APPEAL NO. 93766

This appeal arises under the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. §401.001 *et seq.* (1989 Act). On August 4, 1993, a contested case hearing (CCH) was held in (city), Texas, with (hearing officer) presiding as hearing officer. The issues to be determined at the CCH were: "1. What is CLAIMANT's correct impairment rating? 2. What is CLAIMANT's correct average weekly wage?" The hearing officer determined that the appellant's, claimant herein, correct whole body impairment rating is eight percent and that claimant's average weekly wage (AWW) was $280.94 up to 4-13-92 and is $308.22 thereafter. Claimant contends that the hearing officer erred in using (Dr. Si) impairment rating because Dr. Si, a Texas Workers' Compensation Commission (Commission) appointed designated doctor, ". . . never examined me neither verbally or physically and was never even in the room during the exam." (Emphasis in the original). Claimant also disputed the hearing officer's determination of AWW arguing it is not accurate to compute commission wages that fluctuate throughout the year on only thirteen weeks. Claimant requests that we reverse the hearing officer's de termination on the impairment rating assigning 19% as found by the treating doctor, and recalculate the AWW. Respondent, carrier, responds that the decision is supported by the evidence and requests that we affirm the decision.

DECISION

The decision of the hearing officer is affirmed in part and we reverse and remand in part, as set forth below.

The background facts are largely undisputed. Claimant was a 51 year old body repairman who had worked for (employer), employer herein, for 17 weeks before his injury on (date of injury). Claimant testified he slipped and fell on some brake fluid falling and striking his back, elbows and head. He was taken to the hospital emergency room where he was treated and told to see his family doctor, which claimant did the following day. Claimant's family doctor referred claimant to (Dr. O) who became the treating doctor. Dr. O continued to treat claimant for a period of time until carrier requested a second opinion from (Dr. S). Dr. S determined claimant had reached MMI, which was apparently disputed by Dr. O. As a consequence, the Commission appointed (Dr. P) as a Commission selected designated doctor on March 4, 1992, "[t]o determine if (MMI) has been reached, if so, impairment rating." Dr. P in a comprehensive report dated March 24, 1993, determined MMI had not been reached and concluded:

> Impairment ratings are granted once maximum medical improvement has been reached, therefore, I am not granting him an impairment rating at this time. Following an aggressive exercise rehabilitation program and a functional capacity evaluation at the completion of that program, I would be happy to determine his medical impairment.

Claimant apparently returned to Dr. O for treatment and Dr. O then sent claimant to (rehab

facility) for an impairment evaluation on February 20, 1993. A physical therapist at the rehab facility conducted tests, which claimant testified were similar to those conducted by Dr. P, and arrived at a "Whole Person Impairment Rating" of 19%. Apparently utilizing the rehab facility report, Dr. O on an undated (received by the Commission on April 1, 1993) Report of Medical Evaluation (TWCC-69) indicated claimant had not reached MMI and said "not determined" on the estimated date. Nonetheless, Dr. O assigned a 19% whole body impairment rating. Claimant reached statutory MMI (104 weeks in accordance with Section 401.011(30)(B)) on March 28, 1993. Carrier apparently disputed Dr. O's 19% impairment rating and by letter dated April 13, 1993, the Commission appointed Dr. Si as another designated doctor (Dr. P had initially been appointed to determine both MMI and impairment) to determine "Percentage of impairment only."

Dr. Si saw claimant on May 12, 1993. The circumstances surrounding the evaluation are the basis of claimant's appeal. Claimant, both at the CCH and on appeal, stated that Dr. Si never examined him, took a history or touched him in anyway. Dr. Si only introduced claimant (and his friend (Ms. MS)) to Mr. A as his "assistant." Claimant's testimony regarding Dr. Si's failure to examine him is supported by Ms. MS, who testified she had been present in the same room at all of claimant's evaluations. Claimant testified, and is supported by Ms. MS, that when Dr. Si's assistant saw Dr. O's 19% impairment rating he said "19% seems too high - but we'll see." Claimant argued, both at the CCH and on appeal, that this statement indicates the assistant had prejudged the case. Claimant and Ms. MS testified that although Dr. Si said he would come by periodically to check claimant's evaluation, he never did so. Ms. MS testified that the doctor's assistant, on the straight leg raising test, put his hand under claimant's foot and raised it higher than claimant had been able to do on his own. In a TWCC-69 and letter report dated May 13, 1993, Dr. Si stated "the medical records provided have been reviewed," (incorrectly) recited claimant ". . . has been declared at (MMI) by the primary treating physician or an independent medical examiner," and attached tables "used in determining a whole person impairment of 8%."

