APPEAL NO. 950450

This appeal is brought 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 6, 1994, with the record closing on March 8, 1995, in (city), Texas. (hearing officer) presided as hearing officer. Addressing the disputed issues, she determined that the respondent's (claimant herein) correct impairment rating was 44% as certified by a designated doctor selected by the Texas Workers' Compensation Commission (Commission); that the claimant reached statutory maximum medical improvement (MMI) on March 23, 1994; and that the appellant (carrier herein) is not entitled to a reduction of impairment income benefits (IIBS) based on contribution from prior compensable injuries. The carrier appeals these determinations arguing that they are contrary to the great weight and preponderance of the evidence. The claimant replies that the decision and order of the hearing officer are supported by sufficient evidence and should be affirmed.

DECISION

We affirm in part and reverse and remand in part.

It was not disputed that the claimant sustained a compensable injury to her neck, lower back and left hip on (date), when she fell. Whether her compensable injury also included mental depression was critical to resolution of the issues of correct IR and date of MMI.

In a chart note of March 19, 1992, (Dr. H), the claimant's treating doctor, writes "[t]he patient continues to experience severe depression. This depression is related to the patient's work related injury and her disability." In carrier adjuster notes of May 14, 1992, dealing with a review of Dr. H's billings, the adjuster mentions a bill "for individual psychotherapy" and recommends a review of these charges. On June 2, 1992, the adjuster observes that "the psych referral" was erroneously made to the previous contract vendor, rather that the present one. In a February 7, 1992, "letter of Impairment", (Dr. M), another treating doctor, refers not only to the claimant's physical condition, but also to her "situational depression" which he describes as "significant emotional impairment secondary to depression directly related to the work injury and the poor functional capacity that she has suffered." He therefore assigned a 30% rating for this depression which he added to his other physical impairment ratings for a total IR of 62%. This IR was disputed by the carrier.

In a report of a psychiatric evaluation on September 7, 1993, (Dr. B), a psychiatrist and neurologist, who examined claimant at claimant's request wrote:

> As you know, I am generally the champion of a patient, but alas, in this particular case, I think the work-related injury is only a minor <u>blip</u> in this patient's psychological dysfunction. Therefore, I do not believe this patient's psychological problems are significantly related to her work-related injury. [Emphasis in original.]

On February 7, 1994, (Dr. BR), the second designated doctor selected in this case,[1] completed a Report of Medical Evaluation (TWCC-69) in which he concluded the claimant was at statutory MMI and assigned a 30% IR solely for injuries to the claimants lumbar and cervical spine which included ratings for specific disorders of the spine and loss of range of motion (ROM). No consideration was given in this rating for contribution for the claimant's previous compensable injury. At the first session of the CCH, claimant made much of Dr. BR's failure to assign any rating under Chapter 14 of the Guides to the Evaluation of Permanent Impairment, third edition, second printing, dated February 1989, published by the American Medical Association (AMA Guides) for her depression. The carrier took the position that the claimant's mental condition was never an issue and that the only matter in dispute was Dr. BR's 30% IR. The hearing officer recessed the hearing and on June 14, 1994, wrote Dr. BR, asking him among other things whether he "considered the Claimant's emotional condition, in your rating and evaluation. If you did, please respond accordingly, and if you did not, please state why you did not." By letter of June 20, 1994, Dr. BR stated he did not consider or assign an evaluation for the emotional condition, but would do so after consultation with a psychiatrist. After further communication with the hearing officer and consultation with (Dr. C), a psychiatrist, Dr. BR assigned an additional 20% IR for depression which when combined with the 30% IR previously given for the claimant's physical condition resulted in a final IR of 44%.

Other IRs in evidence include one rendered by Dr. S, who determined that the claimant reached MMI on May 15, 1992, and assigned a 13% IR consisting of seven percent for the lumbar spine (loss of ROM) and six percent for the cervical spine (specific disorder and loss of ROM). Claimant's mental condition was not addressed by Dr. S and he noted that the condition of her lumbar spine was "affected" by her previous injury and surgery and therefore took what he considered half of a 15% IR for the lumbar spine in awarding the seven percent IR.

On April 10, 1992, (Dr. SK) examined the claimant at the carrier's request, found MMI as of that date and assigned a four percent IR for the cervical spine. In so doing, he noted the claimant had "additional significant partial permanent medical impairment" due to a pre-existing condition which he did not rate.

In a report of March 23, 1994, (Dr. O), at the request of the carrier reviewed the previous IRs assigned to the claimant "to determine which was correct based on the medical information supplied." The only doctor he considered "meticulous about his findings" was Dr. SK, but he went on to say his rating of four percent was "too low." Dr. O said he would have assigned a six percent IR for the cervical spine and a 13% IR for the lumbar spine

[1]Dr. BR was selected as the second designated doctor after the agreement between the parties to choose (Dr. S) as designated doctor was found invalid at a prior CCH.

