APPEAL NO. 92412

A contested case hearing was held on June 22 and 25, 1992. She (hearing officer) determined that the greater weight of the other medical evidence is contrary to the report of maximum medical improvement (MMI) and impairment rating by the designated doctor and, therefore, the respondent has not reached MMI and has continued disability. Appellant urges error in several of the hearing officer's findings of fact and conclusions of law and asks that we reverse and render a new decision as to the respondent's reaching MMI and adopt an impairment rating. No response has been filed.

DECISION

Determining the hearing officer erred in her conclusion and decision that the designated doctor's report on MMI and impairment rating was outweighed by the other medical evidence, we reverse and render.

Succinctly, there was no dispute that the respondent injured her back and lower left extremity in the course and scope of her employment in _____. She subsequently underwent a considerable course of treatment including surgery on her knee. On October 19, 1991, the respondent was seen by Dr. K of the (clinic) for an independent examination. There is no Report of Medical Evaluation (TWCC-69) in the file signed by Dr. K, however there is a narrative report and a deposition of Dr. K concerning his examination and evaluation. In his deposition, it is noted that he did not use the specified edition of the American Medical Association guide required by the Texas Workers' Compensation Act, TEX. REV. CIV. STAT. ANN., art. 8308-4.24 (Vernon Supp. 1992) (1989 Act). *See* Texas Workers' Compensation Commission Appeal No. 92074 decided April 8, 1992. Dr. K indicated his opinion, in an 11 page comprehensive narrative report, that the respondent would reach MMI on March 21, 1992 with a 4% whole body impairment. Subsequently the Commission designated Dr. O, an orthopaedic surgeon, to be the designated doctor in evaluating the respondent. Dr. O examined the respondent on January 21, 1992 and certified on a TWCC-69, with an attached seven page narrative, that the respondent had reached MMI on January 21, 1992 with an 18% whole body impairment rating. A deposition of Dr. O shows that he utilized and complied with the American Medical Association guide, Third Edition, in performing his evaluation. There was no indication that he used other than the correct copy of the guides required by 1989 Act. *See* Texas Workers' Compensation Commission Appeal No. 92393, decided September 17, 1992.

Also in evidence is a March 27, 1992 brief statement from Dr. B, the respondent's indicated treating doctor, which opines that as of that date the respondent had not reached MMI. Also in evidence is a letter from Dr. A, of the (medical group), dated April 15, 1992, which states that Dr. B referred the respondent to him for a second opinion evaluation on 9/25/91. He stated the respondent is still under his care and that "I do not feel that (respondent) has yet reached a point of maximum medical improvement; she is still undergoing conservative management."

The respondent testified that she still experiences pain, that she can't walk normally, and that she does not feel she can return to any type of duty.

In addition to issues concerning MMI and the impairment rating in this case, the appellant also cites several other errors. The first of these complains that the hearing officer did not have evidence before her to find that Dr. K did not report his findings on a TWCC-69 or that he did not send a copy to the treating doctor. We agree there was no evidence on these two matters at all. However, Dr. K's report (sans any TWCC-69) and deposition were in the record and there was nothing to indicate that he had filled out the form or sent his report to the treating doctor. Since the primary issue in the case involved MMI and impairment rating and the evidence establishing it, and no evidence was before her to indicate compliance with the certification requirements concerning the TWCC-69 and the sending of a copy to the treating doctor, it was not unreasonable for her to infer that neither had been accomplished. In any event, neither the report containing the signature block of Dr. K, nor any other document attached thereto, was signed by him. This, we have previously held, would render it defective to certify MMI or establish an impairment rating. *See* Texas Workers' Compensation Commission Appeal No. 92027, decided March 27, 1992. Appellant also complains the hearing officer erred in finding the claimant was injured in the course and scope of her employment since it was not an issue. Even assuming some error in what amounts to a superfluous finding, we do not believe any curative action is necessary under the circumstances.

Next, appellant complains the hearing officer erred in finding that Dr. K's whole body impairment rating of 4% was not based upon an objective clinical or laboratory finding. We agree and do not find evidence to substantiate that finding by the hearing officer. Indeed, the doctor's report would indicate the contrary. However, we do note that Dr. K's report on whole body impairment defers any impairment rating concerning the respondent's knee. In any event, this matter is not of significance to our decision and does not affect the final result. As indicated above, the report admitted at the contested case hearing was fatally defective to certify MMI or an impairment rating. Thus, appellant's position that the hearing officer erred in holding that Dr. K's report is not a finding of MMI because of noncompliance with Texas Workers' Compensation Commission rules is without merit. However, the report is not thereby rendered worthless; it can be appropriately considered with other medical evidence on the issue before the hearing officer. *See* Texas Workers' Compensation Commission Appeal No. 92064, decided April 3, 1992; Texas Workers' Compensation Commission Appeal No. 92074, decided April 8, 1992.

