APPEAL NO. 94055

This appeal arises under the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq*. (1989 Act). A contested case hearing was held on December 21, 1993, in (city), Texas, (hearing officer) presiding. In response to the issues--claimant's date of maximum medical improvement (MMI) and correct impairment rating--the hearing officer determined that the designated doctor appointed by the Texas Workers' Compensation Commission (Commission) declined to certify a date of MMI and used the incorrect version of the American Medical Association's Guides to the Evaluation of Permanent Impairment (AMA Guides). She accordingly determined that the certification of claimant's second treating doctor constituted the great weight of contrary medical evidence and is sufficient to overcome the certification of the designated doctor. The claimant appeals the hearing officer's decision that he reached MMI on May 10, 1993, with an eight percent impairment rating, and contends that the designated doctor's impairment rating of 20% is correct. In his appeal he alleges error in certain of the other doctors' reports; he also attaches a Report of Medical Evaluation (Form TWCC-69) from the designated doctor which contains an MMI date. This report was not made part of the record at the hearing. The carrier in response reiterates its arguments as to why the designated doctor's report is not entitled to presumptive weight, and contends that the hearing officer's decision accepting the MMI date and impairment rating of claimant's treating doctor is supported by the evidence.

DECISION

We affirm the hearing officer's decision and order.

The claimant, an oil field worker, suffered a fracture dislocation of his left ankle on (date of injury). He underwent surgery on (date), performed by (Dr. S), his then treating doctor. The claimant also underwent physical therapy. Dr. S found the claimant reached MMI on October 3, 1992, with a zero percent impairment rating.

Claimant saw (Dr. R) on February 5, 1993, for an independent medical examination. In his report, Dr. R notes claimant's complaints of foot dragging and the inability to keep his balance, which he said prevented him from returning to work. Dr. R certified MMI on February 5th, with a six percent impairment rating.

Claimant began treating with (Dr. E) on June 29, 1992; in the fall of that year Dr. E removed hardware from claimant's ankle. In a letter dated February 18, 1993, Dr. E wrote he had seen the claimant who complained that he continued to stumble and fall with his left leg giving out, but only little pain in the ankle. Dr. E wrote that claimant's examination showed normal strength with "confrontational manual muscle testing." However, he said that "with his gait, he tends to drag his foot as well as roll over. Sensation appears intact . . . . His EMG studies demonstrate evidence of some peroneal nerve dysfunction although nerve conduction velocity studies are normal."

Dr. E concluded that the claimant "demonstrates puzzling picture of peroneal nerve dysfunction now nearly 4 months post hardware removal. The differential includes

peripheral neuropathy, possibly from alcohol abuse, malingering or underlying residuals from his prior ankle and tendon injury 20 years ago. I cannot see how these symptoms could be associated with his injury of (date of injury)."

The claimant testified about, and his medical records make reference to, an incident when he was 13 or 14 years old in which he was struck in the left ankle with a lawnmower blade; that injury also required surgery, although claimant testified that he had never experienced the stumbling and foot dropping until after his (date of injury) compensable injury. He said he has been required to wear a brace to allow him to walk normally without falling.

Dr. E certified MMI on May 10, 1993, with an eight percent whole body impairment, based upon claimant's ankle plus weakness of his peroneal and posterior tibial function.

On June 8, 1993, claimant was seen by (Dr. G), a designated doctor appointed by the Commission. Dr. G's report mentioned that claimant walked with a mild drop foot deformity. He also wrote as follows:

> It is my impression this patient has apparent nerve injury. I have reviewed the patient's chart and apparently he has had normal EMGs. It would not appear that he would have a drop foot from the bimalleolar fracture of his ankle. This would appear to be old but I am somewhat puzzled. Nevertheless the patient does have decreased motion, as well as narrowing of the ankle mortise and for some reason, a drop foot deformity. I believe he has a 10 percent impairment to the lower extremity due to the loss of motion in his ankle which is equivolent (sic) to a 4 percent impairment to the body as a whole. Because of the narrowing of the joint I believe that he has a 20 percent impairment to the lower extremity, which is equivolent (sic) to an 8 percent impairment to the body as a whole. Additionally, the patient has an apparent loss of peroneal function with a drop foot deformity. I do not know whether this is real and/or pre-existed this injury. If this is related to the fractured ankle which I cannot be certain that it is, he would have an additional 20 percent impairment to the lower extremity.

While Dr. G's Report of Medical Evaluation gave claimant a 20% impairment rating and circled "yes" to the question, "Has employee reached maximum medical improvement?" it did not give a date of MMI.

On June 28, 1993, the benefit review officer wrote Dr. G asking him to clear up questions which had been raised at the benefit review conference, namely which table in the AMA Guides was used to determine impairment and if the impairment ratings listed for the lower extremity were actually to the foot, how would this affect the total whole body impairment rating. After initially receiving no reply, the benefit review officer on September 8th again wrote Dr. G stating that "there is a concern that the impairment rating that you have rendered does not apply to [claimant's] ankle. I request that you clarify if your rating

does indeed apply to [claimant's] left ankle. Please also inform me which table you used in arriving at your rating and if the combined values chart needs to be consulted in arriving at the final whole body impairment rating." The benefit review officer enclosed with his letter copies of the AMA Guides relative to the lower extremities and the combined values chart.

On September 29th, Dr. G replied as follows:

> . . . the impairment ratings relative to [claimant] are related to the lower extremity. I have reviewed the Guide to Evaluation of Permanent Impairment, (3rd Edition), published by the American Medical Association, and did not find any impairments relating to the ankle. There are impairments relating to the lower extremity or the foot, but not to the ankle. These impairments are determined from the Tables 37 and 38. Additionally, I felt the patient had a 20 percent impairment to the lower extremity as there is no impairment rating for disorders of the ankle but Table 40 relates impairment ratings on the lower extremity due to injury to the knee, and the arthritis second in common of the knee accounts for a 20 percent impairment to the lower extremity (Table 20). Also, the patient has an apparent neurologic injury, (Table 51), with the drop foot deformity.

