

APPEAL NO. 023100
FILED JANUARY 30, 2003

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 November 5, 2002. The hearing officer determined that the presumptive weight afforded the Texas Workers' Compensation Commission (Commission)-appointed designated doctor is not overcome by the great weight of the other medical evidence and that the claimant's impairment rating (IR) is 18%. The appellant (carrier herein) files a request for review, arguing that the designated doctor had failed to properly use the Guides to the Evaluation of Permanent Impairment, fourth edition (1st, 2nd, 3rd, or 4th printing, including corrections and changes as issued by the American Medical Association prior to May 16, 2000) (AMA Guides) in arriving at his IR, and that properly applying the AMA Guides, the claimant's IR is 13% as assigned by a doctor the claimant was referred to by his treating doctor. The claimant responds, arguing that the designated doctor properly applied the AMA Guides and that the hearing officer did not err in giving presumptive weight to the IR of the designated doctor.

DECISION

Affirmed.

Prior to the CCH the hearing officer conducted a prehearing conference and determined that the Commission should not appoint a second designated doctor. The carrier contends the hearing officer abused her discretion in not appointing a second designated doctor. Whether the hearing officer erred by refusing to appoint a second designated doctor is reviewed under an abuse-of-discretion standard. Texas Workers' Compensation Commission Appeal No. 960454, decided April 17, 1996. An abuse of discretion occurs when a decision is made without reference to appropriate guiding rules or principles. Morrow v. H.E.B., Inc., 714 S.W.2d 297 (Tex. 1986). We have held that selection of another designated doctor may be proper where the first doctor refuses to cooperate or to render a report consistent with the 1989 Act. Texas Workers' Compensation Commission Appeal No. 961228, decided August 8, 1996. In the case before us the designated doctor responded at length to both clarification letters that were sent to him, consequently the hearing officer did not abuse her discretion.

The facts of the case are largely undisputed. The claimant sustained a compensable right wrist injury on _____, which required three surgeries. It was stipulated by the parties that the claimant reached maximum medical improvement on August 28, 2001. Dr. D was the Commission-selected designated doctor. Dr. D certified on a Report of Medical Evaluation (TWCC-69) dated January 31, 2002, that the claimant's IR was 20%. In his associated narrative Dr. D explained how he arrived at this rating and gave the measurements he obtained during the course of his examination.

The carrier requested that Dr. W perform a peer review of Dr. D's narrative report and IR certification. Dr. W, in a report of February 11, 2002, pointed out errors he believed that Dr. D had made. On March 21, 2002, Dr. D responded to a clarification letter from the Commission and corrected a mathematical mistake, revising his assignment of IR to 19%, but otherwise standing by his original assessment of IR. On June 6, 2002, Dr. D again responded to a Commission clarification letter stating that, "I stand firm on my impairment rating of 19%."

The carrier contends that Dr. D's assignment of 19% IR is against the great weight of the medical evidence as explained by Dr. W. Dr. W had pointed out that Dr. D's assessment of 3% for an ulnar nerve deviation of 16 degrees was error because per the AMA Guides, page 37, one is required to "round the figures to the nearest 10 degrees." Dr. W stated that this was because the AMA Guides provided in the instructions for rating radial and ulnar deviation that the measurements should be rounded to the nearest 10 degrees. Dr. D disagreed and refused to round to the nearest 10 degrees. Dr. D stated that there was no need to round to the nearest 10 degrees because the table for impairment for radial and distal deviation is set out in increments of 5 degrees. However, as we noted in Texas Workers' Compensation Commission Appeal No. 022504-s, decided November 12, 2002, the Guides require that "the measurements be rounded to the nearest 10 degrees." Dr. W stated that if Dr. D's measurement of radial and ulnar deviation were rounded to the nearest 10 degrees the claimant's correct upper extremity impairment for abnormal motion of the right wrist is 11%, not 12%. Although Dr. D improperly refused to round to the nearest 10 degrees, the hearing officer properly made the mathematical correction, rounding to the nearest 10 degrees, and adjusted the IR to 18%.

The 1989 Act requires that any determination of IR be based upon the AMA Guides. Section 408.124(c); Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE §130.1 (Rule 130.1). Failure by a designated doctor to properly follow the AMA Guides has led to reversal of a decision on IR based upon the designated doctor's report. See Texas Workers' Compensation Commission Appeal No. 93296, decided May 28, 1993; Texas Workers' Compensation Commission Appeal No. 93769, decided October 11, 1993; Texas Workers' Compensation Commission Appeal No. 931008, decided December 16, 1993; and Texas Workers' Compensation Commission Appeal No. 94181, decided March 24, 1994.

Thus, we must first determine whether or not Dr. D properly followed the AMA Guides in certifying the claimant's impairment. This question in turn hinges on whether or not the AMA Guides were properly followed in giving impairment for sensory loss of the superficial radial nerve. The hearing officer stated that "Dr. W simply proffered a different method of assessing a rating" and thus it was merely a difference of opinion how each doctor would have rated the claimant's sensory deficit.

Section 408.125(e) provides that if the Commission chooses the designated doctor, the report of the designated doctor shall have 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. The carrier has not shown that the great weight of the medical evidence contradicts the IR contained in the report of the designated doctor chosen by the Commission. The hearing officer found that the presumptive weight afforded the opinion of the designated doctor was not overcome by the great weight of the other medical evidence and concluded that the claimant's IR is 18%, as adjusted, and certified by the designated doctor. The hearing officer is the sole judge of the weight and credibility of the evidence. Section 410.165(a). The hearing officer's decision is supported by sufficient evidence and is not so against the great weight and preponderance of the evidence as to be clearly wrong and unjust. Cain v. Bain, 709 S.W.2d 175, 176 (Tex. 1986).

We affirmed the hearing officer's decision and order.

The true corporate name of the insurance carrier is **TEXAS HOSPITAL INSURANCE EXCHANGE** and the name and address of its registered agent for service of process is

**ROBERT DION, PRESIDENT
6300 LA CALMA, SUITE 550
AUSTIN, TEXAS 78761.**

Roy L. Warren
Appeals Judge

CONCUR:

Judy L. S. Barnes
Appeals Judge

Gary L Kilgore
Appeals Judge