APPEAL NO. 031165-s
FILED JUNE 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 was held on April 14, 2003. The hearing officer determined that the impairment rating (IR) for appellant/cross-respondent (claimant) is not an issue that is ripe for decision. The hearing ordered that claimant be reevaluated by the new designated doctor and that the new designated doctor 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). Maximum medical improvement (MMI) is not an issue; the parties stipulated that claimant reached MMI on the statutory MMI date. Claimant appealed the ripeness determination, contending that the issue of IR is ripe for determination and that the hearing officer should have accorded presumptive weight to the 17% IR of the new designated doctor, Dr. W. Respondent/cross-appellant (carrier) responded agreeing that the IR issue is ripe for determination, but contending that the fourth edition of the AMA Guides is the correct version of the AMA Guides to apply, so the hearing officer properly refused to accord presumptive weight to the new designated doctor's 17% IR. Carrier cross-appealed, contending that the IR issue is ripe for decision, that the hearing officer should have adopted the IR report of Dr. A, and that the hearing officer erred in determining that there were no valid existing IR certifications prior to the September 16, 2002, designated doctor examination of Dr. W. Claimant responded that, if it is true that the fourth edition of the AMA Guides applies, then the hearing officer was correct in determining that the IR issue was not ripe for adjudication.

DECISION

We affirm.

Claimant contends the hearing officer erred in failing to adopt the 17% IR certified by the new designated doctor on September 16, 2002. Claimant asserts that the IR issue was ripe for determination, if the third edition of the AMA Guides applies in this case. Claimant asserts that if the fourth edition of the AMA Guides applies, the IR issue was not ripe. Carrier appeals, contending that the hearing officer should have adopted the IR report of Dr. A, which was certified applying the fourth edition of the AMA Guides. Carrier asserts that the hearing officer erred in determining that the IR issue was not ripe for determination.

In determining whether the IR issue was ripe for determination, the hearing officer considered whether the new designated doctor applied the correct version of the AMA Guides. The hearing officer determined that the MMI/IR certification of Dr. D and the initial 6% IR and MMI certification of the old designated doctor, Dr. L, were "overturned" in a prior decision and order after a prior hearing. The hearing officer determined that, for that reason, the fourth edition of the AMA Guides applies and,

because the new designated doctor did not use the correct version, the IR issue is not ripe. The hearing officer applied Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 130.1(c)(2) (Rule 130.1(c)(2) in making her determinations. Rule 130.1(c)(2)(B) states, in relevant part:

> (B) The appropriate edition of the AMA Guides to use for certifying examinations conducted on or after October 15, 2001 is:
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> (i) the fourth edition of the AMA Guides . . . ; or
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> (ii) *the third edition, second printing, dated February, 1989 if, at the time of the certifying examination, there is a certification of MMI by a doctor pursuant to subsection (b) of this section made prior to October 15, 2001 which has not been previously withdrawn through agreement of the parties or previously overturned by a final decision.* [Emphasis added.]

The hearing officer's decision and order in case number (previous docket), which also concerned claimant's IR and MMI date for this injury, is in the record. In that prior decision, the hearing officer gave presumptive weight to the February 23, 2001, amended report of the old designated doctor, Dr. L, and certified that claimant was not yet at MMI and that the IR issue was not ripe for adjudication. In her decision and order in that case, the hearing officer noted that claimant had disputed the 0% IR of Dr. D, a treating doctor chosen by the employer, and that the old designated doctor, Dr. L, had then been selected by the Texas Workers' Compensation Commission (Commission) to determine MMI and IR. It is undisputed that Dr. L's first MMI and 6% IR certification, dated January 11, 2000, was later rescinded by Dr. L on February 15, 2001, when he certified that claimant was not yet at MMI. In Texas Workers' Compensation Commission Appeal No. 012009, decided October 11, 2001, which is also in the record, the appeals panel affirmed the hearing officer's decision in the previous docket.

We agree with the hearing officer's determination in the case before us that the January 11, 2000, MMI/IR certification of Dr. L was "overturned by a final decision" and that therefore, pursuant to Rule 130.1(c)(2), the fourth edition of the AMA Guides applies. Similarly, Dr. D's MMI certification was overturned because (1) that certification was also considered at the hearing in the previous docket and rejected in favor of the old designated doctor's amended report, and (2) the determination in the previous docket was affirmed on appeal.

The fourth edition of the AMA Guides applied; therefore, the new designated doctor used the wrong version of the AMA Guides and his September 16, 2002, certification was invalid. Impairment ratings assigned using the wrong edition of the AMA Guides shall not be considered valid. Rule 130.1(c)(2)(C). Carrier asserts that the hearing officer erred in determining that there were no "valid existing certifications" of MMI and IR prior to the new designated doctor's September 16, 2002, report. Although carrier contends the hearing officer erred in failing to adopt the report of Dr. A, we find

no reversible error in this case. Dr. A certified that claimant reached MMI on June 16, 2002, calling that "statutory" MMI in her report. It was undisputed that claimant did not begin losing time from work until August 1, 2000. Carrier conceded at the hearing that the date of statutory MMI would be later than June 2002. The parties stipulated that claimant reached MMI on the date of statutory MMI. The hearing officer apparently rejected Dr. A's report because of the date of MMI found in the report.

We recognize that Section 408.125(e) states that "[i]f the great weight of the medical evidence contradicts the impairment rating contained in the report of the designated doctor chosen by the commission, the commission shall adopt the impairment rating of one of the other doctors." However, the intent of the statute and rules appears to be that a designated doctor shall be selected to decide the IR issue when there is a dispute. The new designated doctor's latest report was invalid because he erroneously used the third edition of the AMA Guides and was not directed to consider the IR based on the correct version of the AMA Guides. Carrier represented that it asked that the new designated doctor be instructed to use the fourth edition of the AMA Guides, but that the Commission refused to instruct the designated doctor. It is apparent that the designated doctor did not know he was using the wrong version of the AMA Guides and no one instructed him in this regard. We have previously stated that where, as here, a question exists as to whether the designated doctor used the statutorily mandated version of the AMA Guides to determine the IR, the preferred course of action is to inquire of the designated doctor and to ensure that the IR was assigned in accordance with the correct version of the AMA Guides. Texas Workers' Compensation Commission Appeal No. 951922, decided December 28, 1995; Texas Workers' Compensation Commission Appeal No. 941237, decided October 31, 1994; Texas Workers' Compensation Commission Appeal No. 94055, decided February 22, 1994; Texas Workers' Compensation Commission Appeal No. 93045, decided March 3, 1993. We perceive no reversible error.

We affirm the hearing officer's decision and order.

According to information provided by carrier, the true corporate name of the insurance carrier is **ZURICH AMERICAN INSURANCE COMPANY** and the name and address of its registered agent for service of process is

LEO F. MALO
ZURICH AMERICAN INSURANCE COMPANY
12222 MERIT DRIVE, SUITE 700
DALLAS, TEXAS 75251.

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Judy L. S. Barnes
Appeals Judge

CONCUR:

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Thomas A. Knapp
Appeals Judge

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Robert W. Potts
Appeals Judge