APPEAL NO. 93622

This appeal arises under 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 (CCH) was originally held in (city), Texas, with (hearing officer) presiding as hearing officer. This panel, in Texas Workers' Compensation Commission Appeal No. 93040, decided March 1, 1993, reversed and remanded the decision of the hearing officer, requesting further clarification be obtained from (Dr. SG), the Texas Workers' Compensation Commission's (Commission) first designated doctor, for a more definitive impairment rating, utilizing the impairment guidelines mandated by Article 8308-4.24 (hereinafter AMA Guides). A hearing on remand was begun on April 1, 1993, and then recessed until June 2, 1993, in order to obtain the requested information from Dr. SG. The hearing on remand was reconvened on June 2nd (dates will be 1993 unless otherwise noted) when Hearing Officer's Exhibit No. 5, a letter to Dr. SG requesting additional information, and Hearing Officer's Exhibit No. 6, Dr. SG's response dated May 11th, were admitted. The parties and the hearing officer appeared to agree that Dr. SG's response "did not provide the information that was requested." Carrier asserted that since Dr. SG did not assess an impairment rating that (Dr. PO) report should be used. The hearing officer, correctly we believe, again sought a "more definitive clarification from [Dr. SG] in regard to her report" to include a layman's explanation of portions of her letter. The hearing was again recessed, to be reconvened on June 16th. The hearing was reconvened, as scheduled, on June 16th. The issues to be resolved were:

1.Did Claimant have an impairment as a result of the injury he sustained on May the 6th, 1991, with the employer?

2.If so, what is Claimant's correct impairment rating?

The hearing officer determined that claimant sustained an impairment rating of 40% based on the designated doctor's (Dr. SG) report and that report was not contrary to the great weight of the other medical evidence.

Appellant, carrier herein, contends that Dr. SG's report "has failed to comply with the requirements of the [Commission] . . . lacks credibility and is not entitled to presumptive weight . . . [and] . . . should be disregarded in its entirety." Respondent, claimant herein, requests we affirm the decision.

DECISION

The decision of the hearing officer is affirmed.

The basic facts of this case, which were set out in Appeal No. 93040, *supra*, are not at issue, are incorporated by reference herein and will not be repeated at length. Claimant, at the time, was a 52-year-old machinist who developed a severe reaction and contact dermatitis to what was ultimately determined to be cutting oil coolants, including nickel.

Claimant was seen by doctors in a local family practice clinic but eventually sought out (Dr. DW), a dermatologist in Dallas. Dr. DW began tests and subsequently referred claimant to (Dr. RG), a board certified dermatologist, in (city). Dr. RG determined the source of claimant's dermatitis, recommended avoidance of certain chemicals and metals and (using an improper version of the AMA Guides) assessed claimant with a "25-50% impairment of the whole person" categorizing claimant as "class 3." In Dr. RG's report of January 22, 1992, Dr. RG notes why he believes claimant is a class 3. By letter dated May 14, 1992, the Commission designated Dr. SG "to clarify . . . impairment rating." Dr. SG submitted a signed Report of Medical Evaluation (TWCC-69) and attached a signed and dated medical report dated June 4, 1992, where she specified what claimant could and could not do and stated, regard claimant's impairment rating:

> . . . I would think best fit class III finds (sic) 25-50% because signs and symptoms of his disorder are still present and will require continous (sic) treatment and there are limitations of many of the activities of daily living. He certainly can not go back to work as a machinist, as it would be impossible to avoid the contact with nickel and the coolants.

Based on this report carrier writes the Commission, by letter dated July 29, 1992, stating:

> Now what do we do? Please advise as to the next step. Should we designate another doctor?

Apparently, as a result of this letter, Dr. PO was appointed as a second "designated doctor." Dr. PO subsequently submitted a TWCC-69 and narrative dated September 18, 1992, assessing a zero percent impairment rating and stating:

> In reviewing the AMA Guides, Page 218, example 3 is almost a perfect example of this individual. He will have to be retrained for another job, however, if he stays away from the offending chemical, technically, he does not have an impairment.
>
> I would like to be very clear, that while following the AMA Third Edition Guides, this patient would have 0% impairment, however, due to the contact dermatitis, he would be completely disabled from his prior position. . . .

