APPEAL NO. 93676

This appeal arises pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. arts. 401.001 *et seq*. (1989 Act). A contested case hearing was held in (city), Texas, on July 9, 1993, to decide the single issue of what is claimant's correct impairment rating. Hearing officer determined that the designated doctor was properly agreed to by the carrier and the claimant and that the claimant's impairment rating was zero percent, as certified by that doctor. The appellant, hereinafter claimant, contends on appeal that the doctor's impairment rating was not based upon criteria contained in the American Medical Association's Guides to the Evaluation of Permanent Impairment (AMA Guides), and she asks that the Appeals Panel render a decision adopting the impairment rating of claimant's treating doctor or, alternatively, hold that the designated doctor's rating is null and void and designate another doctor. The respondent, hereinafter carrier, essentially argues that the hearing officer's decision is correct and should be affirmed.

DECISION

We affirm the decision and order of the hearing officer.

The claimant, who was employed as a revenue attendance clerk by (employer) at the time of injury, injured her low back on (date of injury) while moving boxes. On August 28, 1992, at carrier's request, she was examined by (Dr. W), who found she had reached maximum medical improvement (MMI) and assigned a five percent impairment rating. Claimant's treating doctor, (Dr. H), found MMI on October 1, 1992, with an 18% impairment rating. The carrier paid claimant impairment income benefits in accordance with the five percent impairment rating. When claimant became aware of this, she contacted her attorney in an attempt to set up a benefit review conference to resolve the issue of impairment. Because she said her attorney failed to do so, she released him and contacted the Texas Workers' Compensation Commission (Commission) to see about resolving the dispute.

Records of the Commission indicate that on January 26th, the claimant spoke with (Ms. P), a disability determination officer. The telephone log indicates that the claimant asked that the Commission appoint a designated doctor to resolve the dispute, but that Ms. P requested that claimant contact the carrier to attempt to reach an agreement and to contact the Commission if no agreement could be reached.

The claimant spoke by telephone with (Ms. EH), carrier's adjuster, who claimant said asked her if she had a doctor in mind. The claimant said she did not, because the only doctor she could think of was her own treating doctor. At that point, she said Ms. EH asked her if she had heard of the (impairment center), and said the carrier had had good results with that center. The claimant said that no specific doctor was mentioned and, that while she agreed to going to the impairment center, she did not agree to a doctor; however, she acknowledged that she knew she would see a doctor at the center. She also acknowledged receipt of a "speed memo" from carrier dated February 4, 1993, and

informing her of an appointment scheduled with (Dr. T) at the impairment center on March 5th. Claimant denied, as Ms. EH said in a written statement, that she "just wanted to hurry up and get this matter resolved and she was willing to agree to a designated doctor."

Ms. P, the disability determination officer, testified that she did not specifically remember the conversation she had with claimant, but identified the telephone log as one that she routinely keeps in the course of her dealings with claimants. She said her standard practice in cases such as this one was to inform claimants that they had 10 days to try to reach an agreement with the carrier on a designated doctor, and that thereafter, if no agreement was reached, the Commission would appoint the doctor. She said she believed, in reviewing the telephone log, that she so informed the claimant in this case.

The claimant testified that Dr. T was called away during her first appointment, but that she stayed at the impairment center where she underwent four hours of tests. She returned later for another appointment where Dr. T examined her. At that time, she said, Dr. T told her that she merited at least a five percent impairment rating.

In a letter dated March 18, 1993, Dr. T stated that the several doctors claimant had seen had not been able to find any cause of left rib pain, nor had any tests demonstrated pathology in her ribs or back. Therefore, he assigned no impairment based on the specific disorder table of the AMA Guides. He also said that, pursuant to testing done at the impairment center, claimant was found to "totally invalidate her range of motion in the lumbar region," and stated that this was consistent with inconsistent responses during Dr. T's physical examination and testing which showed no evidence of any neurological or muscular deficit in the lower extremities.

The hearing officer determined that both Ms. P and carrier's adjuster explained the designated doctor procedure to claimant; that the evidence was persuasive that claimant understood and that her consent was informed; and that claimant properly agreed to be examined by a designated doctor. In her discussion the hearing officer stated that "the law is clear that the impairment rating given by an agreed designated doctor has conclusive weight, and must be adopted by the Commission," citing the 1989 Act, Section 408.125(b) (formerly Article 8308-4.26(g)). We find that the hearing officer has correctly stated the law. Although the claimant does not appeal the hearing officer's findings regarding the issue of agreement or informed consent, she contends the designated doctor improperly invalidated her tests which showed "excessive coefficients of variation" and which were incomplete due to claimant's inability to complete them because of her pain. She also complains of Dr. T's statement that "[t]he stopping of the testing [dynamic progressive lifting] for psycho physical reasons alone is considered by some people to be 100% accurate in determining exaggeration."

While we do not hold that a hearing officer could never examine the content of the report of even an agreed designated doctor, we find no error in the hearing officer's adoption of Dr. T's impairment rating in this case. The AMA Guides themselves contemplate the invalidation of range of motion tests on certain grounds, as a safeguard to ensure the tests' reliability; *see* Texas Workers' Compensation Commission Appeal No. 92335, decided August 28, 1992. *See also* discussion in Texas Workers' Compensation Commission Appeal No. 93296, decided May 28, 1993. Dr. T's report does not reflect that any tests were in any way improperly administered or invalidated in a manner contrary to the AMA Guides.

We accordingly affirm the hearing officer's decision and order.

Lynda H. Nesenholtz
Appeals Judge

CONCUR:

Stark O. Sanders, Jr.
Chief Appeals Judge

Joe Sebesta
Appeals Judge