APPEAL NO. 92384

A contested case hearing was held on June 30, 1992, in (city), Texas, with (hearing officer) presiding. The hearing was held pursuant to the Texas Workers' Compensation Act, TEX. REV. CIV. STAT. ANN. arts. 8308-1.01 *et seq*. (Vernon Supp. 1992) (1989 Act). Two issues were before the hearing officer: whether respondent (claimant below) had reached maximum medical improvement, and if so, what was his impairment rating. The hearing officer held that the designated doctor appointed by the Texas Workers' Compensation Commission (Commission) has not filed a report of maximum medical improvement (MMI) in accordance with Commission rules, and thus respondent has not reached MMI and there has been no assigned impairment rating.

The appellant (insurance carrier below) argues that the designated doctor's report is entitled to presumptive weight; that appellant should not be penalized for the doctor's failure to complete a Form TWCC-69 (Report of Medical Evaluation); and that appellant should not be required to pay benefits. No response was filed to the request for review.

DECISION

Finding the hearing officer's decision on MMI and impairment to be in error, we reverse and remand.

Respondent understands and speaks little English and relied upon an interpreter. It was undisputed that respondent injured his left anterolateral torso while working for (employer) on (date of injury). His treating doctor is (Dr. V). According to the medical records introduced into evidence, Dr. V began seeing respondent on July 16th and on that date through December 3rd recommended that respondent remain off work. A letter Dr. V sent appellant on September 17th said he could not give an anticipated date of release to return to work or for MMI. Respondent testified that Dr. V has told him since February 1992 that he may return to light duty work, but that he was informed by employer that no light duty work was available and he was to call when he was released to regular work.

On July 17th respondent saw (Dr. L), at appellant's request. Dr. L found respondent able to return to work, with certain physical restrictions for one month, and found no impairment. According to (Mr. A), appellant's claims supervisor, appellant asked for a benefit review conference in August 1991 where it requested authority to stop income benefits. Mr. A said the request was denied and he was instructed to contact Dr. V regarding respondent's MMI and impairment rating. Mr. A said Dr. V did not respond to the certified letter he sent. Thereafter, a second benefit review conference was held December 12, 1991. At this conference, the parties were instructed to come up with a mutually agreeable designated doctor. Because the parties were unable to agree, the benefit review officer designated (Dr. O), and instructed Mr. A to set up an appointment for respondent. A third benefit review conference was held February 25, 1992. The disputed issues from that benefit review conference were whether the respondent had reached MMI, and whether he has a "0" impairment rating.

Admitted into evidence was Dr. O's report, which was in the form of a six-page narrative. In response to a question from the hearing officer, Mr. A said he did not know whether Dr. O submitted a Form TWCC-69 in addition to his narrative report. The hearing officer held that Dr. O did not file a report regarding MMI and impairment rating in accordance with the requirements of Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE §§130.6 and 130.1 (Rules 130.6 and 130.1).

MMI is defined in the 1989 Act as the earlier of "the point after which further material recovery from or lasting improvement to an injury can no longer reasonably be anticipated, based on reasonable medical probability," or "the expiration of 104 weeks from the date income benefits begin to accrue." Article 8308-1.03(32). The Act further provides, in part, that:

> after the employee has been certified by a doctor as having reached maximum medical improvement, the certifying doctor shall evaluate the condition of the employee and assign an impairment rating . . . The certifying doctor shall issue a written report to the commission, the employee, and the insurance carrier certifying that maximum medical improvement has been reached, stating the impairment rating, and providing any other information required by the commission. Article 8308-4.26(d).

Rule 130.1 provides that a doctor who is required to certify whether an employee has reached MMI or has an impairment shall complete and file a medical evaluation report as required by that rule. "Certify" is defined in the rule as the formal assertion of medical facts or expert opinion by a doctor relating to MMI or impairment. The rule further provides that all reports made under the rule shall be on a form prescribed by the Commission and shall contain a number of items as listed therein. Rule 130.1(c)(1)-(7). Rule 130.6 requires the Commission to appoint a designated doctor to resolve disputes over MMI or impairment if the parties cannot agree on a designated doctor. The 1989 Act provides that a designated doctor's report on MMI and impairment shall have presumptive weight, and the Commission shall base its determination of MMI and impairment on that report unless the great weight of the other medical evidence is to the contrary. Articles 8308-4.25(b), 8308-4.26(g).

The appellant argues that Dr. O's report should be given presumptive weight and that it is also supported by the great weight of the other medical evidence. In addition, appellant contends that no rule or statute supports the conclusion of law that respondent has not reached MMI and that there has been no impairment rating assigned. Appellant further argues it is inequitable to penalize an insurance carrier for a designated doctor's failure to file a TWCC-69, as the carrier has no power or authority over designated doctors.

