APPEAL NO. 040583-s
FILED MAY 3, 2004

This appeal arises pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act). A contested case hearing was held on January 7, 2004. The record closed on February 23, 2004. The hearing officer determined that the impairment rating (IR) of respondent/cross-appellant (claimant) is 14% in accordance with the amended report of the designated doctor, Dr. S/the second designated doctor). Appellant/cross-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 does not contain a response from claimant. In his cross-appeal, claimant contends the hearing officer erred in determining that her IR is 14%. Claimant asserts that the second designated doctor did not properly apply the AMA Guides. Carrier responded that claimant's appeal does not compel reversal.

DECISION

We reverse and remand.

It is undisputed that the date of statutory MMI in this case is April 7, 2002. An issue at the hearing concerned the edition of the AMA Guides that applies. Carrier contends the hearing officer erred in determining that the third edition of the AMA Guides applies. The record reflects that on November 11, 1999, Dr. G, identified as the "treating doctor," certified that claimant reached MMI on October 29, 1999. Dr. H was selected as a designated doctor and on January 21, 2000, he certified that claimant was not yet at MMI.

Dr. G's certifying examination was conducted prior to October 15, 2001, so the hearing officer determined that the third edition of the AMA Guides applied to IRs assigned for the compensable injury. *See* Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 130.1(c) (Rule 130.1(c)). Carrier asserts that Dr. G's IR had been previously "withdrawn through agreement of the parties," so the fourth edition of the AMA Guides should apply. At the hearing, carrier argued that Dr. G's certification was set aside "by the conduct of the parties" when Dr. H was selected. There was evidence that claimant was paid temporary income benefits (TIBs) based on Dr. H's certification that claimant was not at MMI in January 2000. We agree with the hearing officer that the record does not establish that the parties agreed to withdraw Dr. G's certification. The fact that a designated doctor was selected and TIBs were paid after Dr. G's certification does not

establish that Dr. G's certification was "withdrawn" through agreement of the parties. The hearing officer did not err in requiring affirmative evidence that Dr. G's certification was wholly withdrawn. The hearing officer did not err in determining that the third edition of the AMA Guides applied.

Carrier contends the hearing officer erred in determining that the IR is 14%. Carrier complains that when the second designated doctor considered the IR, he increased the IR based on conditions that arose after statutory MMI. We addressed a case involving similar facts in Texas Workers' Compensation Commission Appeal No. 040313-s, decided April 5, 2004. The Appeals Panel interpreted Section 408.123(a) and determined that IR assessments after statutory MMI should be based on the injured employee's condition as of the date of statutory MMI. As in Appeal No. 040313-s, *supra*, it appears that the second designated doctor did not assess the IR based on the claimant's condition as of the date of statutory MMI. Therefore, we must remand the case to the hearing officer.[1] 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. We retreat from Appeal No. 033128-s, *supra*, to the extent that it holds that IR assessments need not be based on the injured employee's condition as of the date of MMI.

Carrier also complains of the content of the May 2003 letter of clarification sent to the second designated doctor by a benefit review officer. Carrier asserts that the second designated doctor's amended report of June 20, 2003, certifying a 14% IR is not entitled to presumptive weight. We perceive no error on the part of the hearing officer and note that any possible error in this regard is necessarily cured by this remand.

In her cross-appeal, claimant contends that the hearing officer erred in determining that her IR is 14% rather than 15%. Claimant complains that the second designated doctor improperly used the combined values chart in arriving at the IR. Given our remand in this case and the fact that the second designated doctor will be reassessing the IR, we need not address this issue at this time. We perceive no reversible error under the facts of this case.

We reverse the determination that claimant's IR is 14% and remand for further proceedings consistent with this decision. We note that after clarification is obtained from the second designated doctor, the hearing officer should allow comment by the parties. The hearing officer should then issue a new decision regarding the IR, consistent with this decision.

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

[1] We acknowledge recent flux in this area of the law. *See generally* Texas Workers' Compensation Commission Appeal No. 033128-s, decided January 28, 2004 (interpreting Texas Workers' Compensation Commission (Commission) Advisory 2003-10); Rule 130.1(c)(3).

decision is received from the Commission's Division of Hearings, pursuant to Section 410.202 which was amended June 17, 2001, to exclude Saturdays and Sundays and holidays listed in Section 662.003 of the Texas Government Code in the computation of the 15-day appeal and response periods. *See* Texas Workers' Compensation Commission Appeal No. 92642, decided January 20, 1993.

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.

____
Judy L. S. Barnes
Appeals Judge

CONCUR:

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Elaine M. Chaney
Appeals Judge

DISSENTING OPINION:

I find myself in agreement with much in the majority opinion. However, with all respect and affection for my colleagues in the majority, I am constrained to dissent because I must disagree with the result. I would not remand this case back to the hearing officer. To remand this case back to the hearing officer for not applying Rule 130.1(c)(3), which was not in effect at the time of the hearing, dispenses with any pretense to prospectively, as opposed to retroactively, applying the law. While the majority opinion is certainly consistent with Appeal No. 040313-s, *supra*, I believe that Appeal No. 040313-s was wrongly decided because it also required a hearing officer to apply a rule prior to its effective date. I would affirm the hearing officer's giving presumptive weight to the report of the designated doctor. I do not address the claimant's point of error concerning whether the designated doctor properly used the combining tables of the AMA Guides as any expression of my opinion on this subject would be purely academic as the majority has decided to remand the case.

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Gary L. Kilgore
Appeals Judge