APPEAL NO. 92650

On October 1, 1992, a contested case hearing was held in (city), Texas, with (hearing officer) presiding as the hearing officer. The record was left open for supplementation and responses until October 26, 1992 when the record was closed. The hearing officer adopted the designated doctor's rating, found a percentage of permanent impairment of 18%, and ordered benefits paid under the Texas Workers' Compensation Act, TEX. REV. CIV. STAT. ANN. art 8308-1.01 *et seq*. (Vernon Supp. 1992) (1989 Act). The appellant, carrier herein, appeals alleging the report and impairment rating of carrier's doctor was not listed in the decision and order, that the treating and designated doctors' impairment ratings were invalid, and requests the appeals panel to reverse the decision of the hearing officer and render a decision that claimant reached maximum medical improvement (MMI) on 6/3/92 with a 9% impairment rating. Respondent, claimant herein, did not file a response. The issue framed at the benefit review conference (BRC) and acknowledged by the parties at the contested case hearing (CCH) was: "[w]hat is the correct impairment rating?"

DECISION

We affirm the decision of the hearing officer regarding the impairment rating but reverse and remand for the finding of an MMI date.

No testimony was taken at the CCH and the case was submitted on the medical records. Physicians submitting reports and ratings were (Dr. De), claimant's treating doctor, (Dr. L), the Texas Workers' Compensation Commission's (Commission) designated doctor, and (Dr. D), carrier's doctor. During the hearing the hearing officer noted there were no TWCC-69's (Report of Medical Evaluation) in the record and consequently she left the record open for supplementation and responses to any supplementation. The hearing officer also stated "the designated doctor's rating of 18% is going to have presumptive weight unless someone can show that it should not be utilized."

Carrier's first allegation of error is that (Dr. D's) TWCC-69, showing MMI on 11/15/91 with a 9% impairment rating, was offered after the hearing as Carrier Exhibit 9 pursuant to the hearing officer's agreement to allow supplementation by a certain date, "[h]owever, the exhibit was not listed in the decision and order." We note that the 1989 Act does not require a statement of the evidence by the hearing officer. *See* Article 8308-6.34(g). Upon review of the entire record, it appears that (Dr. D's) TWCC-69 is contained in Hearing Officer's Exhibit 11 at pages 12 and 13. Further, carrier states that "[i]t ([Dr. D's) TWCC-69] is nothing any different than is already contained, in terms of information, in Exhibit 6, which is the report of 6/3/92 from (Dr. D) . . . ." The hearing officer clearly considered (Dr. D's) report in Finding of Fact No. 6 which states, "(Dr. D) . . . assessed the claimant's percentage of permanent impairment to be 9% and submitted his determination on a TWCC-69." The hearing officer did not err by not listing "Carrier's Exhibit 9" in the decision, particularly as the report was contained in the Hearing Officer's Exhibit 11. *See* Texas Workers' Compensation Commission Appeal No. 92213, decided July 10, 1992.

Carrier alleges error that (Dr. L) did not submit a TWCC-69 giving MMI and impairment ratings and that the hearing officer's Finding of Fact No. 7 and Conclusion of Law No. 3, which follow, constitute reversible error.

FINDING OF FACT

7. The medical reports of (Dr. De) and (Dr. L) contained the same information as that required by TWCC-69, and, as such, the impairment ratings are validly submitted.

CONCLUSION OF LAW

3. The percentage of permanent impairment is 18% because the great weight of the other medical evidence is not to the contrary, pursuant to Art. 8308-4.24 and Art. 8308-4.26(g) V.T.C.S.

Carrier contends that the TWCC-64 [TWCC-61] (Specific and Subsequent Medical Report) prepared by (Dr. L) "is not sufficient as an assessment of impairment (Appeals Panel No. 92198)." Carrier also cites Texas Workers' Compensation Commission Appeal Nos. 92193, decided July 2, 1992, 92257, decided August 3, 1992, and 92335, decided August 28, 1992 as authority for its proposition. We would distinguish Appeal No. 92198, decided July 3, 1992 because that case involved an unsigned TWCC-64 as certification of an anticipated date employee may achieve MMI. That case differs from the instant case because not only was a TWCC-64 form used, but it was unsigned and gave only an anticipated date of MMI. The only similarity to the instant case is the failure to use a TWCC-69. Appeal No. 92193, *supra*, involved an unsigned TWCC-69 which was not admitted by the hearing officer. In Appeal No. 92257, *supra*, we held that a doctor's (other than a designated doctor) letter "was inadequate as a certification of MMI because all the substantive information required to support a certification of MMI is not included." In Appeal No. 92335, *supra*, we held "[w]hile a designated doctor's failure to include one or more of these items contained in [Texas W.C. Comm'n 28 TEX. ADMIN. CODE §§130.1 and 130.5] may not be fatal, we have previously held that MMI and impairment are not properly certified in the absence of the doctor's signature" (citations omitted). In that case we remanded to allow the designated doctor an opportunity to properly certify MMI and assess impairment. In the instant case, the TWCC-61 (Initial Medical Report) is signed by (Dr. L), is submitted with a signed narrative from (Dr. L) and includes computations on Figure 84 of the American Medical Association Guides to the Evaluation of Permanent Impairment (AMA Guides). (Dr. L), in his narrative submitted with the TWCC-61, specifies the tests he used and how he arrived at his 18% whole body impairment rating.

