APPEAL NO. 050729-s
FILED MAY 23, 2005

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 March 4, 2005. With regard to the three disputed issues, the hearing officer determined that: (1) (Dr. K) impairment rating (IR) of 19% was the first valid IR assigned to the respondent (claimant) and that the 19% IR did not become final because there was a significant error in calculating the 19% IR, as established by compelling medical evidence; (2) the claimant's date of maximum medical improvement (MMI) is September 8, 2003; and (3) the claimant's IR is 20%. The appellant (self-insured) appealed, contending that the claimant's IR is 5% as assigned by (Dr. O), the self-insured's required medical examination (RME) doctor; or, in the alternative, the claimant's IR is 19% because that IR became final. The claimant requests that the hearing officer's decision be affirmed. There is no appeal of the hearing officer's determination that the claimant reached MMI on September 8, 2003, which was the MMI date determined by Dr. K and which was stipulated to by the parties.

DECISION

Affirmed in part and reversed and remanded in part.

BACKGROUND INFORMATION

The parties stipulated that the claimant sustained a compensable neck, bilateral hands (bilateral carpal tunnel syndrome), and right knee injury on __________, and that the Texas Workers' Compensation Commission (Commission) chose Dr. K as the designated doctor to determine MMI and IR. Dr. K evaluated the claimant in March 2002, October 2002, and February 2003, and determined at those times that the claimant was not at MMI. Dr. K again evaluated the claimant on September 8, 2003, and at that time determined that the claimant was at MMI. In a Report of Medical Evaluation (TWCC-69) signed by Dr. K and dated September 8, 2003, Dr. K certified on the face of the TWCC-69 that the claimant reached MMI on September 8, 2003, and that the claimant's IR is 19% using 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 parties stipulated that the claimant reached MMI on September 8, 2003, as certified by Dr. K. It is undisputed on appeal that Dr. K's TWCC-69, which contained the 19% IR, was the first valid IR assigned to the claimant. The problem that arose in this case is that Dr. K's narrative report of his MMI/IR evaluation states that the claimant qualifies for a 19% IR, but then goes on to state that the claimant qualifies for 6% whole person impairment for each arm or 12% for both, 4% whole person impairment for the right knee, and 15% whole person impairment under Diagnosis-Related Estimate (DRE) Cervicothoracic Category III Radiculopathy, which impairment values Dr. K combined under the Combined Values Chart of the AMA Guides to arrive at a "28% total person

impairment" in the narrative report. Thus, there was a discrepancy between the 19% IR on the face of the TWCC-69 and the 28% IR reflected in the narrative report.

It is undisputed that neither the claimant nor the self-insured disputed Dr. K's MMI/IR determination within 90 days after receiving his TWCC-69 and narrative report. On January 22, 2004, after the 90-day period expired, the attorney who was representing the claimant at that time called the Commission and inquired about the discrepancy between the 19% and 28% IRs. The Commission then called Dr. K, who sent a fax to the Commission on January 23, 2004, with a notation that the correct IR should have been 28% as stated on page 2 of his report. Along with the faxed letter, Dr. K also sent to the Commission a copy of his TWCC-69 of September 8, 2003, with the 19% IR crossed through and a "corrected" 28% IR written on the face of the TWCC-69. Dr. K also crossed out the 19% IR in his narrative report where it had stated that the claimant qualifies for a 19% IR and wrote in "28% corrected 1-22-04." Dr. K noted in the faxed letter to the Commission of January 23, 2004, that he was faxing a corrected copy to the self-insured and mailing a copy to the claimant.

In a peer review report done at the request of the self-insured and dated February 6, 2004, (Dr. B) wrote that he had reviewed Dr. K's report of a 28% IR and that the claimant should have an IR of no more than 16%, composed of 12% impairment for the upper extremities and 5% impairment for the cervical spine under DRE Cervicothoracic Category II: Minor Impairment.

