

APPEAL NO. 92393

On June 29, 1992, a contested case hearing was held in (city), Texas, with (hearing officer) presiding as the hearing officer. The hearing officer determined that the claimant, (claimant), respondent herein, reached maximum medical improvement (MMI) on December 5, 1991, as certified by the designated doctor, but determined that the zero percent impairment rating assigned by the designated doctor was invalid because there was no evidence that the designated doctor's assigned impairment rating was based on "AMA Guides." Appellant, the employer's workers' compensation insurance carrier, contests the hearing officer's conclusion that the impairment rating assigned by the designated doctor is invalid. The designated doctor reported his certification of MMI and assignment of impairment rating in a signed Report of Medical Evaluation (TWCC-69).

DECISION

We affirm the hearing officer's decision on MMI. We reverse the hearing officer's decision on impairment rating and render a new decision that respondent has a zero percent impairment rating as assigned by the designated doctor.

The issues at the hearing were: (1) whether respondent has reached MMI; and (2) if respondent has reached MMI, what is the impairment rating. The hearing officer's determination that respondent reached MMI on December 5, 1991, as certified by the designated doctor, has not been appealed. Appellant disputes the hearing officer's findings that there was no evidence that the zero percent impairment rating assigned by (Dr. S), who examined respondent at appellant's request, and the zero percent impairment rating assigned by (Dr. C), who is the designated doctor selected by the Texas Workers' Compensation Commission (Commission), were determined by the use of the second printing, dated February 1989, of the Guides to the evaluation of Permanent Impairment, third edition, published by the American Medical Association (AMA Guides) as required by the Texas Workers' Compensation Act, TEX. REV. CIV. STAT. ANN. art. 8308-4.24 (1989 Act). Appellant also disputes the hearing officer's conclusion that the zero percent impairment rating assigned by (Dr. C) is invalid. Appellant urges several bases for contesting the hearing officer's findings and conclusion, one of which is that (Drs. S) and (Dr. C) complied with all provisions of the 1989 Act and Commission rules in reporting the assignment of impairment rating on a Commission prescribed Report of Medical Evaluation form (TWCC-69). The hearing officer also found that there was no evidence that the 50 percent impairment rating assigned by (Dr. Ch), who is respondent's treating doctor, was determined by the use of the AMA Guides. No conclusions were made in regard to the impairment ratings assigned by (Drs. S) and (Dr. Ch).

On (date of injury), respondent sustained a back injury when he slipped and fell at work. In a signed TWCC-69, (Dr. S) certified that respondent reached MMI on August 26, 1991, and assigned an impairment rating of zero percent. In a signed TWCC-69, (Dr. Ch) certified that respondent reached MMI on November 15, 1991, and assigned an impairment rating of 50 percent. In a signed TWCC-69, (Dr. C) certified that respondent reached MMI

on December 5, 1991, and assigned an impairment rating of zero percent. A TWCC-69 does not inquire of the doctor who completes the form whether the doctor has used the AMA Guides in determining the existence and degree of an employee's impairment, and none of the TWCC-69s in evidence, or the attachments thereto, contain a statement that the AMA Guides were used in determining the existence and degree of impairment. However, none of the TWCC-69s in evidence, or the attachments thereto, contain a statement to the effect that the AMA Guides as required by the 1989 Act were not used in determining impairment.

Appellant's position at the hearing was that the impairment rating must be based on the zero percent impairment rating assigned by the designated doctor because the designated doctor's report has presumptive weight under Article 8308-4.26(g). Respondent's position was that if MMI had been reached, which respondent disputed, then the impairment rating should be based on the fifty percent impairment rating assigned by his treating doctor. Neither party contested the impairment rating assigned by any of the three doctors on the ground that the doctor did not use the AMA Guides in determining the existence and degree of impairment. The AMA Guides are not mentioned in the benefit review officer's report. The first mention of the AMA Guides in this case is found in the hearing officer's decision.

Article 8308-4.24 requires the Commission to use the AMA Guides in determining the existence and degree of an employee's impairment. Article 8308-4.26(a) provides that all awards of impairment income benefits shall be based on an impairment rating using the impairment guidelines referred to in Article 8308-4.24. Article 8308-4.26(d) requires that a doctor certifying MMI use the AMA Guides in assigning an impairment rating, and issue a report certifying that MMI has been reached, stating the impairment rating, and providing any other information required by the Commission. Pursuant to Tex. W. C. Comm'n, 28 TEX. ADMIN. CODE Sections 130.1, 130.2. and 130.6, a treating doctor, a doctor other than a treating doctor, and a designated doctor must complete and file with the Commission the report required by Rule 130.1 when certifying MMI and assigning an impairment rating.

