APPEAL NO. 93875

On July 15, 1993, a contested case hearing (CCH) 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. Sec. 401.001 *et seq*. (1989 Act) (formerly V.A.C.S. Article 8308-1.01 *et seq*.). The issue at the hearing was the appellant's (claimant's) impairment rating. Based on the report of (Dr. K), the designated doctor agreed to by the parties, the hearing officer determined that the claimant has a zero percent impairment rating. The claimant disputes the hearing officer's decision and requests that we reverse the decision and remand for the appointment of another designated doctor. The respondent (carrier) responds that the evidence supports the hearing officer's decision and requests that it be affirmed.

DECISION

The decision of the hearing officer is reversed and remanded for further consideration and development of the evidence.

It is undisputed that the claimant injured his back in the course and scope of his employment with his employer, (employer), on (date of injury).

The claimant was initially treated by Dr. C, a chiropractor, who referred the claimant to (Dr. M), a neurologist, and then the claimant selected (Dr. T), an orthopedic surgeon, as his treating doctor.

An MRI scan of the claimant's lumbar spine done on July 29, 1991, revealed "central disc herniation at L4-L5 with associated flattening and indentation onto the adjacent dural sac and a central disc herniation at L5-S1 with ample space between the herniated disc and the anterior aspect of the dural sac with abundant amount of epidural fat at this level. Desiccation, dehydration and degeneration of the nucleus pulposus at L5-S1." An EMG examination of the claimant's lower extremities performed on October 3, 1991, revealed no positive waves nor fibrillations. Nerve conduction studies also performed on October 3, 1991, were reported to be within normal limits.

In a report dated October 23, 1991, Dr. T said he reviewed the MRI of July 29th and that it showed a central disc herniation at the L4-5 level with indentation of the adjacent dural sac and a disc herniation at the L5-S1 level. Dr. T further reported that lumbar spine x-rays showed no fractures or congenital anomalies. In an undated report to the Texas Workers' Compensation Commission (Commission) Dr. T recommended that the claimant undergo a "laser disc decompression." The carrier requested a second opinion on spinal surgery from (Dr. C). In a report dated September 1, 1992, Dr. C stated that the claimant has an L4 radiculopathy and that he is a candidate for a discography and surgery.

In a report dated October 14, 1992, Dr. T reported that on that date he had performed surgery on the claimant consisting of "diskography of L4-5, laser disc decompression of L4-5 and attempted diskography at L5-S1." Dr. T stated that the diskography at L5-S1 was

aborted because of anatomical difficulties. The claimant said he was in the hospital for the operation for one day. In a Report of Medical Evaluation (TWCC-69) dated December 30, 1992, Dr. T certified that the claimant reached maximum medical improvement (MMI) on November 30, 1992, with a five percent whole body impairment rating. Dr. T described objective laboratory and clinical findings as "MRI reveals an HNP of L4-5 more to the left." In numerous medical reports from May 1992 to July 1993, Dr. T reported that the claimant was experiencing low back pain.

In a letter to the carrier dated January 25, 1993, the claimant's attorney's office advised the carrier that "we are not in agreement with the assessment made by [Dr. T]" and recommended Dr. K as the designated doctor. In a letter to the claimant's attorney dated February 2, 1993, the carrier agreed to Dr. K "as a designated physician to determine if rating is proper and pursuant to the AMA guidelines." It was undisputed at the hearing that Dr. K is the designated doctor selected by the mutual agreement of the parties.

The claimant testified that he was examined by Dr. K, but indicated that Dr. K did not use an "apparatus" to measure range of motion. In a TWCC-69 dated April 7, 1993, Dr. K certified that the claimant reached MMI on April 7, 1993, with a zero percent impairment rating. In a narrative report attached to the TWCC-69, Dr. K reported that straight-leg testing was negative and that the claimant had no sensory deficit on the day of examination and did not have any numbness. Dr. K further stated:

> Impression: Postop disc surgery with excellent results. I do not find and (sic) physical impairment in this patient and obviously, he needs to have a work hardening program but I think he can be back to easy work now for another 3-4 months and then full hard work by the end of the summer. On review of the MRI report, a ruptured disc was found at the L4-5 level which is consistent with my findings in this patient with decreased joint space at L4-5 and surgery has been very successfully done by [Dr. T]. As I have said, I do not feel that there is any disability in this patient at this time. It was [Dr. T's] report in October of 1991 that the patient would have 3-4 months of disability and I would agree. I am extending it slightly until he has a work hardening program because he is overweight and prone to injury. I do feel that he will be able to go back to his presurgical type of heavy work in 3-4 months as long as he uses the recommended work hardening program. This is definitely recommended and is the responsibility of the treating physician. There are no orders written in this regard. The patient has reached maximum medical improvement in my opinion although he still is weak and has no impairment of the body as a whole.