The hearing officer adopted Dr. PO's rating, to the exclusion of Dr. SG, the first designated doctor, because Dr. SG "did not comply with her duties and responsibilities." We reversed and remanded for the development of further evidence (carrier was not precluded from presenting further medical evidence) including a request for Dr. SG to provide a more definitive impairment rating, in accordance with the mandated version of the AMA Guides, particularly Chapter 13. We went on to direct "[o]nly if it is evident that Dr.

SG cannot, or will not, comply with the 1989 Act, should consideration be given to the appointment by the Commission of another designated doctor . . ." which we noted had already been done in this case.

Upon remand, by letter dated April 5th, the hearing officer wrote Dr. SG, providing copies to the parties, requesting a more definitive impairment rating, using the language in our remand opinion. Dr. SG, in response, and according to claimant's testimony, as a result of a 2½ hour examination, submitted a narrative report dated May 11th. Dr. SG noted two new developments since her last examination of claimant, and stated regarding claimant's condition:

> I think that his work would involve the restrictions that he avoid contact with metals and nickel, the cutting oil coolant and probably most strong cleansers. He will probably also have to avoid a warm work place and I do not think protective gloves would be able to be worn for any length of time because they generate heat and sweating underneath and this will probably tend to aggravate his blistering hand eczema. He certainly has no restriction as to standing, walking, hearing, speaking, etc. He probably could do some types of work or lifting with protective cotton gloves, but in a cool environment.
>
> Overall I would put him as a class III impairment according to AMA guidelines, as the hand dermatitis has required continuous treatment, and there are some restrictions of daily living. . . .

Because Dr. SG still did not give a specific percentage of impairment (to include zero, if appropriate) the hearing officer, by letter dated June 7th, went back to Dr. SG requiring a specific rating excluding consideration of ability of claimant to return to his previous employment. Dr. SG, by letter dated June 8th, replied as follows:

> . . . According to the AMA guidelines, the whole body impairment, if that is the only consideration, would be class III at a 40% impairment. . . .

The hearing officer determined in pertinent part:

FINDINGS OF FACT

2.[Dr. SG] medically evaluated and physically examined Claimant for 2½ hours on May 11, 1993.

3.[Dr. SG] was provided with all medical tests, medical records and medical reports previously performed and prepared by Claimant's health care providers regarding Claimant's contact dermatitis.

4.[Dr. SG] evaluated the complete clinical and non-clinical history of Claimant's medical condition.

5.[Dr. SG] analyzed Claimant's medical history with the clinical and laboratory findings.

6.Claimant sustained an anatomic or functional abnormality or loss existing from Claimant's compensable injury of contact dermatitis on (date of injury) and is reasonably presumed permanent to [Dr. SG] after Claimant reached [MMI] on September 18, 1992.

7.[Dr. SG] assigned to Claimant a 40% whole body impairment rating due to Claimant's compensable injury of contact dermatitis utilizing the [AMA Guides] on (date of injury).

8.The report of [Dr. SG] was not contrary to the great weight of the other medical evidence.

CONCLUSIONS OF LAW

1.The report of [Dr. SG] shall have presumptive weight because the great weight of the other medical evidence was not to the contrary.

2.Claimant sustained an impairment as a result of the compensable injury Claimant sustained on (date of injury) while in the course and scope of employment with Employer.

3.Claimant has a 40% whole body impairment rating resulting from the compensable injury Claimant sustained on (date of injury).

As indicated previously, carrier contests Findings of Fact Nos. 6, 7 and 8 and Conclusions of Law Nos. 1, 2 and 3.