(without contribution) for an 18% whole body IR. Dr. O does not address a possible psychological component of the compensable injury.

The hearing officer adopted Dr. BR's final IR and a statutory date of MMI as not contrary to the great weight of the other medical evidence. In so doing, she obviously concluded, without expressly stating, that the claimant's compensable injury included a psychological component (depression). The carrier appeals this determination citing Dr. O's view on the correct IR for the spine and contending that Dr. BR added a 20% IR component for psychological injury only after "continued prodding" by the hearing officer and after Dr. BR initially questioned whether, based on lack of objective criteria, the claimant had any mental disorder at all. The carrier also questions the validity of Dr. C's conclusions, pointing out what it perceives to be differences in the claimant's orientation at the hearing and at her examination by Dr. C.

In Texas Workers' Compensation Commission Appeal No. 950330, decided April 17, 1995, and Texas Workers' Compensation Commission Appeal No. 95335, decided April 17, 1995, the Appeals Panel discussed the inherent problems of addressing issues of IR and MMI without also confronting the more fundamental question of extent of injury. In the case now appealed, there is no indication that extent of injury was made an issue at the BRC and, given the stated positions of the parties at the BRC, it is safe to assume that neither party considered the extent of the compensable injury to include more than the lumbar and cervical spine. Thus, we question whether the hearing officer acted properly in extending the compensable injury to the claimed depression. *See* Texas Workers' Compensation Commission Appeal No. 92071, decided April 9, 1992, for a discussion of the process of defining issues for consideration at a CCH. *Compare* Texas Workers' Compensation Commission Appeal No. 94479, decided May 27, 1994, where the issue was correct IR and the extent of injury question was at the "heart" of the BRO's report. However, unlike the cases cited, the carrier in this case does not ground its appeal of the additional 20% IR given by Dr. BR for depression on error by the hearing officer in adding an extent of injury issue, but on its disagreement with the conclusion of the hearing officer that the claimed depression was established as a "true mental depression" entitled to an IR. Thus, it contends that, until browbeaten by the hearing officer, Dr. BR found no objective criteria on which to measure the depression and that Dr. C's description of the symptomatology of depression present at his examination of the claimant was at substantial variance with the claimant's conduct on the witness stand.

Given the posture of this appeal, we decline to address whether the hearing officer improperly imposed an extent of injury issue on the parties. Whether the claimant's compensable injury included her depression was a question of fact for the hearing officer to decide. There was evidence that her depression was "situational" only and not substantially related to her back injury of March 19, 1992. There was also evidence that the claimant's depression was of a permanent and significant nature and was being treated shortly after the injury as part of the compensable injury. The hearing officer resolved this issue against the carrier. Clearly, the report of a designated doctor is not entitled to

presumptive weight on the question of whether the claimant's compensable injury included her depression. Texas Workers' Compensation Commission Appeal No. 94392, decided May 13, 1994. Absent a specific allegation of error in this regard, we are unwilling to conclude that the hearing officer gave Dr. BR's second report presumptive validity on this issue. We therefore conclude that the medical evidence of Dr. H, which noted depression in April 1992 and connected it to claimant's compensable injury, together with the reports of Dr. BR and Dr. C provided sufficient evidence to support the decision of the hearing officer that the claimant's depression was a part of the claimant's compensable injury for which an IR was appropriate.

Sections 408.122(b) and 408.125(e) provide that the report of the designated doctor selected by the Commission has presumptive weight and the determination of MMI and IR shall be based on that report unless the great weight of the other medical evidence is to the contrary. We have repeatedly observed that great weight means more than an equal balancing or even a preponderance of the medical evidence. Whether the great weight of the other medical evidence is contrary to the report of the designated doctor is a factual determination to be made by the hearing officer. Texas Workers' Compensation Commission Appeal No. 93459, decided July 15, 1993. Frequently, the date of MMI given by a doctor is the date of his or her examination even though a date earlier than the examination is not for this reason invalid. Texas Workers' Compensation Commission Appeal No. 93378, decided June 30, 1993. The carrier simply asserts that the date of MMI found by the first designated doctor, Dr. S, a position endorsed by Dr. O, constitutes the great weight of the contrary medical evidence. Of course, this date no longer has presumptive weight by virtue of Dr. S's replacement as designated doctor, but more importantly, it is one date among several, some earlier, some later, proffered as the date of MMI. We do not believe that the fact that other dates of MMI have been found prior to statutory MMI renders the determination that the correct date of MMI is the statutory date against the great weight and preponderance of the other medical evidence and, under our standard of review, decline to reverse this determination of the hearing officer. Cain v. Bain, 709 S.W.2d 175, 176 (Tex. 1986); Pool v. Ford Motor Co., 715 S.W.2d 629, 635 (Tex. 1986).