On April 13, 1993, the claimant requested a benefit review conference (BRC) stating "claimant is not in agreement with the assessment made by the designated doctor." A BRC was held on May 19, 1993, and according to the disputed issue form, the issue raised but not resolved after the BRC was "what is the correct impairment rating?" The benefit review officer recommended that the Commission adopt the impairment rating of zero percent

assigned by the agreed designated doctor.

In a letter to the carrier dated July 14, 1993, Dr. T stated:

> The patient [claimant] had a herniated nucleus pulposus at the level of L4-5 which was contained under discography. The patient underwent left side laser disc decompression on 10/14/92. The patient still has complaints. We are in disagreement with the 0% impairment reading that [Dr. K] has given the patient.

At the CCH the parties agreed that the disputed issue was "what is the claimant's correct impairment rating?" The claimant's position was that Dr. K did not use the Guides to the Evaluation of Permanent Impairment, third edition, second printing, dated February 1989, published by the American Medical Association (AMA Guides) in determining impairment as mandated by Section 408.124, and that Dr. K's zero percent impairment rating does not comply with the AMA Guides. The claimant urged that use of Table 49 (impairments due to specific disorders of the spine) of the AMA Guides would result in at least a nine percent impairment rating since he had a surgically treated disc and an unoperated herniated disc. The carrier urged that since Dr. K is an agreed designated doctor the Commission has to adopt his rating, and that no medical reports showed that Dr. K did anything wrong. At the close of the CCH on July 15, 1993, the hearing officer advised the parties that after he had an opportunity to review the evidence he might have to reopen the record to seek clarification from Dr. K concerning his report.

In a letter dated July 26, 1993, the Commission advised the parties that the hearing officer, very appropriately, had reopened the hearing record to seek additional information from the designated doctor. In a letter dated July 26, 1993, a disability determination officer advised Dr. K that the hearing officer was requesting some clarification regarding his TWCC-69 and narrative report. The letter (copies of which were sent to the parties) states in part:

> In your report you point out that [claimant] underwent successful surgery at L4-5, but still needs further work hardening. However, you did not discuss that he still has a herniated disc at L5-S1 which has not been surgically repaired.
>
> In view of the above, will you please provide us with your rationale for finding no impairment in view of Table 49, Part II, at page 73 of the AMA Guides to the Evaluation of Permanent Impairment, Third Edition, and also describe for us the various measurements you performed in accordance with the Guides in arriving at your impairment rating.
>
> As you are probably aware, your medical opinion as a designated doctor is given favored status by the Texas Workers' Compensation Act. Because it is, it is important that we fully understand the basis for your medical conclusions under the AMA Guides. This inquiry is not to imply that you must have (sic) find some impairment. It is simply to help us understand why, if Claimant has

a surgically repaired disc at L4-5 and an unrepaired

herniated disc at L5-S1, those conditions did not warrant a finding of some degree of impairment under the Guides.

In reply to the Commission letter of July 26th, Dr. K wrote:

8-10-93 Addendum: In response to the inquiry by the Texas Workers' Compensation Commission: This patient's history showed a ruptured disc found on MRI, completely successful surgery carried out, and no disability. The MRI results to which I referred to in its (sic) historical presence was prior to the surgery, not since. There is 0 impairment.

By letter dated August 19, 1993, the hearing officer provided Dr. K's August 10, 1993, response to the parties and advised that he would hold the record open until August 31, 1993, for comments. The hearing officer notes in his decision that no comments were received from the parties and the record was closed on September 1, 1993.

On appeal the claimant disputes the following findings of fact and conclusion of law:

FINDINGS OF FACT

No. 9. Claimant was examined by Dr. K on April 7, 1993, and was found to have an impairment rating of 0%.

No. 10. The impairment rating made by an agreed designated doctor under TWCC Rule 130.6 is conclusive and binding on the Commission.

No. 11. Claimant reached maximum medical improvement on November 30, 1992, with an impairment rating of 0%.

CONCLUSION OF LAW

No. 3. Claimant's impairment rating due to his injury of (date of injury), is 0%.

We first point out that according to the record of this case, the claimant never indicated disagreement with his treating doctor's date of MMI of November 30, 1992; rather, at the BRC and CCH the claimant disputed only the impairment rating assigned by Dr. K. Nothing was mentioned at the CCH in regard to an MMI date and the claimant's arguments on appeal all address only the issue of impairment rating although he references Finding of Fact No. 11 which finds MMI on November 30, 1992. We conclude that the hearing officer had sufficient basis to determine an MMI date of November 30, 1992, considering that there was no real disagreement expressed by the parties in regard to the date of MMI and we note that no arguments in regard to MMI have been raised on this appeal.