At the outset we note that both Drs. SG and RG are board certified dermatologists and that Dr. PO is apparently either a general practitioner or an orthopedic specialist. We are cognizant that the 1989 Act does not require a particular degree of specialty on the part of a particular doctor, even though other specialists may have evaluated the injured worker. *See* Texas Workers' Compensation Commission Appeal No. 93062, decided March 1, 1993, and Texas Workers' Compensation Commission Appeal No. 93105, decided March 26, 1993. We did, however, observe that under a particular set of circumstances it might be appropriate to consider the appointment of a designated doctor

with a particular specialty. *See* Appeal No. 93105, *supra*. This was done in the case of Dr. SG, but upon receiving her admittedly defective initial report, Dr. PO, who was not a dermatologist, was appointed as a second designated doctor.

Carrier argues that Dr. SG's report is not credible because in her report of May 11th, she notes that some of claimant's symptoms were indicative of atopic dermatitis and that she finds it impossible to say how much of his hand dermatitis is due to his atopic dermatitis and how much is due to the contact dermatitis. However, even assuming claimant had an underlying pre-existing proclivity for dermatitis, it is undisputed that claimant had worked for a number of years as a machinist without problems. Apparently, claimant developed contact dermatitis in working with the chemicals and nickel in the employer's shop. As such, the contact dermatitis would be an aggravation of the underlying condition, if there was one. We have on a number of occasions held that, under case law, an injury includes an aggravation of a pre-existing condition, whether or not that condition was job related. Texas Workers' Compensation Commission Appeal No. 91038, decided November 14, 1991; Texas Workers' Compensation Commission Appeal No. 92216, decided July 10, 1992. To defeat a claim for compensation because of a pre-existing condition, the carrier must show that the prior condition was the sole cause of the worker's present incapacity. Texas Employer's Insurance Association v. Page, 553 S.W.2d 98 (Tex. 1977). Texas Workers' Compensation Commission Appeal No. 92047, decided March 25, 1992. Carrier has failed to show whether claimant had a pre-existing medical condition, or that any such condition was the sole cause of claimant's present condition. Dr. SG was not required to attempt to distinguish how much of claimant's impairment was due to an underlying atopic dermatitis in that the work in the machine shop working with chemicals and metal was the precipitating cause of claimant's present impairment. Carrier's point on this allegation is without merit.

Carrier argues that the great weight of the other medical evidence "is totally contrary" to the findings and opinions of Dr. SG. We disagree. As noted previously, Dr. SG's opinion is supported by Dr. RG. Only Dr. PO has a contrary opinion, which does not constitute the great weight of other medical evidence. Carrier argues that claimant's condition is limited to the work place and improves once he is away from the work place and is no longer exposed to certain offending chemicals. We agree that claimant obtains some relief provided he uses creams on his hands twice a day, avoids contact with metals and nickel (*see* Dr. SG's May 11th report) and "most strong cleansers." While the immediate visible symptoms may be alleviated by remaining away from the work place, it is obvious that claimant's underlying condition remains and hinders many of claimant's activities of daily living. Claimant must also avoid warm work places or activities which generate heat and sweating because they "will probably tend to aggravate his blistering hand eczema." We note his reaction in his groin area when claimant attempted to mow his lawn. Carrier cites Dr. DW's report of July 31, 1991, which states "patient's dermatitis is now clear." However, we note that this report was before it was even determined what was causing claimant's

contact dermatitis and that Dr. DW in the same report thought the irritant was soap. We do not find Dr. DW's 1991 report, before he knew the cause of the contact dermatitis, as authoritative or definitive of claimant's present condition. Carrier also cites Dr. RG's findings regarding flare-up but disregards Dr. RG's impairment rating of 25-50%.

Carrier contends that claimant's daily living activities are not limited to justify a 40% impairment rating. One might, as carrier apparently does, believe a 40% impairment rating high. However, carrier offers no viable alternative to the 40% impairment rating. We believe the evidence demonstrates that claimant is limited in his daily living activities to justify some degree of impairment. The posture of the evidence, however, is that the available alternatives are Dr. SG's 40% impairment, supported by Dr. RG's opinion that claimant is "class 3" category with an impairment range of 25-50%, or Dr. PO's zero percent impairment rating. The hearing officer, on remand, gave presumptive weight to Dr. SG's rating and we find this is supported by sufficient evidence. Article 8308-4.26(g) requires that if we were to find the great weight of the other medical evidence to be contrary to the designated doctor's impairment rating "the Commission shall adopt the impairment rating of one of the other doctors." This would require the adoption of Dr. PO's zero rating if Dr. SG's rating were found to be contrary to the great weight of the other medical evidence. We do not believe this to be the case because Dr. SG is supported by Dr. RG and we believe Dr. PO's impairment rating to be clearly erroneous and manifestly unjust. We would note that the carrier could have, on remand, asked that the claimant be evaluated for impairment by a specialist of its own choosing but instead chose to stand with Dr. PO's rating.