This panel has previously considered cases in which a purported certification of MMI or impairment was deficient in certain respects. Texas Workers' Compensation Commission Appeal No. 92127 (Docket No. redacted), decided May 15, 1992, involved

reports of two non-designated doctors which were completed on Forms TWCC-64 (Specific and Subsequent Medical Report) and TWCC-61 (Initial Medical Report). The appellant in that case argued that a TWCC-69 was not required and that the decision maker could look at the doctors' records and the facts surrounding the situation to determine MMI. We observed that the TWCC-64 "simply did not meet the requirements for certification of MMI stated in . . . Rules 130.1 and 130.2." We noted that the form in question did not contain the narrative history, nor the results of the most recent clinical evaluation, nor the statement that the claimant had reached MMI, all of which are required by Rule 130.1. Similarly, we noted that a letter written by one of the doctors did not contain a narrative history of the claimant's medical condition and a description of the most recent clinical evaluation; the letter also did not contain the claimant's social security number nor the doctor's professional license number and his federal tax identification number as required by Rule 130.1, although these data were included in several TWCC-64 forms signed by that doctor. None of the TWCC-64 forms nor the letter assigned an impairment rating.

Texas Workers' Compensation Commission Appeal No. 91083 (Docket No. redacted), decided January 6, 1992 also involved a letter from a non-designated doctor. We held that the letter, even when coupled with a later letter, "did not cover the essential points specified by" Rule 130.1 for certifying MMI. We noted that the information was not on a TWCC-69, "but of greater significance did not cover the criteria for finding [MMI]."

In Texas Workers' Compensation Commission Appeal No. 92074 (Docket No. redacted), decided April 8, 1992, the treating doctor certified MMI and assigned an impairment rating which was disputed by the carrier. Although the parties attempted to stipulate that MMI had been certified, the treating doctor's TWCC-69 was not signed. A second doctor, by agreement of the parties, evaluated impairment only. That doctor's report was not issued on a TWCC-69 and did not contain the claimant's workers' compensation claim number nor the doctor's professional license and federal tax identification numbers. However, neither doctor assigned an impairment rating based upon the statutorily prescribed edition of the American Medical Association's Guides to the Evaluation of Permanent Impairment. Because of the foregoing flaws in certification of MMI and assignment of an impairment rating, the decision of the hearing officer was reversed and remanded for the development of any appropriate evidence.

See also Texas Worker's Compensation Commission Appeal No. 92132 (Docket No. redacted), decided May 18, 1992, which disagreed that a failure to mail an MMI certification to the parties or to the Commission within seven days negates the substance of such report, but which upheld the hearing officer's determination that proper certification of MMI was not made due to the omission of the narrative history of the claimant's medical condition.

Upon our review of Dr. O's letter in this case, we find it complies with Rule 130.1 in the following respects: it contains the respondent's name, date of injury, and workers' compensation claim number; the doctor's name, address, and signature; a narrative history of the respondent's medical condition, including onset and course of the condition and

findings of previous examinations and treatments; a description of the results of respondent's most recent clinical evaluation; and a statement that the respondent has reached MMI. The letter additionally finds respondent has "no residual impairment." Not present are the following elements of Rule 130.1: the respondent's social security number, and the doctor's professional license number and federal tax identification number. As noted above, the certification was not on the form prescribed by the Commission (TWCC-69).

Applying the information before us to the statute, rules, and prior decisions of this panel, we find that Dr. O's narrative report complies with the law's requirements as a substantive certification of MMI. We would thus readily reverse and render a decision in this case, except for Dr. O's characterization of respondent's impairment rating. The 1989 Act defines "impairment" as "any anatomic or functional abnormality or loss existing after maximum medical improvement that results from a compensable injury and is reasonably presumed to be permanent." Article 8308-1.03(24). "Impairment rating" means "the percentage of permanent impairment of the whole body resulting from a compensable injury." Article 8308-1.03(25). We are simply unable to hold that "no residual impairment" is the equivalent of a zero percentage of permanent impairment of the whole body. We therefore remand this case for further development of the record on this issue, as necessary. We note that appellant's request for review says a TWCC-69 from the designated doctor was filed after the close of the hearing, and we instruct the hearing officer to consider on remand this form and Dr. O's January 6th narrative, along with any other information deemed pertinent to the issue of impairment.

We distinguish this holding from our prior decision relating to impairment rating in Texas Worker's Compensation Commission Appeal No. 92126 (Docket No. redacted), decided May 7, 1992. In that case, we upheld the hearing officer's decision to accept the designated doctor's letter report on MMI and impairment, which assigned a percentage impairment rating. However, in the case at hand, we are unclear as to the meaning of the designated doctor's phrase "residual impairment."

We emphasize with this ruling that we are not attempting to elevate form over substance so as to thwart, rather than implement, the dispute resolution process. The fact that a certification of MMI or a finding of impairment is not on the Commission's form does not, in and of itself, go to its substance as an expert opinion. (The sanction against a health care provider for not properly filing reports may be an administrative violation, assessed under Article 8308-10.07(c)(3)). However, we cannot diminish the value of employing a Commission prescribed form, which is designed to ensure that the requisite information is provided and which, if used in this case, would have satisfied certification requirements and would have spared the appropriate forum from grappling with whether a term is at variance with statutory requirements.

The decision and order of the hearing officer is reversed and the case remanded for an expedited hearing and development and consideration of all appropriate evidence

(including the TWCC-69) on impairment consistent with this opinion.

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Lynda H. Nesenholtz
Appeals Judge

CONCUR:

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Susan M. Kelley
Appeals Judge

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Philip F. O'Neill
Appeals Judge