APPEAL NUMBER 94966
FILED SEPTEMBER 6, 1994

Pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq*. (1989 Act), a contested case hearing was held in (City), Texas, on June 14, 1994, (hearing officer) presiding as hearing officer. She determined that the cross-appellant's (claimant) maximum medical improvement (MMI) date was December 9, 1993, with an impairment rating (IR) of 16% as determined by the second selected designated doctor. The appellant (carrier) urges error in the hearing officer's finding and conclusion that the claimant's MMI date was December 9, 1993, and argues that the MMI date of the first selected designated doctor is correct. The claimant urges error in the IR of 16% arguing it should be 20% by using the figures contained in the first designated doctor's report. Neither party responded to the appeal of the other.

DECISION

The decision and order of the hearing officer are affirmed.

That the claimant sustained a compensable back strain on _____, was not in issue. Ultimately, a designated doctor was selected by the Texas Workers' Compensation Commission (Commission) to determine the claimant's MMI and IR. Dr. P rendered a report which provided for an MMI date of September 10, 1993, with an IR of five percent. In his report, Dr. P indicated that:

> The Guides to the Evaluation of Permanent Impairment published by the American Medial Association nor the computerized testing apparatus can taken [sic] into account the Range of Motion that the patient had prior to the accident, the body habitus (obesity, muscularity, etc.) or the patient's individual physiologic stiffness. "Reproducibility of abnormal motion is currently the only known way to validate optimum effort." The impairment attributable to the range of motion has been weighted accordingly. The assessment of impairment relating to solely the loss of motion about the patient's lumbar spine has been negated in order to make the assessment of impairment compatible with Table 50 of the Guides to the Evaluation of Permanent Impairment, Third Edition, published by the American Medical Association. [Guides to the Evaluation of Permanent Impairment, third edition, second printing, dated February 1989, published by the American Medical Association (AMA Guides).]

As we held in Texas Workers' Compensation Commission Appeal No. 94181, decided March 24, 1994 (a decision rendered after the date of the doctor's report here in issue), this is an improper application of the protocols of the AMA Guides; that is, to combine factors for both ankylosis as provided in Table 50 and range of motion measurements as used with Table 49. Because of the improper use of the AMA Guides (similar to the situation in Appeal No. 94181, *supra*) in reaching his evaluation, Dr. P was

asked by the Commission's benefit review officer for clarification. His response was indicative of a disagreement with or insistence on combining different protocols. In any event, at a subsequent benefit review conference, and pursuant to what is misleadingly termed an agreement,[1] a second designated doctor, Dr. F, was appointed by the Commission to render an impairment rating. Dr. F examined the claimant and the medical records and certified that the claimant reached MMI on December 9, 1993, with an IR of 16%. His comprehensive report shows an application of the proper protocols of the AMA Guides. The hearing officer accorded presumptive weight to his report.

Responding to the three issues before her, the hearing officer determined that the second designated doctor's appointment was proper and that the claimant reached MMI on December 9, 1993, with an IR of 16%. We agree, under the particular circumstances present, that a second designated doctor could properly be appointed by the Commission. This is not to be taken to dilute our previous guidance that the selection of a second designated doctor is rarely appropriate and should be restricted to situations where, for example, the first selected designated doctor cannot or refuses to properly apply the AMA Guides (Texas Workers' Compensation Commission Appeal No. 93045, decided March 3, 1993), particularly after being asked for clarification or additional information concerning his report.

The hearing officer rejected the position advanced by the claimant that although Dr. P erroneously applied the AMA guides with regard to impairment, the raw figures on range of motion measurements contained or attached to in his report enabled a determination of a correct IR without further reference to any doctor. Citing Appeal 94181, *supra*, as authority, wherein the Appeals Panel reversed and rendered in a case involving a similar impermissible combining of protocols, claimant urges that figures in Dr. P's report render an IR of 20%. Aside from the fact that the instant case is different from Appeal 94181 in that no second designated doctor had been selected, here it also appears that Dr. P was invalidating any range of motion as a part of the IR. In Appeal 94181, it was apparent that Dr. P found valid range of motion deficits but somewhat arbitrarily reduced the measurements and ultimate rating by improperly combining protocols. In this case, the IR only included a specific disorder from Table 49. The attempt by the Commission to obtain additional information and clarification failed to resolve the matter. Under the circumstances, and with the designated doctor appearing to refuse to correctly observe the AMA Guides' protocols, it was not unreasonable or inappropriate to select a second designated doctor. We do not find a sound basis to disturb the hearing officer's determination on this issue.

[1]The purported agreement in this case appears to be little more than an agreement to disagree since the claimant reserved the right to dispute the designated doctor's certification of MMI and the carrier reserved the right to dispute whether or not the selection of a second designated doctor is proper.

Regarding the date of MMI, we believe there was a sufficient basis for the hearing officer to find the date certified by the second designated doctor, Dr. F, in his report. The "agreement" between the parties does not resolve the matter as the claimant specifically reserved the right to dispute the MMI date of Dr. P, although the selection of Dr. F does appear to focus on an IR. The letter of appointment for Dr. F's examination does not restrict the inquiry to just the impairment rating, and there is no evidence of record to indicate that any clarification was sought or inquiry made of Dr. F to determine if he considered any earlier date of MMI. While different doctors may certify MMI and IR in a case, it is not out of the ordinary for the same doctor to certify both. And, unless MMI is reached, either statutorily or by expert medical determination, an impairment rating cannot be given. It is very possible that Dr. F's IR hinged on the date he found to be the MMI date. Regardless, the determination of the hearing officer, under the circumstances, is not so against the great weight and preponderance of the evidence as to be clearly wrong or manifestly unjust. *See* In re King's Estate, 150 Tex. 662, 244 S.W.2d 660 (1951).

The decision and order are affirmed.

Stark O. Sanders, Jr.
Chief Appeals Judge

CONCUR:

Robert W. Potts
Appeals Judge

Gary L. Kilgore
Appeals Judge