APPEAL NO. 93827

On May 27, 1993, a contested case hearing was held in (city), Texas, with (hearing officer) presiding as the hearing officer. The hearing was held under the provisions of the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq*. (1989 Act) (formerly V.A.C.S., Article 8308-1.01 *et seq*.). The hearing record was reopened on June 4, 1993, and closed on August 23, 1993. The issue at the hearing was the appellant's (claimant's) impairment rating. The hearing officer determined that the claimant's impairment rating is 20% based on an amended report of (Dr. W), the designated doctor selected by the Texas Workers' Compensation Commission (Commission). The hearing officer decided that the claimant is entitled to impairment income benefits for 60 weeks. The claimant timely filed a request for review and a supplemental request for review. The supplemental request for review was not served on the respondent (employer) so the clerk of the Appeals Panel sent the supplemental request to the employer on October 27, 1993, and the employer indicated in a letter of October 27, 1993, that it did not intend to file a supplemental response. The claimant disputes certain findings of fact, conclusions of law, and the decision of the hearing officer. The claimant requests that we render a decision that his impairment rating is 43% based on the original report of Dr. W. The employer responds that the hearing officer's findings, conclusions, and decision are supported by the evidence and requests that the decision be affirmed.

DECISION

The decision of the hearing officer is affirmed.

The parties stipulated that the claimant was injured in the course and scope of his employment with the employer on (date of injury), and that the claimant gave timely notice of his injury to the employer.

The claimant's treating doctor, (Dr. D), diagnosed a left rotator cuff tear and a left biceps tendon rupture. On (date), Dr. D performed surgery on the claimant's left shoulder. The claimant said that following his surgery he had physical therapy for about 60 days. The claimant said he continued treatment with Dr. D until he was released from Dr. D's care sometime in November 1992.

In a signed but undated Report of Medical Evaluation (TWCC-69), Dr. D certified that the claimant reached maximum medical improvement (MMI) on November 5, 1992, with a 23% whole body impairment rating. Dr. D stated that the 23% whole body impairment rating resulted from a 39% impairment rating of the left upper extremity. Dr. D further stated on the TWCC-69 that the claimant still had some residual weakness and restrictions in his active range of motion (ROM), and had permanent restriction from any type of work which requires overhead use of his (upper) extremity or any type of pushing, pulling, or lifting. The TWCC-69 does not refer to any attachments. However, in a medical report dated November 5, 1992, Dr. D noted that the claimant had returned for a follow-up evaluation on that date and stated "[h]is exam today reveals the following active range of motion: flexion

100, extension 30, abduction 90, external rotation 60, internal rotation touches his thumb to L5." Dr. D also recited the same information he gave in the TWCC-69 concerning MMI and impairment rating.

The claimant testified that the carrier disputed Dr. D's impairment rating and that the parties could not agree on a designated doctor so the Commission selected Dr. W as the designated doctor. Dr. W's appointment as the designated doctor is confirmed in a Commission letter dated December 22, 1992. The claimant testified that he was examined by Dr. W on December 30, 1992. In a signed but undated TWCC-69, Dr. W certified that the claimant reached MMI on December 30, 1992, with a 43% whole body impairment rating. The "Body Part/System" from which the whole body impairment rating was derived was stated to be "71% Upper Extremity." No breakdown of the 71% upper extremity rating was given nor where any objective laboratory or clinical findings of impairment stated on the TWCC-69. Dr. W did not refer to any attachments in the TWCC-69.

Also in evidence was another undated TWCC-69 which bore Dr. W's name, but which was not signed. This TWCC-69 also stated that the claimant reached MMI on December 30, 1992, with a 43% whole body impairment rating; however, it contains a breakdown of how the 71% upper extremity rating was reached with a portion of the 71% upper extremity rating being attributed to a 50% rating for "pain & weakness." The employer's attorney represented that this document was faxed to his office by Dr. W's office two or three days before the hearing. From a discussion between the parties and the hearing officer, it appears that Dr. W's office also faxed a copy of this document to the claimant or the ombudsman assisting the claimant at about the same time the employer's attorney received his copy of the document from Dr. W's office.