Claimant also argued at the CCH, and on appeal, that the 17 weeks that he had worked for the employer do not fairly and accurately reflect the "true wages" he would have received over a year. Claimant contends there are two other body repairmen working for the employer and that had he not been injured his annual wages would have been "something between the high man and the low man." Claimant testified that his income was irregular because he received $4.25 an hour plus commissions. The testimony and evidence was that claimant had been paid $50.00 each for Christmas and New Year's Day, was furnished a uniform allowance, and that the employer paid claimant's health insurance until the employer went out of business on April 13, 1992.

On the issue of AWW, the hearing officer determined that claimant had worked for the employer the 13 consecutive weeks prior to his injury, that claimant was not a student or a part-time employee, that claimant was not in seasonal or cyclical employment and was not a seasonal employee. The hearing officer computed claimant's wages based on his earnings during the 13 consecutive weeks prior to the injury, adjusted by certain fringe benefits such as holiday bonuses, uniform allowance and paid health insurance. Claimant

contends his AWW should have been computed using a combination of the other two body repairmen's average annual wage.

On the issue of the AWW, Section 408.041(a) (formerly Article 8308-4.10(a) of the 1989 Act states:

> AVERAGE WEEKLY WAGE (a) Except as otherwise provided by this subtitle, the average weekly wage of an employee who has worked for the employer for at least the 13 consecutive weeks immediately preceding an
>
> injury is computed by dividing the sum of the wages paid in the 13 consecutive weeks immediately preceding the date of the injury by 13.

That provision of the statute has been implemented by Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE §128.3(d) (Rule 128.3(d)) which states:

> (d)If an employee has worked for 13 weeks or more prior to the date of injury, or if the wage at time of injury has not been fixed or cannot be determined, the wages paid to the employee for 13 weeks immediately preceding the injury are added together and divided by 13. The quotient is the average weekly wage for that employee.

Claimant was not a seasonal, student or part-time employee and had been employed for at least 13 consecutive weeks immediately preceding his injury. Under those circumstances the law is quite clear on how AWW is to be calculated. There is no exception for commission workers whose wages fluctuate, or whether the 13 weeks prior to the injury truly reflect the injured employee's wages over the course of a year. While claimant may believe it to "be most fair and just" to raise his wages to match an amount determined by a yearly average wage, the statute is quite clear, that in claimant's case, where he has been employed more than 13 weeks, that the last 13 consecutive weeks wages immediately preceding the injury are divided by 13, to arrive at the AWW. This is what the hearing officer appears to have done, with adjustments for fringe benefits, in arriving at the AWW. We affirm the hearing officer's determinations on this issue.

On the issue of impairment, the hearing officer adopted Dr. Si's report, "as the designated doctor," assigning claimant an 8% whole body impairment rating and concluded that "the 8% impairment rating of the designated doctor (meaning Dr. Si) is entitled to and is given presumptive weight because the great weight of the other medical evidence is not to the contrary." Claimant appeals this issue on the basis that Dr. Si never examined him and cites TWCC Advisory 93-04 that an evaluation or certification must include a physical examination by the doctor. The hearing officer, in his statement of evidence states "[a] physical therapist did the impairment rating tests for the treating doctor and a doctor's assistant did the impairment rating tests for the designated doctor." To equate these tests fails to take into account that presumably the treating doctor, in addition to assigning an impairment rating, was also actually treating the patient whereas Dr. Si clearly states

"[claimant] was seen for the purpose only of providing an impairment rating. I have not provided care for him."

The issue of determining the impairment rating is more complex. First of all we have two designated doctors, Dr. P who was appointed by the Commission in 1992 to determine if MMI has been reached, and if so, impairment; and Dr. Si who was to determine percentage of impairment only. Once Dr. P determined MMI had not been reached, he properly deferred making an impairment rating. When claimant reached MMI (statutorily) instead of sending claimant back to Dr. P, a second designated doctor was appointed by the Commission. However, as the appointment of a second designated doctor was not an appealed issue, we cannot consider it. We do not understand, nor does the record reflect, why Dr. P was not requested to assess an impairment rating once MMI was reached.