Dr. O, the self-insured's RME doctor, evaluated the claimant on June 11, 2004, and in a TWCC-69 signed by Dr. O and dated June 11, 2004, Dr. O certified that the claimant reached MMI on September 8, 2003, and assigned the claimant a 5% IR. Dr. O explained in his narrative report that as of the date of his examination, the claimant had no impairment of the upper extremities nor of the right knee, and no "clear-cut evidence of radiculopathy." Dr. O placed the claimant in DRE Cervicothoracic Category II: Minor Impairment, for a 5% IR.

The Commission asked Dr. K to review the reports of Drs. B and O and to submit a response. Dr. K responded on July 26, 2004, that he reviewed the reports of Drs. B and O, noting that Dr. O had examined the claimant nine months after Dr. K had last examined the claimant, and stating that he stands by his MMI and IR determinations. Dr. K explained in more detail how he arrived at the 28% IR, including further explanation of the electrodiagnostic studies that were performed to support, along with his clinical evaluation, the diagnoses of carpal tunnel syndrome and radiculopathy, and his evaluation of abnormal range of motion of the claimant's right knee.

FINALITY ISSUE

The issue regarding the finality of the first IR was stated as: "Did the first certification of [MMI] and [IR] assigned by [Dr. K] on September 8, 2003, become final under Texas Labor Code, Section 408.123?" The self-insured appeals the hearing officer's determination that the 19% IR assigned by Dr. K did not become final,

contending that the 19% IR was valid because it was noted on the face of the TWCC-69 and became final because it was not disputed within 90 days.

Section 408.123(d) provides that except as provided in subsections (e), (f), and (g), the first valid certification of MMI and the first valid assignment of IR to an employee are final if the certification of MMI and/or the assigned IR is not disputed within 90 days after written notification of the MMI and/or assignment of IR is provided to the claimant and the carrier by verifiable means. Section 408.123(e) provides in pertinent part that the first certification of MMI and/or IR may be disputed after the 90-day period if: (1) there is compelling medical evidence establishing the following: (A) a significant error on the part of the certifying doctor in applying the appropriate American Medical Association Guides and/or calculating the IR.

Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 130.12 (Rule 130.12), which was adopted to be effective March 14, 2004, provides in subsection (d) that the rule applies only to those claims with initial MMI/IR certifications made on or after June 18, 2003. Rule 130.12(a) provides in pertinent part that the certifications and assignments that may become final are: (1) the first valid certification of MMI and/or IR assigned or determination of no impairment. Rule 130.12(c) provides that a certification of MMI and/or IR assigned as described in subsection (a) must be on a Form TWCC-69, Report of Medical Evaluation, and that the certification on the Form TWCC-69 is valid if: (1) there is an MMI date that is not prospective; (2) there is an impairment determination of either no impairment or a percentage IR assigned; and (3) there is the signature of the certifying doctor who is authorized by the Commission under Rule 130.1(a) to make the assigned impairment determination. Rule 130.12(b)(4) provides that the first certification of MMI and/or IR may be disputed after the 90-day period as provided in Section 408.123(e).

The self-insured refers to the following comment and response in the preamble to Rule 130.12 at 29 Tex. Reg. 2336 (2004) in asserting that "the TWCC-69 is controlling."

> Comment: Commentator requests clarification regarding the MMI/IR validity criteria. Specifically, how to reconcile when an MMI date or IR is missing from the TWCC-69 but in the narrative, or when the TWCC-69 and narrative have different information.
>
> Response: The Commission clarifies as follows: In order to be considered a valid certification on its face, MMI and IR must be noted on the TWCC-69 itself. If there is conflicting information between the TWCC-69 and the narrative, the conflict may be resolved through a letter of clarification to the certifying doctor.

We believe that the self-insured's contention regarding finality is confusing the validity of the certification of MMI and/or IR on the TWCC-69, as described in Rule 130.12(c), with the exceptions for disputing after the 90-day period found in Section 408.123(e). The hearing officer made an unappealed conclusion of law that "[Dr. K's]

TWCC-69, which contained an [IR] of 19%, was the first valid [IR] assigned to the Claimant." The hearing officer determined that the 19% IR on the face of Dr. K's first TWCC-69 was a valid certification by stating as follows in the Background Information section of his decision:

> The evidence established that [Dr. K's] 19% certification on the TWCC-69, was the first such certification. It was valid regardless of the discrepancy between it and the accompanying report, because the date of [MMI] on the TWCC-69 was not prospective, there was an express [IR] stated on the TWCC-69, and the TWCC-69 was signed by a doctor who was authorized to make this certification. Because neither party disputed this certification of a 19% [IR], it would become final under Section 408.123(d) unless an exception to finality existed under Section 408.123(e).