At the hearing the employer urged, among other things, that the impairment rating assigned by Dr. W was not in accordance with the Guides to the Evaluation of Permanent Impairment, third edition, second printing, dated February 1989, published by the American Medical Association (the AMA Guides) (Section 408.124 requires the use of the AMA Guides in determining impairment) because the AMA Guides do not allow for an impairment rating for "pain and weakness" for the type of injury the claimant was diagnosed with. In the decision, the hearing officer stated that "subsequent to the date of the contested case hearing, the hearing officer reopened the record on June 4, 1993, to request that [Dr. W] explain how he arrived at his impairment rating of 43 percent since no adequately detailed explanation accompanied his report."

Apparently, the hearing officer asked the benefit review officer (BRO) who conducted the benefit review conference in this case to notify the parties that the case was reopened and to write to Dr. W. In a letter dated June 4, 1993, the BRO wrote a letter to the claimant and the employer's attorney advising them that the hearing officer "has directed that the Report of Medical Evaluation of [Dr. W], the designated doctor, be returned to [Dr. W] to further explain his impairment rating with regard to pain and weakness." The BRO indicated that a copy of the letter sent to Dr. W was attached to the letter of June 4th. The BRO further stated that "the hearing which was originally closed on May 27, 1993, is being

reopened and held open until [Dr. W's] explanation is provided." In the letter to Dr. W the BRO wrote:

> In reviewing the ratings in conjunction with the criteria in Chapter 3 of the [AMA Guides], we are not able to determine how you arrived at the 50% upper extremity impairment you have assigned for pain and weakness. As you are no doubt aware, pain and weakness as discussed in Chapter 3 of the Guides refers only to pain and weakness resulting from a nervous system disorder. In [claimant's] case, there is no evidence of a central nervous system injury.
>
> Please review your determination and provide your rationale for the 50% upper extremity rating you assigned for pain and weakness so we can resolve [claimant's] impairment rating dispute.
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> * * * * *
>
> Please explain if the pain and weakness is to be included in the whole person impairment rating, and if so, the provision in the Guides that defines how the rating is determined.

In a letter to the Commission dated July 7, 1993, Dr. W advised that he had referred the claimant to the (Center) for a "disability/impairment rating." Dr. W stated that "[u]pon receipt of [Center's] report pertaining to same, I will forward a TWCC 69 to you." Dr. W did not mention the impairment he assigned for pain and weakness.

In a signed TWCC-69 dated August 4, 1993, Dr. W certified that the claimant reached MMI on December 30, 1992, with a 20% whole body impairment rating. In this report, Dr. W wrote that the claimant had a 33% impairment of the upper extremity which translated to a 20% whole body impairment rating. Dr. W did not mention pain and weakness in this report. However, he references an attached report of four pages from the Center dated July 21, 1993, which indicated that an "Impairment Rating Evaluation" was performed on the claimant on July 15, 1993, and which concluded that the claimant had a 33% impairment of the upper extremity which resulted in a 20% whole body impairment rating. The Center's report found impairment for limited ROM of the upper extremity and for motor dysfunction, however, it does not mention impairment for pain and weakness. Dr. W signed the last page of the Center's report and indicated that he had "reviewed and approved" the report.

In a letter dated August 5, 1993, the hearing officer informed the parties that Dr. W had "adjusted" his assigned impairment rating of the claimant to 20% based on the Center's evaluation and his medical examination of the claimant. The hearing officer said that he was providing Dr. W's report to the parties and that they had until August 20, 1993, to provide him with their comments. The hearing officer further stated that he would "attach" documents generated in the case since May 27, 1993 (the date of the hearing) as hearing officer exhibits.

By letter dated August 12, 1993, the employer advised the hearing officer that it was willing to abide by the adjusted impairment rating of Dr. W. The hearing officer noted that the claimant had not "responded" when the record was closed on August 23, 1993.

In his appeal, the claimant agrees with the hearing officer's finding that Dr. D's certification of MMI on November 5, 1992, was not disputed, and the claimant raises no issue with that portion of the hearing officer's decision which determines that the claimant reached MMI on November 5, 1992. Consequently, for purposes of this decision we accept without discussion the hearing officer's determination of an MMI date of November 5, 1992.

With regard to the disputed issue of impairment rating, the claimant disagrees with the following findings of fact and conclusions of law:

FINDINGS OF FACT

No. 10.[Dr. W's] amended impairment rating of 20 percent is entitled to be given presumptive weight.

No. 12.The only medical evidence contrary to the designated doctor's amended impairment rating of 20 percent is Dr. D's unexplained impairment rating of 23 percent.

