APPEAL NO. 92594

On October 9, 1992, a contested case hearing was held in (city), Texas, with (hearing officer) presiding as the hearing officer. The issue at the hearing was "What is the impairment rating for (claimant), claimant, for the injury she sustained in the course and scope of employment with (employer), employer, on (date of injury)?" Based on the report of (Dr. O), a designated doctor selected by the Texas Workers' Compensation Commission, the hearing officer determined that the appellant, hereafter the claimant, reached maximum medical improvement on June 16, 1992, with a zero percent whole body impairment rating. He further determined that the respondent, hereafter the carrier, is not liable for impairment income benefits. The claimant complains of certain findings of fact, conclusions of law, and an evidentiary ruling, and contends that her impairment rating should be 18 percent as reported by (Dr. S), whom she claims was a designated doctor agreed to by the parties. The carrier responds that the complained of findings and conclusions are supported by the evidence and requests that we affirm the decision of the hearing officer.

DECISION

The decision of the hearing officer is affirmed.

The claimant testified that she was injured at work on (date of injury). There was very little testimony at the hearing concerning how the claimant was injured at work. Doctors' reports indicated that the claimant said she was injured scrubbing shower floors at work and that she did not fall. The claimant testified that she was initially seen by (Dr. C) who she said diagnosed her as having a "thoracic lumbar sprain." (Dr. C) referred her to (Dr. B) who, according to his progress notes, treated her from February 11, 1991 to November 20, 1991. (Dr. B) diagnosed a lumbar strain. He noted that (Dr. G), a neurologist the claimant saw in June 1991, said that the majority of her pain was muscle and soft tissue related with no evidence of nerve injuries, and further noted that (Dr. L), a chiropractor the claimant saw in November 1991, found some "pelvic obliquity" that appeared to be very mild. (Dr. B) stated in his November progress note that it was his opinion that the claimant has a considerable amount of magnification of her physical symptoms. In a TWCC-69 Report of Medical Evaluation, (Dr. B) certified that the claimant reached maximum medical improvement (MMI) on November 20, 1991 with a five percent whole body impairment rating. In the space on the report for documenting objective laboratory or clinical findings of impairment, (Dr. B) noted only that the claimant was six months post injury and had recurrent spasms. The claimant disputed the report of (Dr. B).

A benefit review conference was held on March 5, 1992. A written BRC agreement of the same date, which was signed by the claimant, the carrier's representative, and the benefit review officer, indicated that the disputed issue and resolution of the issue was as follows:

Disputed Issue: Whether claimant has reached MMI; and what limitations on work ability exist at this time; and whether claimant is entitled to temporary income

benefits; and who treating doctor is to be.

Resolution: (Dr. S) is the designated doctor. Claimant agrees to ask (Dr. S) to fill out Form-69 to inform us if he thinks she has reached MMI. If (Dr. S) says MMI not reached, he is authorized to treat, and is requested to list job limitations. TIBS question to hinge on responses from (Dr. S).

In an undated TWCC-69 form, (Dr. S) failed to fill out Block 14 of the form which asks whether the employee has reached MMI and, if so, what, if any, is the employee's whole body impairment rating. In a letter to the Commission dated March 20, 1992, (Dr. S) stated that he believed that the claimant was suffering from "fibromyalgia" and that it was his opinion that she "probably has reached the maximum benefit at this time." (Dr. S) wrote that he was going to refer the claimant to (Dr. G) or Dr. Lewin for evaluation of impairment rating. There was no indication in the record that the claimant was ever evaluated by either of those doctors and no medical reports from those doctors were in evidence.

In an undated TWCC-69 form, (Dr. Sa) reported that he examined the claimant on April 2, 1992 "for an impairment rating as requested by [the carrier] and (Dr. H)." The claimant said that she had been examined by (Dr. H) in April 1991 (no report from (Dr. H) was in evidence), and that it was (Dr. S), and not (Dr. H), that had referred her to (Dr. Sa). The claimant said that she was referred to (Dr. Sa) by (Dr. S) with the approval of the carrier and the Commission. (Dr. Sa) reported in the TWCC-69 that the claimant had a whole body impairment rating of 18 percent, but he did not indicate whether the claimant had reached MMI. He noted that "I did this impairment rating at the request of the insurance company and (Dr. H). (Dr. H) needs to determine whether she has reached MMI." In the space provided on the form for documenting objective laboratory or clinical finding of impairment, (Dr. Sa) stated "see attached documents for explanation." The explanatory documents were not attached to the copies of (Dr. Sa's) TWCC-69 form which were introduced into evidence by both parties. The claimant testified that the carrier disputed the impairment rating given by (Dr. Sa). On July 17, 1992, (Dr. Sa) wrote the claimant stating that the carrier had referred her to his office for an "independent Impairment Rating Evaluation/Examination, that in his evaluation of her he used a machine that supplies motion testing readings only, and that using the "AMA guidelines", she had an 18% impairment rating of the whole body.