The hearing officer then discussed the significant error exception in Section 408.123(e)(1)(A) as follows:

> There is compelling medical evidence of an error in calculation and contents of [Dr. K's] accompanying report. The second page of that report summarized the elements of the [IR] and expressly stated that it was 28%. Because of this error, [Dr. K's] certification of a 19% [IR] did not become final despite the lack of a dispute within 90 days of receipt of this certification.

In an unappealed finding of fact, the hearing officer found that "The 19% [IR] was based on a significant error in calculating the [IR], as reflected in the report of [Dr. K], which accompanied the TWCC-69 that assigned a 19% [IR]." The self-insured does appeal the hearing officer's conclusions of law that "[Dr. K's] [IR] of 19% did not become final because there was a significant error in calculating the 19%, as established by compelling medical evidence" and that "[Dr. K's] 19% IR did not become final even though no party disputed it within 90 days of receipt."

We conclude that the hearing officer's determination that Dr. K's IR of 19% did not become final because there was a significant error in calculating the 19% IR, as established by compelling medical evidence, is supported by sufficient evidence and is not so against the great weight and preponderance of the evidence as to be clearly wrong and unjust. We affirm the hearing officer's determination that the 19% IR did not become final.

IR ISSUE

A. Pieced Together IR

Section 408.125(c) provides that the report of the 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, and that, if the great

weight of the medical evidence contradicts the IR contained in the report of the designated doctor chosen by the Commission, the Commission shall adopt the IR of one of the other doctors. Rule 130.6(i) provides that the designated doctor's response to a Commission request for clarification is considered to have presumptive weight as it is part of the doctor's opinion.

The hearing officer found that the elements of Dr. K's 28% IR were 4% for the right knee, 6% for each wrist (12% total), and 15% for the cervical spine; that the great weight of the other medical evidence is not contrary to Dr. K's IR for the right knee and wrists; and that the great weight of the other medical evidence is contrary to Dr. K's IR of 15% for the cervical spine. The hearing officer adopted the 5% IR assigned by Dr. O for the cervical spine instead of the 15% assigned by Dr. K for the cervical spine. The hearing officer combined the 12% (6% each wrist impairment by Dr. K), 4% (right knee impairment by Dr. K), and 5% (cervical impairment by Dr. O) to arrive at a 20% IR. The hearing officer concluded that the claimant's correct IR is 20%.

The self-insured contends that the hearing officer exceeded his authority in assembling an IR from the various doctors who examined the claimant, and that because the hearing officer rejected the designated doctor's report regarding the cervical impairment of 15% as being against the great weight of the other medical evidence, the hearing officer was required to adopt the IR of one of the other doctors who examined the claimant, that being the 5% IR assigned by Dr. O. The self-insured contends that the claimant's correct IR is 5% as assigned by Dr. O.

We agree with the self-insured's assertion that the hearing officer erred in assembling an IR from the reports of Dr. K and Dr. O. In Texas Workers' Compensation Commission Appeal No. 94646, decided July 5, 1994, the Appeals Panel stated:

> The hearing officer either finds that the great weight of the other medical evidence is not contrary to the complete report of the designated doctor and adopts the IR of the designated doctor or does not use the IR of the designated doctor. The hearing officer may direct questions to the designated doctor, have the designated doctor further examine the claimant, or even have another designated doctor appointed by the Commission. The hearing officer does not pick and choose parts of the report of the designated doctor in regard to IR.

