APPEAL NO. 94240

Pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq*. (1989 Act), a contested case hearing was held on December 31, 1993. He (the hearing officer) determined that the respondent (claimant) reached maximum medical improvement (MMI) on November 13, 1992, with an impairment rating (IR) of 23% as certified by an agreed designated doctor in an amended report. The appellant (carrier) urges that the decision be reversed and rendered or, alternatively, remanded because of error in that the claimant made improper unilateral contact with the agreed designated doctor and, further, that the carrier was not given any opportunity to contest the Texas Workers' Compensation Commission's (Commission) ordering of a second opinion on spinal surgery, although the parties had entered into a binding agreement that the agreed designated doctor would determine the need for spinal surgery. Carrier argues that the initial certification and award of five percent IR by the agreed designated doctor should be adopted. Claimant urges that the appeal is untimely, that the original certification of the designated doctor was not valid as he did not use the correct version of the American Medical Association's Guides to the Evaluation of Permanent Impairments, Third Edition, second printing, February 1989 (AMA Guides), that the agreement on spinal surgery was only for an opinion and not a binding determination and that there is no prohibition against unilateral contact with the designated doctor. The claimant asks that the decision be affirmed.

DECISION

Finding error in the decision and order of the hearing officer, we reverse and remand.

Initially, we determine that the appeal in this case was timely filed. The Commission records show that the decision and order of the hearing officer was distributed on February 9, 1994, and, according to the appeal, was received on February 11, 1994. Because the fifteenth day after receipt fell on a week end, the final day for filing an appeal was Monday, February 28, 1994, the date the appeal was dispatched to the Commission.

The issues stated at the hearing were whether the claimant had reached MMI, the date of MMI and the claimant's IR. The circumstances of the claimant's injury were not set forth and the compensability of any injury was not in contest. However, from a February 26, 1992, medical history in evidence it appeared that the claimant worked as a sewing machine operator when on (date of injury), she attempted to catch some jeans falling off a cart and developed pain in her left hand and arm. She subsequently had carpal tunnel surgery on September 11, 1991, and has not worked since. Although her hand improved, the claimant continued to complain of a burning sensation in the left upper arm and a knot on her left shoulder. She was referred to (Dr. P), who performed a myelogram and diagnosed cervical stenosis and suggested neck surgery.

Documents admitted show that the claimant was found to have reached MMI and assessed an IR by a Dr. C and a Dr. S, both of whom found an MMI date of "3-15-92" with

a "0%" impairment. At a Benefit Review Conference on October 7, 1992, the disputed issue was stated as "whether the claimant has reached [MMI] with an [IR] as assigned by Dr. C and Dr. S" and the parties entered into a written agreement to select a designated doctor within 10 days "or the Commission will appoint a designated doctor." The written agreement went on to provide that the "designated doctor is to issue an opinion as to the need for surgery."

(Dr. T) was agreed to by the parties and on "12-1-92" certified MMI as of "11-13-92" with a five percent IR. He also reported that:

> [i]t is my opinion that although the patient has some cervical spondylosis, I do not feel that any surgery will benefit the patient's present complaints. She has a full range of movement of the cervical spine and full range of movement of all joints of the upper extremity. The symptoms of which she is now complaining are subjective, but I have difficulty obtaining objective findings.

Dr. T's report specifically states that he used the "2nd edition" of the AMA Guides and that "[a]s to disability, it should be based purely upon the subjective complaint of discomfort although she had no limitation of movement. He felt that she "probably has five percent disability to the body as a whole."