On April 28, 1992, Disability Determination Officer (O) wrote a letter to the claimant and the carrier in which she stated that "Due to the continued dispute over the impairment rating of the above captioned claimant, Texas Workers' Compensation Commission hereby designates (Dr. O) of the (city) Impairment and Disability Evaluation Center to make a final assessment." In a TWCC-69 form, (Dr. O) certified that the claimant had reached MMI on June 18, 1992, and reported that she had a zero percent whole body impairment rating. On the face of the report he wrote "See Attached." Attached to (Dr. O's) report is a three page report from him dated June 16, 1992 along with 24 pages of supporting documents. In his three page report, (Dr. O) set forth his step-by-step evaluation of the claimant and

concluded that "Using the AMA Third Edition Guides as directed by the Texas Workers' Compensation Act, I would have to give this patient a 0% impairment."

As previously noted, the issue to be determined at the hearing was what is the claimant's impairment rating for her injury of (date of injury). The carrier has paid the claimant 32 weeks of impairment income benefits. The claimant contended at the hearing, as she does on appeal, that (Dr. Sa) was a designated doctor whose 18 percent impairment rating is entitled to presumptive weight. The carrier contends that (Dr. S) was a designated doctor but that he failed to assign an impairment rating, that (Dr. Sa) was not a designated doctor, and that (Dr. O) was a designated doctor whose zero percent impairment rating is entitled to presumptive weight.

Under the 1989 Act, if the impairment rating is disputed, the Commission directs the employee to be examined by a designated doctor selected by the mutual agreement of the parties. If the parties are unable to agree on a designated doctor, the Commission directs the employee to be examined by a designated doctor selected by the Commission. If the parties agree on a designated doctor, the Commission must adopt the impairment rating made by the designated doctor. If the Commission selects a designated doctor, the report of the designated doctor has presumptive weight and the Commission must base the impairment rating on that report unless the great weight of the other medical evidence is to the contrary, in which case the Commission must adopt the impairment rating of one of the other doctors. Article 8308-4.26(g).

The hearing officer made the following pertinent findings of fact and conclusions of law:

Findings of Fact

No. 6.Claimant's treating doctor evaluated and examined claimant's lumbar spine and certified claimant reached MMI on November 20, 1991, with a 5% whole body impairment rating.

No. 9.Claimant and carrier entered into a BRC agreement on March 5, 1992, specifically naming (Dr. S) as the designated doctor to complete a Report of Medical Examination (TWCC-69).

No. 10.(Dr. S) submitted a signed and undated Report of Medical Evaluation (TWCC-69) which neither certified claimant had reached MMI nor assigned a whole body impairment rating.

No. 11.Carrier and (Dr. H) referred claimant to (Dr. Sa) for an impairment rating subsequent to March 5, 1992.

No. 12.(Dr. Sa), who was not a designated doctor, evaluated and examined

claimant's thoracic, cervical and lumbar spine on April 2, 1992.

No. 13.Based on his evaluation and examination of claimant, (Dr. Sa) submitted a signed and undated Report of Medical Evaluation (TWCC-69) which did not certify claimant had reached MMI, but assigned claimant an 18% whole body impairment rating.

No. 14.Because (Dr. S) did not comply with the BRC agreement on March 5, 1992, and there was a continuing dispute over the impairment rating assigned to claimant, the Commission designated (Dr. O) as designated doctor on April 28, 1992, to resolve claimant's impairment rating.

No. 17.(Dr. O) submitted a signed and dated Report of Medical Evaluation (TWCC-69) with medical records attached certifying claimant reached MMI on June 18, 1992, to the lumbar spine with a 0% whole body impairment rating.

Conclusions of Law

No. 3.The Report of Medical Evaluation (TWCC-69) submitted by (Dr. S) is not entitled to presumptive weight because he neither complied with the applicable statutes and rules with regard to a designated doctor nor did he comply with the BRC agreement of March 5, 1992.

No. 5.The Report of Medical Evaluation (TWCC-69) submitted by (Dr. Sa) is not entitled to presumptive weight because he was neither a designated doctor nor did he comply with the applicable rules with regard to Report of Medical Evaluation.