In Texas Workers' Compensation Commission Appeal No. 94732, decided July 20, 1994, the Appeals Panel reversed a hearing officer's decision that pieced together an IR from the reports of the designated doctor and another doctor and stated:

> In regard to the appealed issue of the hearing officer's action in piecing together an IR from part of the IR given by the designated doctor and part of the rating given by Dr. O, following our decision in Texas Workers' Compensation Commission Appeal No. 94646, *supra*, we hold such action to be impermissible under the 1989 Act.

In Texas Workers' Compensation Commission Appeal No. 002295, decided November 15, 2000, the Appeals Panel 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 a limited situation, such as in Texas Workers' Compensation Commission Appeal No. 941732, decided January 31, 1995, where the designated doctor rated a noncompensable body part (wrist) and the IR assigned by the designated doctor for the compensable body parts (cervical and lumbar) could be determined from the designated doctor's report without requesting additional input from the designated doctor because the impairment assigned for the noncompensable wrist condition was separate and distinct from the impairment assigned for the compensable back and neck injuries, the Appeals Panel affirmed a hearing officer's determination of the IR based on the IR the designated doctor assigned for the compensable body parts, noting that such a case does not involve rejection by the hearing officer of a portion of the IR assigned by the designated doctor for the compensable injury. In the instant case, the hearing officer is rejecting the designated doctor's IR for the claimant's neck, which is part of the compensable injury, and substituting another doctor's rating for that compensable body part. Thus, Appeal No. 941732, *supra* does not support the hearing officer's decision in this case to assemble one IR from two IRs.

In Texas Workers' Compensation Commission Appeal No. 041424, decided July 21, 2004, the Appeals Panel corrected a clerical error made by the designated doctor in using the Combined Values Chart of the AMA Guides, citing Old Republic Insurance Company v. Rodriguez, 966 S.W.2d 208 (Tex. App.-El Paso 1998, no pet). In the instant case, the hearing officer is not correcting a clerical or mathematical error when he substituted Dr. O's 5% cervical IR for Dr. K's 15% cervical IR.

We hold that the hearing officer erred in piecing together an IR of 20% from using part of the IR assigned by the designated doctor and the IR assigned by Dr. O.

B. Radiculopathy

The AMA Guides at page 104 discusses DRE Cervicothoracic Category III: Radiculopathy, and provides in pertinent part as follows:

> *Description and Verification:* The patient has significant signs of radiculopathy, such as (1) loss of reflexes or (2) unilateral atrophy with greater than a 2-cm decrease in circumference compared with the unaffected side, measured at the same distance above or below the elbow. The neurologic impairment may be verified by electrodiagnostic or other criteria (differentiators 2, 3, and 4, Table 71 p. 109).

Table 71 of the AMA Guides lists DRE Impairment Category Differentiators. Differentiator 2 is Loss of reflexes; Differentiator 3 is Decreased circumference, atrophy; and Differentiator 4 is Electrodiagnostic evidence, which states:

> Unequivocal electrodiagnostic evidence exists of acute nerve root compromise, such as multiple positive sharp waves or fibrillation potentials; or H-wave absence or delay greater than 3 mm/sec; or chronic changes such as polyphasic waves in peripheral muscles.

The Appeals Panel has previously addressed the question of radiculopathy under DRE Cervicothoracic Category III in Texas Workers' Compensation Commission Appeal No. 030091-s, decided March 5, 2003. In that decision, the Appeals Panel noted:

> However, the AMA Guides indicate that to find radiculopathy, doctors must look to see if there is a loss of relevant reflexes or unilateral atrophy with greater than a two centimeter decrease in circumference compared with the unaffected side, measured at the same distance above or below the elbow. The AMA Guides state that such findings of neurologic impairment may then be verified by electrodiagnostic studies. The AMA Guides do not state that electrodiagnostic studies showing nerve root irritation, without any loss of reflexes or atrophy, constitutes undeniable evidence of radiculopathy.

The hearing officer made the following unappealed findings of fact with regard to radiculopathy:

FINDINGS OF FACT

13. The great weight of the other medical evidence is contrary to [Dr. K's] [IR] of 15% for the cervical spine and consists of [Dr. K's] own electrodiagnostic test results of March 12, 2002, which are not unequivocal electrodiagnostic evidence of acute nerve root compromise; the reports of [Dr. B] and [Dr. O]; and the absence of other medical evidence of significant signs of radiculopathy such as loss of reflexes or atrophy in either upper extremity.