Carrier further attacks (Dr. L)'s rating by saying "[t]he TWCC-64 (sic) prepared by (Dr. L) [Claimant Exhibit "8"] is not sufficient as an assessment of impairment . . . ." Review of Claimant's Exhibit 8 shows a letter from (Dr. L) to the carrier's representative referencing "a report in early April of 1992 on [claimant] explaining explicitly in the most detailed fashion,

how I arrived at 18% whole body impairment" and enclosing a signed TWCC-69 referencing "enclosed report and spine impairment." Carrier further objects to (Dr. L's) rating because answers to various written deposition questions did not, in carrier's opinion, indicate compliance with Articles 8308-4.24 mandating the use of the February 1989 AMA Guides and Article 8308-4.25(a) requiring that evidence of impairment be based "on an objective clinical or laboratory finding." At the outset, we note that the use of a designated doctor is clearly intended under the 1989 Act to assign an impartial doctor to resolve disputes over MMI and impairment ratings. To achieve this end, the report of the designated doctor, if selected by the Commission, shall have presumptive weight in accordance with Articles 8308-4.25(b) and 4.26(g). This presumptive weight can only be overcome by the great weight of the other medical evidence. As the appeals panel has stated before, this requires more than a mere balancing of the evidence. *See* Texas Workers' Compensation Commission Appeal No. 92570, decided December 14, 1992, citing Texas Workers' Compensation Commission Appeal No. 92412, decided September 28, 1992. In the instant case, the designated doctor filed a TWCC-61 dated 3/31/92 attaching a narrative report, dated March 31, 1992, specifying the tests conducted, detailing how he arrived at the 18% impairment rating, and attaching a copy of Figure 84 of the AMA Guides showing his computations. In addition, the designated doctor submitted answers to written deposition questions confirming he had read and used the AMA's Guides to the Evaluation of Permanent Impairment, third edition, second printing, February 1989. Claimant's Exhibit 8 indicates that the designated doctor, by letter dated July 27, 1992, further responded to carrier by referring carrier to the doctor's "early April of 1992" (probably the March 31, 1992) report explaining the impairment rating, sending another copy of the AMA Guides Figure 84 with his computations and a signed TWCC-69 showing an 18% whole body impairment rating. No other doctor's report is accorded this special presumptive status. *See* Texas Workers' Compensation Appeal Nos. 92366, decided September 10, 1992 and 92412, *supra*. The hearing officer did not err in finding that the designated doctor's medical reports collectively contained the essential information required by a TWCC-69 and that the impairment rating was valid, and in concluding the great weight of the other medical evidence was not to the contrary.

Carrier alleges that (Dr. L's) impairment rating is invalid because the doctor used range of motion calculations which rely in part on subjective symptoms and which therefore are not reliable and reproducible measures of impairment. In Texas Workers' Compensation Commission Appeal No. 92335, decided August 28, 1992, a carrier raised many of the same arguments regarding range of motion testing and the statutory definition of "objective clinical or laboratory finding." In that case we held that the requirement in Article 8308-4.25(a) that evidence of impairment must be based on an objective clinical or laboratory finding was intended to preclude recovery of impairment benefits where the only evidence of impairment is the employee's subjective complaint of pain, citing Montford, A Guide to Texas Workers' Comp Reform, Volume 1 §4B.25, Butterworth Legal Publications, Austin (1991). We further held that a doctor must determine whether an objective clinical or laboratory finding of impairment exists and document the same before assigning an impairment rating. "That impairment cannot be based solely on a subjective complaint,

does not mean that subjectivity can play no part in the determination or measurement of impairment." Appeal No. 92335, *supra*. As we pointed out in Appeal No. 92335, the AMA Guides address both the protocols for measurement and the evaluation process using range of motion tests and procedures. *See also* Texas Workers' Compensation Commission Appeal No. 92412, decided September 28, 1992, which said "[w]e 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. 92394 . . ., decided September 17, 1992." Even the carrier concedes it "is aware of Appeals Panel Decisions approving the use of range-of-motion calculations in the determination of whole body impairment . . . ." We are unwilling to say as a matter of law, based on the evidence before us, that the designated doctor improperly or inaccurately used the range of motion tests in determining impairment rating.