No. 6.(Dr. O) was a designated doctor selected by the Commission to resolve the disputed issue, and the Report of Medical Evaluation (TWCC-69) submitted by (Dr. O) is entitled to presumptive weight and must be adopted because the greater weight of the other medical evidence was not to the contrary.

No. 7.Claimant reached MMI on June 16, 1992, with a 0% whole body impairment rating based upon competent objective medical evidence that was independently confirmed by

(Dr. O), the designated doctor, without reliance on the claimant's subjective symptoms.

Having reviewed the record, we conclude that the hearing officer's findings of fact are sufficiently supported by the evidence and that they are not against the great weight and preponderance of the evidence. We further conclude that the findings of fact support the hearing officer's conclusions of law. (Dr. S) was a designated doctor but he failed to assign an impairment rating. The claimant urged that (Dr. Sa) was a designated doctor; however, there is no evidence that the requirements of Rule 130.6 were followed. As we observed in Texas Workers' Compensation Commission Appeal No. 92511, decided November 12, 1992, while an agreement on a designated doctor need not be a signed contract, Rule 130.6(c) plainly requires that any verbal agreement be memorialized in a written letter of confirmation. Moreover, the Commission's confirmation of the agreement is envisioned under Rule 130.6(d). We further observed that, if a designated doctor is not agreed to, but is appointed by the Commission, this is done by order, as described in Rule 130.6(d). Whether (Dr. Sa) was a designated doctor was a fact question to be determined by the hearing officer. The record does not contain an order from the Commission appointing (Dr. Sa) as a designated doctor, nor does the record contain a letter confirming an agreement by the parties to have (Dr. Sa) be a designated doctor. Consequently, we cannot conclude that the hearing officer erred in finding that (Dr. Sa) was not a designated doctor. In any event, (Dr. Sa) specifically declined to certify whether the claimant had reached MMI when he assigned an impairment rating and his report failed to document specific laboratory or clinical findings that an impairment exists. Thus, his report did not meet the requirements of Rule 130.1. The evidence is conflicting as to whether the claimant was referred to (Dr. Sa) by (Dr. H) or by (Dr. S). If (Dr. S) had referred the claimant to (Dr. Sa) for an impairment rating, that referral would not have made (Dr. Sa) a designated doctor because a designated doctor is either agreed to by the parties or is selected by the Commission.

The evidence showed that (Dr. O) was a designated doctor selected by the Commission to resolve the impairment rating dispute and that he assigned a zero percent impairment rating after extensive evaluation. His impairment rating is entitled to presumptive weight under Article 8308-4.26(g) unless the great weight of the other medical evidence is to the contrary. The reports of Drs. (B) and (Sa) are quite bare in regard to their respective documentation of objective clinical findings of impairment, whereas (Dr. O) gave a rather extensive review of his evaluation of the claimant. In addition, (Dr. B), the claimant's treating doctor, noted that the claimant had magnification of her physical symptoms which was borne out in (Dr. O's) evaluation of the claimant. We cannot conclude that the hearing officer erred in determining that the great weight of the other medical evidence was not contrary to (Dr. O's) report.

The claimant requests review of the hearing officer's ruling excluding Claimant's Exhibit 6 from evidence. The claimant said that she had obtained the document, a log of telephone calls of March 9 and March 26, 1992 purportedly made by the disability determination officer concerning the claimant, a week before the hearing but did not

exchange it with the carrier because she thought the carrier would not receive a copy of the document in time for the hearing if she mailed it. The hearing officer determined that the claimant had not shown good cause for not exchanging the document prior to the hearing and excluded it from evidence. Rule 142.13(c) provides that, not later than 15 days after the BRC, parties shall exchange with one another documents which a party intends to offer into evidence at the hearing, and thereafter, parties shall exchange additional documentary evidence as it becomes available. The hearing officer must make a determination whether good cause exists for a party not having previously exchanged such information or documents to introduce such evidence at the hearing. We cannot conclude that the hearing officer abused his discretion in excluding the document from evidence. We also cannot conclude that a different decision would have been reached by the hearing officer if the document had been admitted into evidence.

The claimant included with the request for review a number of documents, some of which were made a part of the hearing record and some of which were not. Since our review of the evidence is limited to the record developed at the hearing, we have not considered those documents included with the request which were not made a part of the hearing record. Article 8308-6.42(a)(1); Texas Workers' Compensation Commission Appeal No. 92092, decided August 6, 1992. In any event, we believe that such documents would not have affected the result of the hearing.

The decision of the hearing officer is affirmed.

Robert W. Potts
Appeals Judge

CONCUR:

Joe Sebesta
Appeals Judge

Thomas A. Knapp
Appeals Judge