APPEAL NO. 042160
FILED OCTOBER 20, 2004

This appeal after remand 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 January 7, 2004. The record closed on February 23, 2004. The hearing officer determined that the impairment rating (IR) of appellant (claimant) was 14% in accordance with the amended report of the designated doctor, Dr. S the second designated doctor. Respondent (carrier) appealed, contending that: (1) the Guides to the Evaluation of Permanent Impairment, third edition, second printing, dated February 1989, published by the American Medical Association (AMA Guides third edition) do not apply, and that the hearing officer should have applied 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 fourth edition); (2) the second designated doctor improperly certified the IR based on conditions that arose after statutory maximum medical improvement (MMI); and (3) letters of clarification sent to the second designated doctor were improper. The file did not contain a response from claimant. In her cross-appeal, claimant contended the hearing officer erred in determining that her IR is 14%. Claimant asserted that the second designated doctor did not properly apply the AMA Guides. Carrier responded that claimant's appeal does not compel reversal. The Appeals Panel reversed the hearing officer's decision and remanded the case to the hearing officer. Texas Workers' Compensation Commission Appeal No. 040583-s, decided May 3, 2004. The Appeals Panel stated that the hearing officer should instruct the second designated doctor to assess an IR for the compensable injury based on the injured employee's condition as of April 7, 2002, the date of statutory MMI. The hearing officer did not hold a hearing on remand. The hearing officer sought clarification from the second designated doctor and then issued a decision and order on remand. The hearing officer stated that the second designated doctor's most recent report "appears to have been rendered in conformity with the AMA Guides." The hearing officer again determined that claimant's IR is 14%. Claimant appealed, contending that impairment should have been included for her post-statutory MMI surgery, and that her IR should be 15%, as certified by her treating doctor. Carrier responded that the hearing officer did not err in making the IR determination.

DECISION

We affirm.

This is an AMA Guides third edition case. Claimant contends that the hearing officer erred in determining that her IR is 14%. She asserts that the 15% IR found by her treating doctor, Dr. C, is the correct IR. Claimant contends that the IR should include impairment for her surgery, which took place after the date of statutory MMI.

In his prior report dated June 20, 2003, the designated doctor had included impairment for specific disorders of the lumbar spine due to a lumbar laminectomy that took place on August 8, 2002, which was after the date of statutory MMI. Claimant had reached statutory MMI on April 7, 2002. After the remand, the hearing officer wrote to the designated doctor and requested that he state claimant's IR as of April 7, 2002, without consideration of medical conditions that arose after that date. In his response to the hearing officer's May 10, 2004, letter of clarification, the designated doctor stated that, "as requested, no medical condition after the date of statutory MMI will be included in the [IR]." The designated doctor said claimant's impairment included 2% for the right knee, 5% for loss of range of motion in the lumbar spine, and 7% impairment under Table 49 for six months of medically documented pain. The designated doctor signed an amended Report of Medical Evaluation (TWCC-69) on June 8, 2004, and certified that claimant's IR is 14%.

We have reviewed the complained-of determinations and conclude that the hearing officer did not err in according presumptive weight to the designated doctor's June 8, 2004, report. The hearing officer's determinations are supported by the record and are not so against the great weight and preponderance of the evidence as to be clearly wrong or manifestly unjust. Cain v. Bain, 709 S.W.2d 175, 176 (Tex. 1986).

We affirm the hearing officer's decision and order.

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

MARVIN KELLY, EXECUTIVE DIRECTOR
9120 BURNET ROAD
AUSTIN, TEXAS 78758.

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Judy L. S. Barnes
Appeals Judge

CONCUR:

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Robert W. Potts
Appeals Judge

DISSENTING OPINION:

I dissented in Appeal No. 040583-s, *supra*, because I believed that by remanding the case to require the hearing officer to apply Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 130.1(c)(3) (Rule 130.1(c)(3)), which was not in effect on the date of the CCH we were requiring that Rule 130.1(c)(3) be applied retroactively. The hearing officer has now issued a decision on remand and in this case we now review that decision on remand. Ironically, in the end the hearing officer has reached the same final resolution of the issue of IR, 14%, as she did prior to the remand. The majority is affirming that result as the hearing officer has now applied Rule 130.1(c)(3) in reaching it. As in Appeal No. 040583-s, I find myself in agreement with much of what the majority says in its opinion. I merely dissent, even though at this point it may be somewhat academic, because I remain convinced that we should not have remanded this case in the first place.

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Gary L. Kilgore
Appeals Judge