

## APPEAL NO. 93039

Pursuant to the Texas Workers' Compensation Act, TEX. REV. CIV. STAT. ANN. art. 8308-1.01 *et seq.* (Vernon Supp. 1993) (1989 Act), a contested case hearing was held on November 12, 1992, (hearing officer) presiding as hearing officer. He (hearing officer) determined the designated doctor did not perform his examination in accordance with the American Medical Association's (AMA) Guides and rejected his report. He found a maximum medical improvement (MMI) date and impairment rating based upon another doctor's report. Appellant (carrier) appeals the hearing officer's rejection of the designated doctor's report and urges that the great weight of other medical evidence was not to the contrary so as to overcome the presumptive weight attached to a designated doctor's report. Respondent (claimant) urges that the hearing officer's decision be affirmed.

### DECISION

Finding error, we reverse and remand.

The only issue in this case was whether the claimant reached MMI and what his whole body impairment rating was. The claimant, under the treatment of a chiropractor for a back injury, had an impairment rating performed by another chiropractor, Dr. W, on February 25, 1992. Dr. W rendered a report indicating MMI on February 25, 1992, and assessed a 21% impairment rating. Subsequently, the claimant was sent to a designated doctor, Dr. D, an orthopedic surgeon, who determined MMI as of June 12, 1992 and assessed an impairment rating of 5%.

Dr. W testified at the hearing, defended his report, and opined that Dr. D did not perform an examination in accordance with the AMA Guides. He described his view of the proper method of conducting and examining for impairment rating and described the correct use of an inclinometer which is illustrated in the AMA Guides. He criticized Dr. D's report in several respects, stated that Dr. D did not perform a proper range of motion examination and that he had not used an inclinometer. He testified that there was an entry in Dr. D's report that was not consistent with a radiology report. In this regard, we note the hearing officer incorrectly indicated in his Decision and Order that the radiologist's report was admitted when the record clearly shows it was rejected at the hearing. Therefore, it cannot be considered and we are uncertain if it was considered by the hearing officer in rendering his decision.

The claimant testified through an interpreter and the recording is exceedingly difficult to decipher as the interpreter and claimant repeatedly talked at the same time. However, it appears that the claimant asserts that he did not feel that he was given a thorough examination by Dr. D and stated that Dr. D did not use an inclinometer but that he used a "measuring tape." He described the motions that Dr. D had him do and said that Dr. D talked to him about the injury and looked at the x-ray and told the claimant he had been seen by a lot of doctors.

The reports of Dr. W and Dr. D were admitted into evidence. Dr. W's narrative report

attached to a Texas Workers' Compensation Form 69, Report of Medical Evaluation (TWCC-69) entitled "IMPAIRMENT RATING" goes through a history, current complaints, and his examination which discussed range of motion evaluations and references the AMA Guide. He renders his diagnosis and indicates "a score of 21% whole body impairment." Dr. D's report submitted on a TWCC-69 with an attached narrative covers a history, discusses his examination of the claimant including particular physical limitations, refers and considers diagnostic tests previously performed, provides an assessment and plan and states, "[his] permanent physical impairment would be 5% based the (sic) AMA Guidelines for Evaluating Permanent Physical Impairment . . . ."

Based upon this state of the evidence, the hearing officer found Dr. D's "examination was not performed in accordance with the American Medical Association's Guides to the Evaluation of Permanent Impairment, Third Edition, Second Printing" and used the report of Dr. W in determining MMI and impairment rating.

We have repeatedly emphasized the special and unique status accorded the medical opinion and evaluation of a designated doctor. Articles 8308-4.25 and 4.26 specifically provide that the report of a designated doctor selected by the Commission shall have presumptive weight and the determination of MMI and impairment rating shall be based on the report unless the great weight of the other medical evidence is to the contrary. In Texas Workers' Compensation Commission Appeal No. 92412, decided September 28, 1992, in reversing a hearing officer's rejection of a designated doctor's report we held that only the great weight of other medical evidence can outweigh the presumptive weight accorded the designated doctor and that this "is not just equally balancing evidence or a preponderance of evidence." The hearing officer, in his rejection of the designated doctor's report, does not purport to accord the level of great weight to the other medical evidence in this case. In this regard, we held in Texas Workers' Compensation Commission Appeal No. 92522, decided November 9, 1992 that a hearing officer who rejects a designated doctor's report because the great weight of the other medical evidence is to the contrary, must clearly detail the evidence relevant to his or her consideration, clearly state why the great weight of other evidence is to the contrary and further state how the contrary evidence outweighed the designated doctor. See *also* Texas Workers' Compensation Commission Appeal No. 93007, decided February 18, 1993; Texas Workers' Compensation Commission Appeal No. 93021, decided February 19, 1993.

It appears that the hearing officer's decision in this case is at least to some degree predicated on the testimony of Dr. W who criticizes Dr. D's report and highlights his opinion of shortcomings that indicate to him that Dr. D has not properly followed the AMA Guides. We would call to the attention of the hearing officer our decision in Texas Workers' Compensation Commission Appeal No. 92595, decided December 21, 1992. In that case, where a designated doctor's report was rejected, we stated:

The use of a designated doctor is clearly intended under the Act to assign an impartial doctor to finally resolve disputes of MMI and impairment rating. As we noted recently in Texas Workers' Compensation Commission Appeal No. 92570, decided December 14, 1992, it is important to realize that the

designated doctor, unlike a treating doctor or a doctor for whom a carrier seeks a medical examination order under Article 8308-4.16, serves at the request of the Commission. We believe that it is the responsibility of the Commission, and not of either of the parties, to ensure that the designated doctor completes the TWCC-69 form or otherwise supplies the information required under Texas Workers' Compensation Rules, 28 TEX. ADMIN. CODE §130.1 (Rule 130.1). If information is nevertheless missing or unclear by the time that the contested case hearing officer is asked to evaluate the designated doctor's report, it is appropriate for the hearing officer, in carrying out his or her responsibilities to fully develop the facts required, in accordance with Article 8308-6.34(b), to seek that additional information. Moreover, direct contact between the Commission and its appointed designated doctor will serve to discourage unilateral contact from either side following the examination that could serve to undermine the perception that the designated doctor is impartial. See Texas Workers' Compensation Commission Appeal No. 92511, decided November 12, 1992.

While we specifically limit the decision in Texas Workers' Compensation Commission Appeal No. 92611, decided December 30, 1992, to the particular facts of that case and did not in any way denigrate (as so aptly cautioned in the dissent filed in that case) the unique status accorded the designated doctor under the Act and our previous decisions, we indicated that information concerning the designated doctor's report might appropriately be sought to clarify significant ambiguities. That decision did not open a designated doctor's report to unbridled attack or suggest a designated doctor's report can be rejected, absent a substantial basis to do so. In a situation like that found in this case, we find error in rejecting a designated doctor's report without any attempt or opportunity to explain, clarify or discount the somewhat subjective attacks upon it. Accordingly, we reverse the questioned finding, conclusion and decision of the hearing officer and remand for further consideration and development of evidence, not inconsistent with this opinion.

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. 92642, decided January 20, 1993.

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Stark O. Sanders, Jr.  
Chief Appeals Judge

CONCUR:

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Philip F. O'Neill  
Appeals Judge

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Thomas A. Knapp  
Appeals Judge