CONCLUSIONS OF LAW

No. 3.[Dr. W's] assigned impairment rating of 20 percent is not against the great weight of the other medical evidence.

No. 4.Claimant's impairment rating is 20 percent.

The claimant contends that it was unfair for the hearing officer to seek clarification from Dr. W concerning his 43% impairment rating; that the Center's examination was inadequate; that he was ordered by the Commission to attend the examination by Dr. W at the request of the employer; that the hearing officer erred in admitting into evidence excerpts from the AMA Guides; that Dr. W's 20% impairment rating should not be given any more weight than his 43% rating; that Dr. D did explain his assigned impairment rating of 23%; that the employer did not meet its burden of proof regarding the report of the designated doctor; and that the 1989 Act is unconstitutional.

We have held that a hearing officer should seek to resolve deficiencies in a designated doctor's report when it is feasible and can be accomplished without undue delay. Texas Workers' Compensation Commission Appeal No. 92595, decided December 21, 1992. For example, in Texas Workers' Compensation Commission Appeal No. 92617, decided January 14, 1993, we affirmed the action of a hearing officer in reopening the record on his own motion to seek another report from the designated doctor. Our decision was based on Article 8308-6.34(b) (now Sec. 410.163(b)) which provides in part that a hearing

officer shall ensure the full development of facts required for the determinations to be made, and on the fact that the hearing officer "sought evidence relative to issues that were before the hearing he was conducting." *See* also Texas Workers' Compensation Commission Appeal No. 93837, decided October 29, 1993, where we approved the hearing officer's action in reopening the record to seek clarification concerning the report of the designated doctor. We have also held that a designated doctor may amend a TWCC-69 for proper reason. Texas Workers' Compensation Commission Appeal No. 93207, decided May 3, 1993; Texas Workers' Compensation Commission Appeal No.92503, decided October 29, 1992; Texas Workers' Compensation Commission Appeal No. 92441, decided October 8, 1992.

Chapter 3, Section 3.1i of the AMA Guides relates to impairment of the upper extremity due to peripheral nervous system disorders. This section states in part that:

> In order to evaluate impairment resulting from the effects of peripheral spinal nerve lesions, it is necessary to determine the extent of loss of function due to (a) sensory deficit, pain or discomfort; and (b) loss of muscle strength and altered fine motor control of muscles of the part.

Neither Dr. D nor Dr. W referred to any peripheral nervous system disorder in the medical reports, including the TWCC-69's, that were introduced into evidence by the parties at the hearing. Yet, Dr. W assigned an impairment for pain and weakness, which, according to Section 3.1i of the AMA Guides would appear to be related to a peripheral nervous system disorder. The employer challenged Dr. W's impairment rating on the grounds that no basis was shown for the impairment assigned for pain and weakness. Considering the impairment guidelines relating to pain and loss of muscle strength in the upper extremity, the lack of reference to a peripheral nervous system disorder in the medical reports, and the employer's challenge to Dr. W's impairment rating, we believe that the hearing officer was on firm ground in reopening the hearing, with notice to all parties, for the purpose of resolving an apparent deficiency in the report of the designated doctor. We also conclude that Dr. W had a proper reason for amending his report after having been referred to the appropriate guidelines in the AMA Guides by the Commission.

As to the claimant's assertion that he was ordered to see Dr. W by the Commission at the employer's request, we note that the parties represented at the hearing that the employer disputed the impairment rating assigned by Dr. D and that in response to the dispute, the Commission selected Dr. W to be the designated doctor after the parties failed to agree on a designated doctor. The evidence shows that the Commission did select Dr. W as the designated doctor, and there is no evidence to indicate that the employer was in any way involved with the selection of the designated doctor. As we pointed out in Appeal No. 92595, *supra*., "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 (now Section 408.004), serves at the request of the Commission." Thus, while the employer's dispute of Dr. D's impairment rating prompted the appointed of Dr. W as the

designated doctor, there is no merit to the claimant's contention that the Commission ordered him to see Dr. W at the request of the employer.