Although not developed in the record, Dr. P apparently once more recommended cervical surgery after Dr. T rendered his report of December 1, 1992, which had indicated surgery was not appropriate. Nonetheless, the Commission apparently determined that the carrier waived any second opinion on surgery because the carrier did not correctly complete a form it was sent notifying the carrier of the renewed recommendation for surgery. In any event, the cervical surgery was performed by Dr. P in February 1993. The claimant's attorney subsequently and unilaterally (no copies or notice to either the Commission or the carrier) wrote to Dr.T in August 1993, stating he had written to Dr. T previously about the case, that the claimant had undergone "significant additional treatment" since the original examination and stated that "[if you feel that [claimant] was not at [MMI] at the time of her last examination or that a different IR is more appropriate, let me know" and that if Dr. T preferred to examine the claimant again that he would make the arrangements. Dr. T replied indicating that "since this patient has had surgery and is still having some symptoms, I feel that her disability would probably be different than was noted in her previous examination" and stated "another examination would be indicated." There is no indication that the Commission or carrier was advised of this matter. In a report dated "9-20-93," Dr. T did not address MMI but rendered an IR of 23%. Dr. T wrote to the carrier in a letter dated September 20, 1993, advising it of his amended IR. This amendment does not make reference to any AMA Guides.

The 1989 Act at Section 408.124 provides that:

> (a) An award of an impairment income benefit, whether by the commission or a court, shall be made on an [IR] determined using the [IR] guidelines described in this section.

(b) The commission shall use for determining the existence and degree of an employee's impairment "Guides to the Evaluation of Permanent Impairment," third edition, second printing, dated February 1989, published by the American Medical Association.

From the face of the report, it appears the designated doctor did not use the statutorily mandated AMA Guides in rendering his certification of impairment rating, as reflected in his initial report. We have stated that "[i]n the absence of an issue on IR that is based on the failure of a doctor to use the AMA Guides in determining impairment, or in the absence of evidence adduced at the hearing that the doctor assigning an IR did not use the Guides, the hearing officer should not require a party to present evidence that the AMA Guides were used when the doctor's assigned IR is reported on a Commission prescribed TWCC-69 form." Texas Workers' Compensation Commission Appeal No. 92393, decided September 17, 1992. We held the hearing officer erred in that case in invalidating a designated doctor's IR merely because there was no evidence he used the correct AMA Guides. Those circumstances were markedly different from the case at hand, where the designated doctor's report specifically states the wrong Guides were utilized. And, we are unwilling, as suggested by claimant's counsel, to presume, on the basis that no mention is made in the amended report, that the correct AMA Guides were used for purposes of the amended report. Appeal 92393, *supra*, does not support such a proposition. Accordingly, the case is necessarily reversed and remanded for accomplishment of a valid IR.

As early as December 21, 1992, the Appeals Panel indicated that unilateral contact between the parties and the designated doctor (outside of the examination of the claimant) was improper. This was in no way intended to hamper, restrict or otherwise prevent a party from seeking or providing additional information where a designated doctor is involved; rather, it was to insure impartiality and unbiased evaluation by using the Commission as the conduit for such communications. In Texas Workers' Compensation Commission Appeal No. 92595, decided December 21, 1992, we stated:

> The use of a designated doctor is clearly intended under the Act to assign an impartial doctor to finally resolve disputes over MMI and [IR]. As we noted recently in Texas Workers' Compensation Commission Appeal No. 92570, decided December 14, 1992, it is important to realize that the designated doctor, unlike a treating doctor or a doctor from whom a carrier seeks a medical examination order under Article 8038-4.16, serves at the request of the Commission. We believe that it is the responsibility of the Commission, and not of either of the parties, to ensure that the designated doctor completes the TWCC-69 form or otherwise supplies the information required under Texas Workers' Compensation Commission Rules, 28 TEX. ADMIN. CODE § 130.01 (Rule 130.1). If information is nevertheless missing or unclear by the time that the contested case hearing officer is asked to evaluate the designated doctor's report, it is appropriate for the hearing

> officer, in carrying out his or her responsibilities to fully develop the facts required, in accordance with Article 8308-6.34(b), to seek that additional information. Moreover, direct contact between the Commission and its appointed designated doctor will serve to discourage unilateral contacts from either side following the examination that could serve to undermine the perception that the designated doctor is impartial. *See* Texas Workers' Compensation Commission Appeal No. 92511, decided November 12, 1992.