Rule 130.1(a) provides that a doctor who is required to certify, or who determines during the course of treatment, whether an employee has reached MMI, or has an impairment, shall complete and file a medical evaluation report as required by this rule. Rule 130.1(c) provides that all reports made under this rule shall be on a form prescribed by the Commission and then lists the information that the report must contain. There is no requirement in subsection (c) that the report contain a statement that the doctor used the AMA Guides in determining impairment. Rule 130.1(e) provides that if a doctor certifies that an employee has an impairment, the doctor shall assign a whole body impairment rating based on the injury, and that all certifications of impairment shall be made in compliance with the AMA Guides. There is no requirement in subsection (e) that the doctor state in the report that he used the AMA guides, although the rule, in compliance with the statutory provision, requires the use of the AMA Guides in determining impairment. Finally, Rule 130.1(g) provides that the "Medical Evaluation Report" form shall contain: the information required in subsection (c); an instruction to the doctor that the impairment rating shall be

based on the compensable injury alone; and an instruction to the doctor as to the definition of objective clinical or laboratory finding as contained in Article 8308-1.03. In summary, there is no requirement in Rule 130.1 relating to reports of medical evaluation that the Medical Evaluation Report form inquire of the doctor whether the doctor used the AMA Guides in determining impairment, nor does this rule contain a requirement that the doctor state on the form that he or she used the AMA Guides in determining impairment.

An examination of the TWCC-69 Report of Medical Evaluation form, which is the form prescribed by the Commission for the reporting of MMI and impairment rating, reveals that the form does not mention the AMA Guides, does not inquire of the doctor as to whether the AMA Guides were used in determining the existence and degree of an employee's impairment, and gives no indication as to whether the doctor must state that the AMA Guides were used.

In the present case, the designated doctor reported his assignment of a zero percent impairment rating on the Commission prescribed TWCC-69 form, neither party contested the report of the designated doctor on the ground that he did not use the AMA Guides in determining impairment, and there was no evidence adduced at the hearing that the designated doctor failed to use the AMA Guides. In sum, it appears that neither party presented evidence on the use of the AMA Guides at the hearing because the parties did not view that as a part of the dispute over the impairment rating. Having reviewed the record, the applicable statutes and rules, and the Commission prescribed TWCC-69 form on which the designated doctor reported his assigned impairment rating, we conclude that the hearing officer erred in concluding that the designated doctor's assigned impairment rating was invalid on the basis of her finding that there was no evidence that the impairment rating was determined by use of the AMA Guides. In the absence of an issue on impairment rating that is based on the failure of a doctor to use the AMA Guides in determining impairment, or in the absence of evidence adduced at the hearing that the doctor assigning an impairment rating did not use the AMA Guides, the hearing officer should not require a party to present evidence that the AMA Guides were used when the doctor's assigned impairment rating is reported on a Commission prescribed TWCC-69 form. Of course, the TWCC-69 form could be changed to include reference to the AMA Guides, and a certification that the doctor used the AMA Guides in determining the existence and degree of an employee's impairment. Having held that the hearing officer erred in invalidating the zero percent impairment rating assigned by the designated doctor, and recognizing that under Article 8308-4.26(g) the report of the designated doctor has presumptive weight and that the Commission must base the impairment rating on that report unless the great weight of the other medical evidence is to the contrary, we conclude, after reviewing the record, that the impairment rating is as assigned by the designated doctor and that the great weight of the other medical evidence is not to the contrary. We note that (Dr. S) also assigned a zero percent impairment rating.

We distinguish our decision in the present case from our decisions in Texas Workers' Compensation Commission Appeal No. 92074 (Docket No. redacted) decided April 8, 1992,

and Texas Workers' Compensation Commission Appeal No. 92335 (Docket No. redacted) decided August 28, 1992, because in each of those cases the claimant's contest of the impairment rating assigned by the designated doctor was based on the use of the AMA Guides in determining the impairment rating and there was evidence adduced at the hearing concerning use of the AMA Guides.

Attached to appellant's request for review are several documents all of which were in evidence except for a notation dated July 28, 1992, from (Dr. C) which, as pointed out by respondent, was not offered into evidence at the hearing nor made a part of the record. We decline to consider on appeal the July 28th notation because our review of the evidence is limited to the record development at the contested case hearing. Article 8308-6.42(a)(1); Texas Workers' Compensation Commission Appeal No. 92092 (Docket No. redacted) decided April 27, 1992.

We affirm the hearing officer's decision that respondent reached MMI on December 5, 1991. We reverse the hearing officer's decision that the impairment rating assigned by the designated doctor is invalid, and render a new decision on that issue that respondent's impairment rating is zero percent.

Robert W. Potts
Appeals Judge

CONCUR:

Stark O. Sanders, Jr.
Chief Appeals Judge

Joe Sebesta
Appeals Judge