14. The Claimant does not have significant upper extremity radiculopathy.

Dr. K's March 12, 2002, bilateral upper extremity NCS/EMG report was in evidence and with regard to radiculopathy it contains an electrodiagnostic impression of: Electrodiagnostic evidence suggestive of right C5 or C6 radiculopathy. With regard to radiculopathy, the NCS/EMG report contains a diagnosis of: R. C5 or C6 radiculopathy. Tabular data and graphs are part of the report. While Dr. K's MMI/IR narrative report mentions the claimant's complaints of numbness in her hands and arms, it does not reference anything about upper extremity loss of reflexes or atrophy. In his response to the Commission's request for clarification, Dr. K asserted that the NCS/EMG findings were valid evidence of radiculopathy. Dr. K did not state in his response whether the claimant had upper extremity loss of reflexes or atrophy, although he mentioned lack of strength, flexed posturing, and limited range of motion.

Dr. B, the peer review doctor, reviewed the EMG report and said that there was no data to support a verifiable radiculopathy. Dr. O, the self-insured's RME doctor, who examined the claimant in June 2004, reported, with regard to the cervical evaluation, that at that time the claimant had no sign of atrophy, normal reflexes, and no evidence of radiculopathy. Dr. O stated that the EMG report showed a possible C5 or C6 radiculopathy and that there is no clear-cut evidence of radiculopathy.

As previously noted, the hearing officer made unappealed findings of fact that the great weight of the other medical evidence is contrary to Dr. K's IR of 15% for the cervical spine and that the claimant does not have significant upper extremity radiculopathy.

The self-insured does appeal the hearing officer's finding of fact that the great weight of the other medical evidence is not contrary to Dr. K's IR for the right knee and wrists, but that finding is supported by sufficient evidence and is not contrary to the great weight of the evidence.

The self-insured contends that because the hearing officer rejected a portion of the designated doctor's report (the 15% IR for cervical radiculopathy) as being contrary to the great weight of the other medical evidence, the hearing officer was required to adopt the IR of Dr. O (5% total IR) under Section 408.125(c). We agree that Section 408.125(c) does provide that if the great weight of the other medical evidence contradicts the IR contained in the report of the designated doctor chosen by the Commission, the Commission shall adopt the IR of one of the other doctors. We also agree that the evidence reflects that Dr. O is the only other doctor who examined the claimant for the purpose of assigning an IR. However, it is clear that the hearing officer did not consider Dr. O's report of a 5% IR to include impairment for all of the compensable injury because the hearing officer determined that the great weight of the other medical evidence was not contrary to Dr. K's IR for the right knee and wrists, and, as noted, Dr. O did not assign any impairment for the right knee or wrists. Under these circumstances, we decline to render a decision that the claimant has a 5% IR based on the report of Dr. O. Nor can we adopt Dr. K's IR of 28% because of the unappealed findings of fact regarding the absence of significant signs of radiculopathy.

SUMMARY

We affirm the hearing officer's determination that Dr. K's IR of 19% did not become final because there was a significant error in calculating the 19% IR. We reverse the hearing officer's determination that the claimant's IR is 20% because it was pieced together from two IRs, and we remand the case to the hearing officer for the appointment of a second designated doctor to determine the claimant's IR based on the stipulated date of MMI of September 8, 2003.

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, as amended effective June 17, 2001, to exclude Saturdays and Sundays and holidays listed in Section 662.003 of the Texas Government Code in the computation of time in which a request for appeal or a response must be filed.

The true corporate name of the insurance carrier is **STATE OFFICE OF RISK MANAGEMENT (a self-insured governmental entity)** and the name and address of its registered agent for service of process is

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Robert W. Potts
Appeals Judge

CONCUR:

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Thomas A. Knapp
Appeals Judge

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Margaret L. Turner
Appeals Judge