We have consistently re-emphasized the impropriety of unilateral contact (and this applies with equal force to all parties, *See* Texas Workers' Compensation Commission Appeal No. 94237, decided this date, March 31, 1994) with the designated doctor and have noted that such contact could result in reversal in an appropriate situation. *See* Texas Workers' Compensation Commission Appeal 93762, decided October 1, 1993; Texas Workers' Compensation Commission Appeal No. 93272, decided May 24, 1993; Texas Workers' Compensation Commission Appeal No. 93702, decided September 27, 1993. In Texas Workers' Compensation Commission Appeal No. 93613, decided August 24, 1993, we specifically caution that "[w]e could envision a situation where a unilateral communication so compromises the appearance of impartiality of the designated doctor as to require us as a matter of law to hold that his opinion must be disregarded."

Although not published at the time of the activity in this case, we observe that the Commission has promulgated an advisory in accord with the decisions of the Appeals Panel. Texas Workers' Compensation Commission Advisory 94-02 signed March 14, 1994, by the Executive Director, provides in pertinent part as follows:

> Since the Act gives the designated doctor's report presumptive weight and preferred status, all precautions should be taken to ensure the designated doctor's report is impartial and unbiased. Parties to a specific case, their representatives, and an Ombudsman assisting an injured worker or employer should communicate with a designated doctor only through appropriate Commission personnel. In most instances this will be a disability determination officer. However, depending on the current level of dispute resolution and type of communication, a benefit review officer or a benefit contested case hearing officer may need to communicate with the designated doctor.

In a case, such as this where the designated doctor is an agreed designated doctor whose IR is conclusive, the need for impartiality is, if anything, heightened. Although our reversal and remand is predicated principally on the failure to use the correct edition of the statutorily mandated AMA Guides, the unilateral communication in this case causes us enough concern that we direct corrective action on this matter be accomplished in conjunction with the remand. Under the circumstances, it might be more appropriate to agree upon or designate another designated doctor to examine the claimant and review the medical records with an opportunity for both parties to present, through the

Commission, pertinent information to be considered.

Regarding the matter of the benefit review conference agreement that the designated doctor would render an opinion on surgery, although not necessary to the disposition of this case under the circumstances, we observe that the terms of the agreement are at best ambiguous. Without deciding whether a binding benefit review conference agreement could be entered into to determine an issue of the need for spinal surgery, the written agreement in this case would not accomplish this objective. An issue related to need for surgery was not set out as an issue in dispute in the benefit review conference agreement and the notation in the "Resolution" section of the agreement only states that the designated doctor is to issue an opinion as to the need for surgery. We cannot infer, particularly considering the positions of the parties on this matter, that the parties, by this language, did or intended to enter into an agreement that the designated doctor would finally resolve the question of whether or not surgery was reasonable, appropriate, or necessary medical treatment in the case. We note that while parties are accorded very wide latitude in agreeing to the resolution of issues, Section 408.005, SETTLEMENTS AND AGREEMENTS, provides that: "(b) An employee's right to medical benefits as provided by Section 408.021 may not be limited or terminated." Whether this prohibition comes into play in a given case will depend on the particular circumstances presented. In this case, the agreement that the designated doctor would render an opinion on the need for surgery does not result in any binding action, particularly in the absence of any indication that such was the knowing intent of the parties.

For the reason set forth above, the decision and order are reversed concerning the IR and the case is remanded for further consideration and development of evidence. Pending resolution of the remand, 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 Section 410.202. *See* Texas Workers' Compensation Commission Appeal No. 92642, decided January 20, 1993.

Stark O. Sanders, Jr.
Chief Appeals Judge

CONCUR:

Susan M. Kelley
Appeals Judge

Gary L. Kilgore
Appeals Judge