The carrier introduced into evidence a December 6, 1993 letter from (Mr. A) with the corporate office of Impairment Rating Facts, which reviewed Dr. G's report and raised several areas of concern regarding Dr. G's methodology. However, neither Mr. A's background, training, nor area of expertise was given, and the hearing officer stated that this report was not considered relevant since there was no indication that it constituted medical evidence.

The carrier argued at the hearing and on appeal, and the hearing officer stated in her discussion of the evidence, that Dr. G's references to the portions of the AMA Guides that he used in assessing claimant's impairment rating belie his assertion that the correct version of the Guides was used. The 1989 Act mandates that only the second printing, dated February 1989, of the Third Edition, be used in determining impairment. Section 408.124(b); Texas Workers' Compensation Commission Appeal No. 92335, decided August 28, 1992. Dr. G's letter of September 29, 1993, references impairments relating to the lower extremity or the foot and to the knee; he also references an apparent neurologic injury related to the drop foot deformity. However, the tables cited by the designated doctor relate to impairment due to amputation, abnormal motion, and ankylosis of the hip joint (Tables 37, 38, and 40); impairment due to amputation, abnormal motion and ankylosis of the interphalangeal joint of the great toe (Table 20); and impairment due to abnormal motion and ankylosis of the cervical spine region (Table 51).

This panel has held that the designated doctor's report, to be accorded presumptive weight, must meet the requirements of the 1989 Act. Texas Workers' Compensation Commission Appeal No. 92027, decided March 27, 1992. We have also held that where the designated doctor fails to use the correct version of the AMA Guides in determining

impairment, his or her impairment rating is vulnerable to challenge. Texas Workers' Compensation Commission Appeal No. 92611, decided December 30, 1992. Thus we find no error in the hearing officer's determination that the report of the designated doctor was not entitled to presumptive weight, and his determination that claimant's MMI date and impairment rating were those found by Dr. E; the 1989 Act provides that if the great weight of the medical evidence contradicts the designated doctor's impairment rating, the Commission shall adopt the impairment rating of one of the other doctors. Section 408.125(e).

The hearing officer's decision is further reinforced by the fact that a representative of the Commission, on two occasions, sought clarification from the designated doctor as to possible deficiencies in his report. We have held that because the designated doctor is intended to finally resolve disputes over MMI and impairment ratings, it is the Commission's responsibility to ensure that that doctor completes the proper form or otherwise supplies the information required by the 1989 Act and its rules. Texas Workers' Compensation Commission Appeal No. 92595, decided December 21, 1992. We would note that despite the hearing officer's assertion to the contrary, it does not appear that a Commission representative queried Dr. G about his apparent failure to assign a date of MMI, which would have been appropriate in this case. However, given our affirmance of the hearing officer's invalidation of the designated doctor's report on other grounds, we find this omission does not require our reversal and remand for further inquiry.

With regard to Dr. G's TWCC-69 proffered by the claimant with his appeal (and which gives an MMI date of June 8, 1993), this panel has held that our review of the evidence is limited to the record developed at the contested case hearing. Section 410.203(a); Texas Workers' Compensation Commission Appeal No. 92092, decided April 27, 1992. We have also said it is incumbent upon the party offering such materials to show that the information was unknown or unavailable at the time of the hearing; that due diligence would not have brought such information to light; that it was not cumulative of evidence in the record; and that the information would probably tend to produce a different result. Jackson v. Van Winkle, 660 S.W.2d 807 (Tex. 1983). The claimant has not shown why this information was unknown or unavailable at the time of the hearing, and given the hearing officer's determination with regard to the designated doctor's use of the wrong version of the AMA Guides, we cannot say that a different result probably would have been reached if this case were remanded to allow consideration of this report.

The claimant also contends that the reports of Drs. E and R were flawed in that Dr. E did not sign the TWCC-69 and Dr. R did not list the specific body parts/system and rating. While Dr. E's TWCC-69 was not signed, it stated "see attached" and was accompanied by a written narrative that was signed by the doctor. We have held that a doctor's filing of a TWCC-69 in conjunction with a written report can be read together in determining whether the composite meets the requirements of the statute and rules. Texas Workers' Compensation Commission Appeal No. 92077, decided April 13, 1992. While Dr. R's report did not, either on the TWCC-69 or accompanying narrative, set forth ratings for specific body parts, and we have remanded to require a doctor to provide this information,

see Texas Workers' Compensation Commission Appeal No. 92613, decided December 28, 1992, such remand is not necessary in this case where the hearing officer did not accept the MMI date or impairment rating of Dr. R.

Finally, claimant appears to argue, in essence, that Dr. E's TWCC-69 is unreliable because his prior reports are inconsistent (citing, for example, an early report which states the claimant can return to work, versus a statement approximately four months later that his stumbling problem could preclude him from his regular duties). We have reviewed all the medical evidence in this case, including each of Dr. E's reports, and cannot say that anything therein appears to show that the hearing officer's acceptance of Dr. E's MMI date and impairment rating was flawed. We decline to substitute our judgment for that of the hearing officer where, as here, her decision was based upon sufficient evidence and was not so against the great weight and preponderance of the evidence as to be manifestly unjust and unfair. Cain v. Bain, 709 S.W.2d 175, 176 (Tex. 1986).

The decision and order of the hearing officer are affirmed.

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Lynda H. Nesenholtz
Appeals Judge

CONCUR:

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Gary L. Kilgore
Appeals Judge

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Alan C. Ernst
Appeals Judge