The carrier asserts on appeal that in the deposition on written questions the designated doctor "does not give the printing of the Guides which was used." We note that the doctor did state he had read the AMA Guide to the Evaluation of Permanent Impairment, third edition, second printing, February 1989, and in response to a specific question he stated he had used the AMA Guides, third edition, but then referred to the printing as the third edition. There was no evidence or allegation at the CCH that another version of the AMA Guides had been used, only that the designated doctor failed to recite it was the second printing in the deposition on written questions. It does not appear we have ruled on this exact point previously but adopting language from Texas Worker's Compensation Commission Appeal No. 92393, decided September 17, 1992 we hold that evidence that the second printing of the AMA Guides was used is not required where the parties did not question the printing as a part of the dispute over the impairment rating.

Carrier also alleges (Dr. De) impairment rating is incorrect, even though he did not include range of motion, because his calculations according to Table 49 of the AMA Guides assigned incorrect values to herniation levels, and because he did not state which edition of the AMA Guides was used. First, we note that because (Dr. De) is not the designated doctor, his report is not entitled to presumptive weight. We also note that carrier made the same argument on appeal as it did in its "Brief in Support of Carrier's Issue Positions" considered in Hearing Officer's Exhibit 11. The hearing officer, as the sole judge of the weight and credibility of the evidence (Article 8308-6.34(e)) no doubt considered carrier's argument in reaching her decision. We have already decided, as noted above, that failure to recite the edition of the AMA Guides used is not error where the edition used is not part of the dispute over impairment.

Carrier's last allegation of error is that the hearing officer "failed to make a finding as to the date of maximum medical improvement, although this issue was argued by the parties at the hearing and in the brief in support of carrier's issue positions . . . ." In reviewing the transcript of the hearing we note that the hearing officer stated as the issue "[w]hat is the correct impairment rating?" to which carrier's response was, "[t]hat is correct." Further, in

reviewing the carrier's position at the BRC, the hearing officer asked carrier if they were still contesting the designated doctor's use of range of motion in assessing impairment to which carrier replied "yes" and raised questions regarding use of the "appropriate guides, apart from the issue of range of motion." Review of the BRC report indicates MMI was not raised as an issue. Carrier's supplemental brief (Hearing Officer's Exhibit 11) on page 7 makes almost the identical argument that carrier makes on appeal. Article 8308-6.31(a) and Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE §142.7 (TWCC Rule 142.7) provide in part that "issues not raised at the benefit review conference may not be considered except by consent of the parties or unless the commission determined good cause existed for not raising the issue . . . earlier." In the instant case MMI was clearly not raised at the BRC, nor was it raised when the hearing officer announced, and obtained the agreement of the parties, as to the dispute at the CCH. Carrier in its appeal states "[t]here is no dispute that the claimant has reached maximum medical improvement." The achievement of MMI is not at issue. However, because Article 8308-4.26(c) provides that an employee's entitlement to impairment income begins the day after the employee reaches maximum medical improvement, it becomes important to establish an MMI date. In Texas Workers' Compensation Commission Appeal No. 92570, *supra*, we held "[a] party must be able to ascertain from the hearing decision the date on which . . . impairment benefits accrue i.e., the MMI date, and this should be addressed in the decision on remand." We are unable to determine from the record before us whether there was an agreed date of MMI or when the impairment benefits were to accrue. We note that the designated doctor, on the TWCC-61 dated March 31, 1992, does not find MMI and on the TWCC-69 filed with the carrier on July 27, 1992 states MMI was reached, but fails to give a date.

We affirm the decision of the hearing officer that the percentage of permanent impairment is 18% and, not being able to determine an MMI date with any certainty, we reverse and remand the decision for an expedited finding of the date of MMI. Pending resolution of the remand, a final decision has not been made in this case. However, since reversal and remand necessitates 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 Texas Workers' Compensation Commission's division of hearings, pursuant to Article 8308-6.41. *See* Texas Workers' Compensation Commission Appeal No. 9292642, decided January 20, 1993.

_____

Thomas A. Knapp
Appeals Judge

CONCUR:

_____
Susan M. Kelley
Appeals Judge

_____
Philip F. O'Neill
Appeals Judge