Appellant contends the hearing officer erred in concluding that the greater weight of the other medical evidence is contrary to the report of the designated doctor regarding MMI even though portions of his impairment rating were based on factors other than objective clinical or laboratory findings. Appellant also faults the hearing officer's conclusion of law that "[t]he report of Claimant's treating doctor shall be adopted by the commission."

As set forth above, this case involves the not uncommon disagreement between various medical reports and medical practitioners concerning reaching MMI and assessing an impairment rating. This was something that must have been envisaged by the legislature in enacting Articles 8308-4.25 and 4.26 of the 1989 Act. These articles provide a mechanism when there is a dispute involving MMI and impairment ratings. Succinctly, a designated doctor (TWCC Rule 133.2, Tex. W. C. Comm'n, TEX. ADMIN. CODE §133.2 sets forth that prior medical reports and tests are to be provided to a designated doctor) is appointed by the commission and unless the doctor is selected by the mutual agreement of the parties, the report of the designated doctor "shall have presumptive weight and the commission shall base (MMI and an impairment rating) on that report unless the great weight of the other medical evidence is to the contrary, in which case the commission shall adopt the impairment rating of one of the other doctors." We do not read this language to require a mere balancing of the evidence, as, for example, occurs in establishing a compensable claim, and determining that a preponderance of the evidence either does or does not establish that fact. Rather, in the area of MMI and impairment ratings, where there is a dispute regarding medical evidence, an attempt is made under the statute and rules to designate an independent doctor to finally resolve these matters. It is for this apparent reason that "presumptive weight" is specifically accorded the designated doctor's report. And, it is not just equally balancing evidence or a preponderance of evidence that can outweigh such report, but only the "great weight" of other medical evidence that can overcome it. We have previously emphasized the unique position that a designated doctor's report occupies under the Texas Workers' Compensation system. *See* Texas Workers' Compensation Commission Appeal No. 92255, decided July 27, 1992; Texas Workers' Compensation Commission Appeal No. 92275, decided August 11, 1992; Texas Workers' Compensation Commission Appeal No. 92392, decided September 21, 1992. Similarly, we have observed that no other doctor's report, including a report of a treating doctor, is accorded this special, presumptive status. Texas Workers' Compensation Commission Appeal No. 92366, decided September 10, 1992.

Applying the provisions of Articles 8308 4.25 and 4.26--that the report of the designated doctor shall have presumptive weight and shall be the basis for MMI and impairment rating unless the great weight of the other medical evidence is to the contrary --to the facts in this case causes us to reverse. The undetailed statements of the treating doctor and the referral doctor indicating MMI had not been reached (as opposed to the two comprehensive reports of the doctor performing an independent medical examination and the designated doctor) at the very most resulted in the medical evidence being in some degree of balance. And, regarding the impairment rating, the reports of the latter two doctors were performed utilizing versions of the American Medical Association guides on impairment ratings. With the evidence in this posture, we determine the hearing officer misapplied the specific provisions of Articles 8308-4.25 and 4.26 and failed to accord the required presumptive weight to the designated doctor's report, under the circumstances,

and erred in according the treating doctor's report as rising to the level of "great weight of the other medical evidence."

Appellant's complaint that the designated doctor inappropriately relied on factors other than objective clinical or laboratory findings in his impairment ratings is not supported by the evidence. It appears that both Dr. K and Dr. O gave some consideration to range of motion data in arriving at their opinions and that Dr. O had, and referenced, Dr. K's report at the time of his examination and report. We have previously held that range of motion data is properly considered, in addition to clinical and laboratory data, in arriving at impairment ratings and that such is in accord with the American Medical Association guides. *See* Texas Workers' Compensation Commission Appeal No 92335, decided August 28, 1992; Texas Workers' Compensation Commission Appeal No. 92394, decided September 17, 1992. From the evidence of record, we are not able to conclude that any improper medical matters were considered by the designated doctor in reaching his opinion. He specifically stated in his deposition that he utilized and complied with the required American Medical Association guides.

For the reasons stated, the decision of the hearing officer is reversed. We render a new decision that the determinations of the designated doctor on MMI and impairment rating are accorded presumptive weight, that the great weight of the other medical evidence is not to the contrary and that the report of the designated doctor is hereby adopted.

_____
Stark O. Sanders, Jr.
Chief Appeals Judge

CONCUR:

_____
Susan M. Kelley
Appeals Judge

_____
Lynda H. Nesenholtz
Appeals Judge