of 90 days would not be dispositive." However, in Texas Workers' Compensation Commission Appeal No. 94049, decided February 18, 1994, we stated that we did not read Appeal No. 93489 as carving out broad new general categories

of exceptions to Rule 130.5(e) and that we viewed that decision as saying that there may be, under some circumstances, "such egregious medical conditions as to compel a finding that the passage of 90 days under Rule 130.5(e) would not be dispositive." Given that the evidence reflects that silicosis is a form of pneumoconiosis and that Dr. W diagnosed both MDP and silicosis, we cannot conclude that sufficient evidence supports the hearing officer's finding that Dr. W's report of IR was based on a clear misdiagnosis of the nature contemplated in Appeal No. 93489, *supra*, notwithstanding that the evidence supports the hearing officer's determination that the claimant has MDP but not silicosis.

However, the evidence in this case shows that Dr. W did not assign a specific percentage of impairment in his report of July 29, 1993. Instead, he stated that the claimant's IR was "60% or significant." Section 401.011(24) defines IR as "the percentage of permanent impairment of the whole body resulting from a compensable injury." (Underlining supplied). Section 408.123(a) provides in part that "[a]fter an employee has been certified by a doctor as having reached [MMI], the certifying doctor shall evaluate the condition of the employee and assign an [IR] using the [IR] guidelines described by Section 408.124." Section 408.124 provides that the Commission shall use the version of the AMA Guides previously set forth in this decision to determine the existence and degree of an employee's impairment. In Texas Workers' Compensation Commission Appeal No. 92384, decided September 14, 1992, we stated that we were unable to hold that "no residual impairment" was equivalent to a zero percentage of permanent impairment. In addition, in Texas Workers' Compensation Commission Appeal No. 93040, decided March 1, 1993, the designated doctor reported that the claimant "would rate about a 50% impairment," the hearing officer determined that the designated doctor's report was not entitled to presumptive weight, and we reversed the decision and remanded the case for further development of the evidence, including a request to the designated doctor to provide a "specific percentage rating . . . instead of a percentage range." In doing so we stated "[w]hile we do not disagree with the hearing officer that the report submitted by Dr. SG, the first designated doctor, is not sufficiently definite for use, rather than summarily discarding the report . . . some effort should be made by the Commission to clarify the report." *See also* Texas Workers' Compensation Commission Appeal No. 941247, decided October 27, 1994, where we held that a conditional IR did not become final under Rule 130.5(e).

In addition to not assigning a specific percentage of impairment on July 29, 1993, Dr. W acknowledged that he was unaware of the AMA Guides when he made that report, which demonstrates that he did not use the AMA Guides at all in assigning the IR on that date. In Texas Workers' Compensation Commission Appeal No. 941360, decided November 28, 1994, we rendered a decision that the first IR did not become final under Rule 130.5(e) because the doctor did not use the required version of the AMA Guides. *But cf.* Texas Workers' Compensation Commission Appeal No. 931170, decided February 3, 1994, and Texas Workers' Compensation Commission Appeal No. 941309, decided November 14, 1994.

In this case in assigning the first IR Dr. W did not give a specific percentage of impairment, but instead provided a range of impairment of "60% or significant." In addition, he acknowledged that he was not aware of the AMA Guides when he assigned the rating on July 29, 1993, and that he used his own criteria in arriving at the rating. Given that Dr. W did not assign a specific IR on July 29th and that the evidence demonstrates that he did not use the AMA Guides at all in determining the rating of "60% or significant" set forth in his report of July 29th, we cannot conclude that the hearing officer erred in determining that the first IR was invalid and did not require dispute. We do not find merit in the claimant's contention that since Dr. W stated in his report of November 4, 1994, that he used pulmonary function standards (Crapo and Morris values, see pages 110-115 of the AMA Guides) that are described in the AMA Guides in arriving at his initial IR such rating was done in accordance with the AMA Guides, because while the standards referred to predict normal values, there is no evidence that they convert observed values into impairment percentages as is done in Chapter 5 of the AMA Guides. Dr. W noted that he used his own criteria in assessing the initial IR.

The hearing officer's decision and order are affirmed.

Robert W. Potts
Appeals Judge

CONCUR:

Susan M. Kelley
Appeals Judge

Thomas A. Knapp
Appeals Judge