APPEAL NO. 931059

This appeal arises under the Texas Workers' Compensation Act of 1989 (1989 Act), (formerly V.A.C.S., Article 8308-1.01 *et seq*.) TEX. LAB. CODE ANN. § 401.001 *et seq*. On September 30, 1993, a contested case hearing was held in (city), Texas, with (hearing officer) presiding. He determined that appellant (claimant) injured her right elbow only and reached maximum medical improvement (MMI) on December 7, 1992, with a 13% impairment rating. Claimant asserts that the designated doctor's opinion that she had a 21% rating was correct. The carrier states that the hearing officer's decision is correct.

DECISION

We affirm.

Claimant was injured when working in a nursing home. She was moving a patient when the patient started to fall. Claimant did not release the patient, staying with her to break her fall. As claimant was descending, her right arm was described as hitting the edge of the bed and then sliding between the woodwork and the mattress, twisting the arm.

The two issues before the hearing were: whether the injury, described above, of (date of injury), extended to the right shoulder, and whether the designated doctor's impairment rating is correct.

Claimant testified that she told all doctors that her elbow hurt and that the pain extended down to her hand and back up to her shoulder. Medical records in evidence indicate elbow and arm pain reported when obtaining medical care. On February 25, 1992, (Dr. A) assessment includes "medial and lateral epicondylitis of the right upper extremity causing pain in her right forearm." Then on (date), claimant's pain is reported as "around elbow shooting up her right shoulder when she tries to lift . . . . "

The carrier sent claimant to see (Dr. C) on December 3, 1992. He prepared a TWCC Form 69 indicating that claimant reached MMI on December 7, 1992, with zero percent impairment. Claimant was then sent to (Dr. T) in February 1993 who was designated to determine impairment only. He reported that MMI was reached on February 25, 1993, with 38% impairment to the right upper extremity, which he also reported as 38% whole body impairment. In his report he discussed both the right shoulder and the right elbow.

Thereafter, on March 20, 1993, the benefit review officer wrote to Dr. T asking for impairment to the whole person, calling attention to the fact that his report addressed the right upper extremity. This letter also asked the designated doctor to opine whether the right shoulder is "associated with this injury." The benefit review officer next wrote to Dr. T on May 21, 1993, referring to Dr. T's response of March 30, 1993, which was said to indicate that the shoulder could have been involved by the accident of (date of injury). (The March 30th letter of Dr. T was not made part of the record.) The May 21, 1993, letter specifically told Dr. T to limit his impairment rating to the right elbow injury.

The claimant takes issue with the percentage of impairment determined by the

hearing officer. She also objects to a decision not to grant her a continuance, to consideration of her past car accident, and to being denied the help of an ombudsman.

The claimant asked for a continuance at the time the hearing was convened on September 30, 1993. The record shows that a hearing first convened on July 7, 1993, when claimant asked for a continuance because of insufficient notice. In the discussion of the continuance solicited in September 1993, the carrier referred to two prior continuances granted claimant; claimant responded that one of the continuances was because of a death in the family. Carrier objected to additional continuances. Claimant had asked for a continuance at the September 30, 1993, hearing in order to try to get an attorney; she had a phone number of one but had no indication that the particular attorney would take the case. The hearing officer's decision not to grant a continuance was not an abuse of his discretion. *See* Texas Workers' Compensation Commission Appeal No. 92007, decided February 21, 1992.

We note that claimant did not take issue with the hearing officer's determination that MMI was reached on December 7, 1992, rather than the date ascribed by the designated doctor, February 25, 1993. The commission letter concerning the designated doctor only designated Dr. T to determine impairment. As a result, the ruling in Texas Workers' Compensation Commission Appeal No. 93710, decided September 28, 1993, is applicable; when only an impairment rating is solicited from a designated doctor, then any particular date that is given in regard to MMI by that doctor has no presumptive weight and is to be weighed along with other medical evidence when a finding as to MMI is needed for the decision.

The claimant's main focus of objection is directed at the hearing officer's determination that 13% is the correct impairment rating. Claimant states that Dr. T's rating of "21% which includes the shoulder is correct." Three reports of Dr. T were entered in evidence, all by claimant. The first considered the shoulder and gave a right upper extremity rating of 38% but did not decrease it for the whole body rating, which it also stated as 38%. (We note that Table 3, page 20 of the Guides to the Evaluation of Permanent Impairment, third edition, second printing, dated February 1989, published by the American Medical Association (Guides) considers a 38% upper extremity impairment to be a 23% total body impairment.) The report of Dr. T that is marked as claimant's exhibit 2 states that the right upper extremity impairment is 21% and provides the same 21% for the whole body impairment. (We note that the TWCC Form 69 that is marked Claimant's Exhibit 2 is not signed.) Claimant's Exhibit 3 also states that the right upper extremity has 21% impairment, but then says the whole body impairment is 13%. (We note that the same Table 3, as previously described, indicates that 21% impairment of the upper extremity equates to a 13% whole body impairment.) In essence, Claimant's Exhibits 2 and 3 are the same, with exhibit 3 being signed and correctly reducing a 21% upper extremity rating to 13% for the whole body per Table 3 of the Guides. There is no designated doctor's opinion in evidence that certifies 21% whole body impairment.

Texas Workers' Compensation Commission Appeal No. 92617, decided January 14,

1993, affirmed the action of a hearing officer who told a designated doctor to limit his impairment rating to a certain area of the body. The hearing officer is the trier of fact; he is the sole judge of the evidence. Section 410.165. Texas Workers' Compensation Commission Appeal No. 93735, decided October 4, 1993, pointed out that the designated doctor is only entitled to a presumption when designated to determine MMI or impairment. His view as to the extent of injury or whether injury occurred is entitled to no presumption. Injury is a fact issue for the hearing officer to decide. In determining that the 13% rating was correct, the hearing officer was consistent with his factual determination that the injury did not extend to the shoulder. The evidence was sufficient to support his decision as to extent of injury.

With no issue as to sole cause of the shoulder problem, the hearing officer did not have to make a finding of fact relating to the injury claimant incurred in a prior automobile accident. If the hearing officer had found that any aggravation of a condition that was present at the time the injury in question took place, then the 1989 Act provides that there was injury to the area of the condition. The elapsed time before the medical records referred to shoulder problems provided a sufficient basis, but did not compel, the hearing officer to find the injury did not extend to the shoulder, without any consideration of a past automobile accident. *See* Appeal No. 92617, *supra*. *Compare to* Texas Workers' Compensation Commission Appeal No. 92503, decided October 29, 1992.

The objection claimant raises as to assistance by the ombudsman was not raised at the hearing; in addition, the record of the hearing reflects that the ombudsman assisted the claimant throughout the hearing. This contention is rejected.

The carrier took issue with whether the claimant timely filed an appeal. The decision of the hearing officer was distributed on November 3, 1993, and claimant's mailed appeal is postmarked November 20th; with five days provided to receive a mailed decision by Tex W. C. Comm'n, 28 TEX. ADMIN. CODE § 102.5(h), November 8th was the date of receipt, and thereafter the claimant's 15 days to appeal began to run. The appeal was timely.

The findings of fact and conclusions of law are sufficiently supported by the evidence and the decision and order are sufficiently supported by the evidence. We affirm.

Joe Sebesta
Appeals Judge

CONCUR:

Lynda H. Nesenholtz
Appeals Judge

Thomas A. Knapp
Appeals Judge