Carrier states that Dr. PO was properly designated to assess the claimant's impairment. We note that we have previously discussed this point in our decision on the original hearing, noting that there may be some circumstances where a second designated doctor may be appointed. These might include the death or incapacity of the first designated doctor, or the necessity for obtaining a rating to a different part of the body or different injury outside the expertise of the first designated doctor and other similar situations. This case is an example of problems that arise when a second designated doctor is prematurely appointed merely because the first designated doctor's report is unclear or has some apparent defect which could and should be clarified. We can only repeat the language we used in Texas Workers' Compensation Commission Appeal No. 92595, decided December 21, 1991:

> The use of a designated doctor is clearly intended under the Act to assign an impartial doctor to finally resolve disputes over MMI and impairment rating. As we noted recently in Texas Workers' Compensation Commission Appeal No. 93570, 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 Commission 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.

As we stated, the purpose of the designated doctor procedure is to resolve disputes which may arise between the claimant's treating doctor and/or carrier's medical examination doctor. When multiple designated doctors are prematurely appointed, the entire designated doctor procedure breaks down and there will likely be two or more designated doctors whose opinions each are accorded presumptive weight. See our opinion in Appeal No. 93040. Accordingly, we affirm the decision of the hearing officer adopting the impairment rating assigned by Dr. SG, the first designated doctor, and we void the order for appointment of a second designated doctor as improperly premature.

In summary, the determination of the hearing officer to accept the impairment rating of Dr. SG, the first designated doctor, is not so against the great weight and preponderance of the evidence to warrant a reversal and rendering of another impairment rating.

Thomas A. Knapp
Appeals Judge

CONCUR:

Robert W. Potts
Appeals Judge

CONCURRING OPINION:

I concur in the decision to affirm the hearing officer's decision to give presumptive weight to the opinion of Dr. G, the only validly appointed designated doctor in this case.

This case repeats the all too frequent scenario (in this judge's opinion) of a party

attempting to meet its considerable "great weight" burden of proof by simply serving up medical evidence that already exists in a file and arguing that it is the great weight. I see nothing in the statute or rules which would prohibit either party who asserts that a designated doctor's report is incorrect from seeking additional comment from experts of its own choosing as to the soundness or accuracy of the designated doctor's report.

In my opinion, a party who does not undertake to prepare a direct medical response to a designated doctor's report with which the party disagrees is ill-equipped to complain later when the finder of fact accords statutory presumptive weight to the designated doctor's report. The hearing officer in this case has done exactly what the law directs. The report of the designated doctor is corroborated by another dermatologist's report (and that dermatologist assigned an even higher impairment rating). That report is based on the AMA Guides. The report of Dr. PO is not supported to the extent it opines that there has been no effect on claimant's activities of daily living.

For whatever reason, the skin portions of the AMA Guides can result in higher impairment ratings than portions for spinal impairment. While a lay person may not be able to make sense of this, it is a fact of the publication that the legislature has mandated.

In response to carrier's argument that claimant's condition is not permanent, I would note that whether claimant's rash can be cleared up begs the question of the condition causing the impairment. It is the systemic allergy of claimant to various substances which is the impairment condition. The rash is a symptom. This must also be kept in mind when comparing the skin portions of the AMA Guides to, say, the spinal impairment sections.

In short, there is not a great weight of <u>medical</u> evidence demonstrating that the designated doctor's report should be cast aside.

Susan M. Kelley
Appeals Judge