APPEAL NO. 111840
FILED FEBRUARY 3, 2012

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 November 9, 2011, in [City], Texas, with [hearing officer] presiding as hearing officer. With regard to the two issues before her, the hearing officer determined that the respondent (claimant) reached maximum medical improvement (MMI) on October 12, 2011, and that the claimant's impairment rating (IR) is 5%. The appellant (carrier) appealed, contending that there was no substantial basis to reject the designated doctor's report which has presumptive weight. The appeal file does not contain a response from the claimant.

DECISION

Reversed and rendered.

The claimant testified how he injured his low back while moving a hospital bed for the employer. The parties stipulated that the claimant sustained a compensable injury on [date of injury], and that the Texas Department of Insurance, Division of Workers' Compensation (Division)-appointed designated doctor for MMI and IR was [Dr. K]. According to the Notice of Disputed Issue(s) and Refusal to Pay Benefits (PLN-11) dated October 27, 2010, in evidence, the carrier has accepted a lumbar strain as the compensable injury. The evidence establishes that the claimant sustained a similar work-related injury in 2006 and received a 5% IR for that injury in 2007.

The claimant initially sought treatment for the injury at issue on September 20, 2010, at a clinic where the doctor diagnosed a low back strain. An MRI performed on November 3, 2010, showed only mild degenerative changes without evidence of disc herniation, spinal stenoisis or nerve root impingement.

MMI AND IR

Section 401.011(30)(A) defines MMI as "the earliest date after which, based on reasonable medical probability, further material recovery from or lasting improvement to an injury can no longer reasonably be anticipated." Section 408.1225(c) provides that the report of the designated doctor has presumptive weight, and the Division shall base its determination of whether the employee has reached MMI on the report of the designated doctor unless the preponderance of the other medical evidence is to the contrary. Section 408.125(c) provides that the report of the designated doctor shall have presumptive weight, and the 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. 28 TEX. ADMIN. CODE § 130.1(c)(3) (Rule 130.1(c)(3)) provides that the assignment 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 hearing officer rejected the report of Dr. K, the designated doctor, stating that Dr. K "indicated she reviewed records, but does not list those in her report." We will discuss Dr. K's report later. The hearing officer adopted the October 13, 2011, certification of MMI and IR of [Dr. H] the treating doctor.

In a Report of Medical Evaluation (DWC-69) and narrative dated August 1, 2011, Dr. H certified the claimant at clinical MMI on March 25, 2011, based on an examination on that date, with a 10% IR. Dr. H commented that the claimant "clinically [has evidence] of radiculopathy" but that Dr. H was not allowed to complete an EMG-NCV. The report does not indicate evidence of loss of relevant reflexes or unilateral atrophy. Dr. H testified at the CCH that he believed the claimant met the requirements for Diagnosis-Related Estimate (DRE) Lumbosacral Category III: Radiculopathy (*See* 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) page 3/102). Dr. H did not explain how that was so or how that assertion was supported by objective clinical evidence.

Also in evidence is another DWC-69 and narrative dated October 13, 2011, from Dr. H, certifying MMI on October 12, 2011, assessing a 5% IR. The hearing officer adopted that report in determining the October 12, 2011, MMI date and 5% IR. Regarding the MMI date, Dr. H cites the statutory provisions of MMI in his narrative, states the claimant is not at MMI and that the claimant could reach MMI and still require medical care. Nonetheless, Dr. H on his DWC-69 certified the claimant at MMI on October 12, 2011. Dr. H does not indicate how he determined the certified MMI date of October 12, 2011. Regarding the IR, Dr. H used the range of motion (ROM) Model on page 3/113 of the AMA Guides to arrive at the 5% impairment. We note that the AMA Guides on page 3/112 state that "[t]he [ROM] Model should be used only if the Injury Model is not applicable, or if more clinical data on the spine are needed to categorize the individual's spine impairment." In Appeals Panel Decision (APD) 030288-s, decided March 18, 2003, the Appeals Panel stated that although there are instances when the ROM Model may be used, such as if none of the categories of the DRE Model are applicable, or as a differentiator, the use of the DRE Model is not optional and is to be used unless there is a specific explanation why it cannot be used. (*See also* APD

091822, decided January 14, 2010) Dr. H does not explain why he used the ROM Model. Regarding the 5% assigned by Dr. H, the hearing officer referenced Dr. H's August 2011 10% IR and the October 2011 5% rating and asks the doctor for further explanation. Dr. H testified at the CCH that the prior 2007 5% IR was "offset" against the current 10% IR saying "10% minus 5 is 5. That's how the Guides work." Clearly, Dr. H was applying a contribution factor (contribution was not an issue) to his 10% IR to arrive at the 5% IR. Dr. H does not give any specifics to support his statement "[t]hat's how the Guides work." We hold that neither of Dr. H's certifications can be adopted. Accordingly, we reverse the hearing officer's determinations that the claimant reached MMI on October 12, 2011, with a 5% IR.

Dr. K, the designated doctor, in her report of March 25, 2011, notes that the medical "records received for this examination will be described throughout the report in detail in each section of the report to which they pertain . . . ." Dr. K's report does not reference any guarding or spasms, loss of reflexes or atrophy. Dr. K diagnosed a Lumbosacral sprain/strain. Dr. K had reviewed the claimant's treatment stated that the clinical condition is not likely to improve with further active medical treatment in certifying the March 25, 2011, date of MMI. Dr. K assessed a DRE Lumbosacral Category I: Complaints and Symptoms in finding the 0% IR.

The hearing officer found that the IR evaluation of Dr. K was not performed in accordance with the AMA Guides. We disagree. The only reason the hearing officer gives that Dr. K's evaluation is not in accordance with the AMA Guides is the hearing officer's comment in her Background Information that "[Dr. K] indicated she reviewed records, but does not list those in her report." Dr. K actually listed the reports she reviewed individually and summarized their contents. In reviewing a "great weight" challenge, we must examine the entire record to determine if: (1) there is only "slight" evidence to support the finding; (2) the finding is so against the great weight and preponderance of the evidence as to be clearly wrong and manifestly unjust; or (3) the great weight and preponderance of the evidence supports its nonexistence. *See* Cain v. Bain, 709 S.W.2d 175 (Tex. 1986). We hold that the hearing officer's determinations that the claimant reached MMI on October 12, 2011, with a 5% IR to be so against the great weight and preponderance of the evidence as to be clearly wrong and manifestly unjust. We reverse the hearing officer's determinations and render a new decision that the claimant reached MMI on March 25, 2011, with a 0% IR in accordance with the designated doctor's report which is not contrary to the other medical evidence.

The true corporate name of the insurance carrier is **SENTRY INSURANCE A MUTUAL COMPANY** and the name and address of its registered agent for service of process is

CT CORPORATION
350 NORTH ST. PAUL STREET
DALLAS, TEXAS 75201.

Thomas A. Knapp
Appeals Judge

CONCUR:

Cynthia A. Brown
Appeals Judge

Margaret L. Turner
Appeals Judge