Claimant, in his appeal, alleges that Dr. Si failed to examine him, "either verbally or physically and was never even in the room during the exam" contrary to the direction in TWCC Advisory 93-04. We note that claimant's testimony is unrefuted and is in fact both supported by Ms. MS's testimony and inferentially by the hearing officer's comment that "a doctor's assistant did the impairment rating tests for [Dr. Si]." Claimant accurately quotes TWCC Advisory 93-04 which states:

> An evaluation or certification under the "Guides" and the Act must include physical examination and evaluation by the doctor. Although the "Guides" provide that any knowledgeable physician or any other knowledgeable person may compare the clinical findings on a particular patient with the criteria in the "Guides", a doctor must conduct a physical evaluation and is responsible for the integrity of the evaluation process. This means the doctor must evaluate the complete clinical and non-clinical history of the medical condition(s), perform an examination of the injured worker, analyze the medical history with the clinical and laboratory findings, and assess and certify an impairment rating according to the Act, Commission Rules, and the "Guides".

We have addressed this issue in Texas Workers' Compensation Commission Appeal No. 93410, decided July 8, 1993, and Texas Workers' Compensation Commission Appeal No. 93095, decided March 19, 1993. Appeal No. 93095 states and is quoted at length in Appeal No. 93410 as follows:

> It is this latter matter [the claimant's uncontradicted testimony that the designated doctor did not examine him] that concerns us and causes our remand. Clearly, and we have so held, a designated doctor can appropriately consider and rely on tests, exams, data, medical reports, etc. performed by others in arriving at his final evaluation in a given case. *See generally* Texas Workers' Compensation Commission Appeal No. 92275, decided August 11, 1992; Texas Workers' Compensation Commission Appeal No. 92126, decided May 7, 1992. Of course, when he does so, he places his imprimatur on such sources and in considering them either adopts, rejects or distinguishes them

> for his own evaluation purposes. However, as a part of the very important process of certifying MMI and impairment ratings, a designated doctor must himself also examine the injured party and not just review records and totally rely on examinations by others. Articles 8308-4.25 and 4.26 (since codified as Sections 408.122(b) and 408.125(a)) provide in pertinent part that if a dispute exists as to MMI or impairment rating, "the commission shall direct the employee to be examined by a designated doctor." (emphasis added). The commission rules are consistent with the necessity for an examination of the injured employee. Tex. W.C. Comm'n 28, TEX. ADMIN. CODE Sec. 130.3 (TWCC Rule 130.3). We have repeatedly noted the important and unique position occupied by the designated doctor under the 1989 Act. Texas Workers' Compensation Commission Appeal No. 92555, decided December 2, 1992; Texas Workers' Compensation Commission Appeal No. 92412, decided September 28, 1992. We have also stated that where there are problems concerning a report of a designated doctor, the hearing officer can appropriately effectuate corrective action. Texas Workers' Compensation Commission Appeal No. 93045, decided March 3, 1993. We observed "[i]t is essential that the Commission have a designated doctor program that is credible, fair and widely accepted . . ." in Texas Workers' Compensation Commission Appeal No. 93062, decided March 1, 1993. We believe, and conclude the law requires, that a thorough evaluation and appropriate examination is essential to the designated doctor program.

As discussed above, it appears from the evidence, and as recognized by the hearing officer, that claimant may well not have been examined by Dr. Si. Certainly nothing in Dr. Si's cover letter, dated May 13, 1993, refers to an evaluation by Dr. Si. The letter only states the medical records were reviewed but does not state by whom. Dr. Si only states "I have not provided care for him." Consequently, and in accordance with Appeal Nos. 93095 and 93410 we reverse the hearing officer's decision on this point. Parenthetically we note that the rating of the treating doctor, Dr. O, may also be invalid in that he may have assessed an impairment rating before the statutory MMI was reached and he states MMI is "not determined."

We reverse the hearing officer's determination and remand with direction that claimant receive a physical examination and evaluation by a doctor who has been appointed for that purpose.

The hearing officer's decision as to AWW is affirmed. On the issue of impairment a final decision has not been made in this case. However, since reversal and remand necessitate 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 § 410.202. *See* Texas Workers' Compensation Commission Appeal No. 92642, decided January 20, 1993.

_____
Thomas A. Knapp
Appeals Judge

CONCUR:

_____
Joe Sebesta
Appeals Judge

_____
Lynda H. Nesenholtz
Appeals Judge