We are more troubled with the decision of the hearing officer which afforded presumptive weight to Dr. BR's IR for the cervical and lumbar spine in light of Dr. O's criticisms of it. For example, Dr. O suggests that Dr. BR did not correctly apply Table 49 to the claimant's previous surgeries in computing a 10% IR for the lumbar and that the correct rating for this injury should be 13%. Dr. O also questions the propriety of using negative numbers to measure cervical ROM deficits, a practice we disapproved of in Texas Workers' Compensation Commission Appeal No. 950357, decided April 20, 1995, and criticizes the use of fractions in arriving at a component of the IR. We agree that Dr. O raises valid questions about Dr. BR's compliance with the AMA Guides in arriving at his 30% IR for the spine. We therefore reverse so much of the hearing officer's finding of the correct whole body IR as is based on Dr. BR's IR of the lumbar and cervical spine and remand on this

issue for clarification in light of the Dr. O's comments.[2] *See* Texas Workers' Compensation Commission Appeal No. 950477, decided May 8, 1995.

Section 408.084 provides in pertinent part that at the request of the carrier, the Commission "may order that impairment income benefits . . . be reduced in a proportion equal to the proportion of a documented impairment that resulted from earlier compensable injuries." In arriving at an IR for a current compensable injury, an evaluating doctor may not "discount" his assessment for the effects of the prior injury. Texas Workers' Compensation Commission Appeal No. 931130, decided January 26, 1994; Texas Workers' Compensation Commission Appeal No. 93695, decided September 22, 1993. The carrier has the burden of proving its entitlement to contribution and whether contribution has been established is a question of fact for the hearing officer to decide. Texas Workers' Compensation Commission Appeal No. 941716, decided February 6, 1995.

In this case, the claimant admitted that she sustained a prior compensable lower back injury which resulted in a laminectomy in 1976, a second surgery in 1979 to remove scar tissue and a third surgery in 1982 to implant a pain control unit. She also stated that since her 1979 surgery she has completely recovered and was virtually pain free until her 1991 compensable injury. The location of that prior injury was not specified beyond the lower back and the only evidence of a current lower back injury is an x-ray report of Dr. S which refers to a "narrowing at L4-5." Though declining to assign an IR to claimant's lumbar spine, Dr. SK concluded that the claimant's entire lumbar condition was pre-existing. Similarly, Dr. O concluded that the entire 13% he assigned the lumbar spine was based on the previous condition. Dr. S considered approximately one-half the IR for the lumbar spine attributable to the previous condition.

The hearing officer evaluated this evidence and found the carrier did not meet its burden of establishing contribution. We observe that the prior medical condition of the claimant, on which contribution would be based, was only described in general terms of lower back injury with one doctor suggesting herniation while the new condition was somewhat more specifically described as a narrowing at L4-5. This case is similar to Appeal No. 941716, *supra*, where the medical evidence as to contribution was conflicting, the claimant testified to pain she had experienced before and "the relatively long time interval between the prior back injury in 1987 and the present May 1993 injury." In that case, the Appeals Panel affirmed the decision of the hearing officer denying contribution. In the case now appealed, the hearing officer was presented with a long interval between the prior compensable injury for which contribution was sought and the current injury, conflicting evidence about contribution and the testimony of the claimant that the prior condition had more or less resolved. The hearing officer resolved the conflicts in the evidence on this issue in favor of the claimant by finding the carrier did not meet its burden of proof. As in

[2]The hearing officer may also want to clarify stipulation No. 7 which reflects that Dr. BR assigned a 30% IR in light of his second TWCC-69 which raised this to 44%.

Appeal No. 941716, we are unwilling to conclude that these findings on contribution are so against the great weight and preponderance of the evidence as to mandate reversal under our standard of review.

We affirm those parts of the decision and order of the hearing officer which assign a rating for claimant's depression and which find that the carrier did not establish its entitlement to contribution. We reverse that portion of the decision which finds an IR for the claimant's lumbar and cervical spine and remand for clarification and reconsideration of the issue of the claimant's correct whole body IR in light of our discussion above.

Pending resolution of the remand, a final decision has not been made in this case. However, since reversal and remand necessitate the issuance of a new decision and order by the hearing officer, a party who wishes to appeal from such new decision must file a request for review not later than 15 days after the date on which such new decision is received from the Commission's division of hearings pursuant to Section 410.202. See Texas Workers' Compensation Commission Appeal No. 92642, decided January 20, 1993.

Alan C. Ernst
Appeals Judge

CONCUR:

Philip F. O'Neill
Appeals Judge

Tommy W. Lueders
Appeals Judge