In essence, the claimant urges that there is conclusive, objective clinical findings to show that he had two herniated discs and that surgery was performed at one level. The claimant contends that considering his objective medical findings, the AMA Guides indicate an impairment other than zero percent, and that the 1989 Act requires the use of the AMA Guides in determining impairment. Thus, Dr. K could not have used the AMA Guides in determining impairment because had he done so he would have had to assign an impairment rating greater than zero percent. The claimant further contends that Dr. K did not clarify his report as requested by the Commission.

Section 408.125(d) (formerly Article 8308-4.26(g)) provides that "If the designated doctor is chosen by the parties, the commission shall adopt the impairment rating made by the designated doctor." In regard to the adoption of the report of a designated doctor, we note that Texas Workers' Compensation Commission Appeal No. 93001, decided February 19, 1993, involved the report of an agreed designated doctor with respect to impairment rating. The hearing officer in that case ordered the claimant to attend an appointment with the agreed designated doctor, but failed to give the parties an opportunity to respond to the designated doctor's report before issuing his decision. On appeal, the carrier urged that the 15% rating assigned by the carrier was miscalculated and should have been 14% and further urged that the designated doctor's report did not specify what ratings were given for various body parts. We remanded the case for the hearing officer to determine what, if any, effect the absence of body part ratings in the designated doctor's report would have on his determination and to allow him to admit evidence from the designated doctor relevant to what whole body impairment rating should be adopted. In doing so we stated "[t]he above decisions [Texas Workers' Compensation Commission Appeal No. 92608, decided December 8, 1992, and Texas Workers' Compensation Commission Appeal No. 92469, decided October 15, 1992] do not indicate that the Commission must accept (adopt) the whole body impairment rating of an agreed designated doctor irrespective of how he arrived at it or irrespective of how thorough his report was." Similarly, in Texas Workers' Compensation Commission Appeal No. 93676, decided September 17, 1993, while we affirmed the hearing officer's decision adopting the zero percent impairment rating of the agreed designated doctor, we stated "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 [agreed designated doctor's] impairment rating in this case." *See also* Texas Workers' Compensation Commission Appeal No. 93130, decided April 7, 1993, wherein we stated "[w]hile this panel has consistently accorded the opinion of a designated doctor great deference . . . yet we have said that prior decisions of this panel have not indicated the Commission must adopt the whole body impairment rating of an agreed designated doctor irrespective of how he arrived at it or irrespective of how thorough his report was."

In the instant case, the medical evidence demonstrates that the claimant had a herniated disc at L4-5 which was operated on and has a herniated disc at L5-S1 which was not operated on. Table 49, at page 73, of the AMA Guides indicates that a surgically treated lumbar disc lesion with no residuals merits an eight percent impairment rating and that a surgically treated lumbar disc lesion with residual symptoms merits a ten percent impairment

rating. The same table indicates that ratings of zero, five, or seven percent may be given for an unoperated intervertebral disc or other soft tissue lesion of the lumbar spine depending generally on the severity of the unoperated lesion. In addition, impairment may also be found for range of motion abnormalities. Dr. K was specifically asked to explain his rationale for finding no impairment in view of Table 49. We observe here, as we did in Texas Workers' Compensation Commission Appeal No. 93837, decided October 29, 1993, that appropriate inquiries should have been undertaken at an earlier stage of the dispute resolution process. Dr. K responded to the effect that the claimant had successful surgery on a ruptured disc. That explanation is simply not adequate in view of the objective clinical findings and the requirements of the AMA Guides. Section 408.124 mandates that an impairment rating be determined using the AMA Guides, the claimant disputed Dr. K's impairment rating on the grounds that the AMA Guides were not used, Dr. K was asked to clarify his zero percent rating in view of Table 49, and his clarification falls far short of what should be required under the particular circumstances of this case, that is, an explanation which references specific provisions of the AMA Guides which support his assigned impairment rating. Since we are unable to reconcile the provisions of the AMA Guides with the report of the designated doctor, an explanation from the designated doctor should be forthcoming. We observe that in Texas Workers' Compensation Commission Appeal No. 93045, decided March 3, 1993, we stated that the need or desirability for the Commission to select a second designated doctor should be very limited and restricted to a situation such as, for example, where an initially appointed doctor cannot or refuses to comply with the requirements of the 1989 Act. Of course, under Section 408.125(a) and (b) the Commission selects the designated doctor in the event the parties are unable to agree on a designated doctor. Consequently, notwithstanding that Dr. K is an agreed designated doctor, we reverse the decision of the hearing officer and remand the case for further consideration and development of evidence, including further clarification from Dr. K in regard to his assigned impairment rating of zero percent.

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.

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Robert W. Potts
Appeals Judge

CONCUR:

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Stark O. Sanders, Jr.
Chief Appeals Judge

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Gary L. Kilgore
Appeals Judge