

APPEAL NO. 020128
FILED MARCH 6, 2002

This appeal arises pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act). A contested case hearing (CCH) was held on July 24, October 29, and December 13, 2001, with the record closing on December 13, 2001. The hearing officer resolved the sole disputed issue by determining that the issue of the appellant's (claimant) impairment rating (IR) is not ripe for adjudication. The claimant appealed the hearing officer's determination on sufficiency grounds. The respondent (carrier) responded, requesting affirmance.

DECISION

The hearing officer's decision is reversed and rendered.

The hearing officer erred in determining that the claimant's IR was not ripe for adjudication. As the hearing officer notes, the parties stipulated that the claimant sustained a compensable right arm, right shoulder, neck, thoracic spine, reflex sympathetic dystrophy, and thoracic outlet syndrome injury. The parties also stipulated that the claimant reached maximum medical improvement on November 16, 1998. In a report dated September 10, 1999, the claimant's treating doctor assigned the claimant a 62% IR. On October 20, 1999, the designated doctor, chosen by the Texas Workers' Compensation Commission (Commission), examined the claimant and determined that the claimant's IR was 51%. The carrier-selected required medical examination (RME) doctor determined that the claimant's IR was 9% on February 9, 2000. In response to a request for clarification from a benefit review officer, the designated doctor reviewed the RME doctor's report and again explained his own report on August 11, 2000.

The claimant argued that the designated doctor's report should be given presumptive weight. Pursuant to Section 408.125(c) of the 1989 Act, if the designated doctor is chosen by the Commission, the designated doctor's report is to be given presumptive weight and the Commission shall base the IR on that report unless the great weight of the other medical evidence is to the contrary. Here, in addition to his first report, the designated doctor clarified his report and contrasted it with the RME doctor's report, citing the RME doctor's examination as much later than his own, and citing precisely which physical complaints of the claimant led him to use the Guides to the Evaluation of Permanent Impairment, third edition, second printing, dated February 1989, published by the American Medical Association (AMA Guides), and the tables therein, as he did. The hearing officer wanted to seek further clarification from the designated doctor, but he has retired and requested removal from the designated doctor list; in addition, his phone numbers are no longer in operation. Given the situation of the designated doctor, at the second of the three CCHs, the parties agreed that they did not want to have another designated doctor appointed, but wished to go forward with the medical evidence currently available to them.

The carrier argued that the great weight of the other medical evidence was against the designated doctor's rating, and urged that the 9% assigned by the RME doctor be the claimant's IR. The carrier also alleged that the designated doctor "improperly" applied the AMA Guides¹ and did not include his range of motion (ROM) measurements in his report. Along with the RME doctor's report, the carrier also urged the conclusions made by a peer review doctor who did not examine the claimant. It appears from the record that the hearing officer also considered the peer review doctor's opinions. It should be noted that the RME doctor rated the claimant based upon a vascular disease², which was not an injury to which the parties stipulated.

The great weight of the other medical evidence is not contrary to the opinion of the designated doctor. The differences in the ratings of the designated doctor and the RME doctor appear to be merely differences of medical opinion. We have long held that mere differences in medical opinion will not suffice to rebut the presumption in favor of the designated doctor. Texas Workers' Compensation Commission Appeal No. 960034, decided February 5, 1996. Further, as noted, the RME doctor's rating is based upon a diagnosis not listed as one agreed by the parties. In addition, while it is unfortunate that the ROM measurement sheets are not included in the designated doctor's report, he does specifically address the ROM measurements in his narrative in relation to his diagnosis and to his application of the AMA Guides. The peer review doctor never examined the claimant, so his opinion does not constitute a "substantial basis" necessary to rebut a statutory presumption. Texas Workers' Compensation Commission Appeal No. 950561, decided May 22, 1995.

Therefore, the hearing officer is reversed, and we render the opinion that the claimant's IR is 51%, in accord with the rating of the Commission-selected designated doctor.

¹ In its response to the claimant's appeal, the carrier claims that the hearing officer 'found' that the designated doctor "improperly" applied the AMA Guides. This allegation is incorrect in its imprecision. The hearing officer wrote in her Statement of the Evidence that she did not understand why the designated doctor used the tables he did, and she did not believe he adequately explained his use of the Guides. She wrote "it appear [sic] he did not properly apply" the AMA Guides. The record on appeal does not include a medical report that demonstrates how the designated doctor improperly applied the AMA Guides, as required.

²The vascular disease rating was one of the departures of the RME doctor's rating from that of the designated doctor's. The designated doctor rated the claimant based upon a brachial plexus injury, which was an injury that the parties stipulated was compensable.

The true corporate name of the insurance carrier is **TEXAS PROPERTY AND CASUALTY INSURANCE GUARANTY ASSOCIATION for Reliance National Indemnity Company, an impaired carrier** and the name and address of the registered agent for service of process is

**MARVIN KELLY, EXECUTIVE DIRECTOR
T.P.C.I.G.A.
9120 BURNET ROAD
AUSTIN, TEXAS 78758.**

Terri Kay Oliver
Appeals Judge

CONCUR:

Michael B. McShane
Appeals Judge

Robert W. Potts
Appeals Judge