Concerning the claimant's contention that the hearing officer erred in admitting into evidence certain excerpts from the AMA Guides, we note that at the hearing the employer sought to introduce into evidence several excerpts from the revised edition of the AMA Guides. The hearing officer advised the employer that the 1989 Act did not authorize the use of the revised AMA Guides and recessed the hearing in order to allow the employer to compare its exhibits with the AMA Guides. After the recess the employer introduced into evidence without objection some excerpts from the AMA Guides and other excerpts from the revised AMA Guides which the employer represented were the same as corresponding excerpts from the AMA Guides. Ordinarily, evidence which is admitted without objection can not be complained of on appeal. Dicker v. Security Insurance Company, 474 S.W.2d 334 (Tex. Civ. App. - Waco 1971, writ ref'd n.r.e.). Thus, we find no merit in claimant's contention regarding admission of the employer's exhibits which is raised for the first time on appeal. However, we caution that the 1989 Act does require the use of the AMA Guides in evaluating impairment. In this case, error, if any, in admitting excerpts from the revised AMA Guides has not been shown to be harmful inasmuch as the reason the hearing officer reopened the record for clarification from the designated doctor is firmly footed in the impairment guidelines set forth in the correct version of the AMA Guides.

As to the weight to be given the various medical reports in evidence, Section 408.125(e) provides that the report of a designated doctor chosen by the Commission regarding an impairment rating has presumptive weight and the Commission shall base the impairment rating on that report unless the great weight of the other medical evidence is to the contrary. We have previously held that it requires more than a preponderance of the medical evidence to overcome the report of the designated doctor; the medical evidence must be determined to be the "great weight" of the medical evidence contrary to the report of the designated doctor. Texas Workers' Compensation Commission Appeal No. 92412, decided September 28, 1992. We have also held that a hearing officer can read an initial and an amending report of a designated doctor together to determine impairment rating. Texas Workers' Compensation Commission Appeal No. 92469, decided October 15, 1992. Furthermore, a correction or amendment of the first report generated by a designated doctor, especially when the first document was based upon incomplete or erroneous facts, which is done fairly soon after the first report, may be given presumptive weight. Texas Workers' Compensation Commission Appeal No. 92639, decided January 14, 1993; Texas Workers' Compensation Commission Appeal No. 92441, decided October 8, 1992.

In the instant case, in evaluating the claimant and assigning an impairment rating of 20 percent in his amended report, the designated doctor had the results of his own physical examination of the claimant of December 1992 as well as the Center's evaluation which the designated doctor specifically approved. While we have held that a designated doctor must examine the injured worker, which according to the claimant's testimony was done in December 1992, we have also held that a designated doctor may appropriately consider and rely on tests and examinations by others in arriving at his final evaluation in a given

case. Texas Workers' Compensation Commission Appeal No. 93095, decided March 19, 1993. Having reviewed the record, we conclude that the hearing officer could appropriately assign presumptive weight to the amended report of Dr. W which assigned a 20 percent impairment rating and find that the great weight of the medical evidence is not contrary to that report. We note that the 20 percent impairment rating is much more in line with the 23 percent rating given by the claimant's treating doctor than was the 43 percent impairment rating originally assigned by Dr. W. While we agree that the hearing officer in stating that Dr. D's report was unexplained overstated the situation, the weight to be given to that report was for the hearing officer's determination. Section 410.165.

Since it has been held that administrative agencies have no power to determine the constitutionality of statutes, we decline to address that issue on appeal. Texas State Board of Pharmacy v. Walgreen Texas Company., 520 S.W.2d 845 (Tex. Civ. App. - Austin 1975, writ ref'd n.r.e.).

At the hearing the parties stipulated that "employer was self-insured under the provisions of the Texas Workers' Compensation Act for coverage of its employees on (date of injury)." Despite this stipulation, in his appeal the claimant states "upon reflection, I am not sure of self-insurance, this date," and that "I am not totally sure that the employer was self-insured on (date of injury)." Inasmuch as no certificate of authority to self-insure could be issued prior to January 1, 1993, (*See* Article 8308-3.55(a), now Section 407.041) the employer could not have been a certified self-insurer on (date of injury). However, under Section 504.011 a political subdivision of this state, including a "special district" may be self-insured. The employer in this case is a hospital and may well be part of a "special district" type of political subdivision, although the record is silent as to the status of self-insurance other than the aforementioned stipulation. Considering that the parties stipulated that the employer was self-insured on the date of injury, and there being no evidence to the contrary, the claimant's uncertainty as to the matter of self-insurance which is raised for the first time on appeal provides no basis for disturbing the hearing officer's decision.

The decision of the hearing officer is affirmed.

Robert W. Potts
Appeals Judge

CONCUR:

Stark O. Sanders, Jr.
Chief Appeals Judge

Joe Sebesta
Appeals Judge