APPEAL NO. 92613

This appeal arises under the Texas Workers' Compensation Commission Act of 1989 (1989 Act), TEX. REV. CIV. STAT. ANN. arts. 1.01 through 11.10 (Vernon Supp 1992). On October 6, 1992, a contested case hearing was held in (city), Texas, with (hearing officer) presiding. He determined that respondent, claimant herein, reached maximum medical improvement (MMI) on May 7, 1992 with 25% impairment, as reported by the designated doctor. Appellant, carrier herein, asserts that the designated doctor's report is invalid because it indicates that the impairment rating is an estimate, and it does not reference specific body parts and their ratings. In addition, the carrier says that an issue was raised as to whether the designated doctor used the correct guidance (Article 8308-4.24 of the 1989 Act) for assigning an impairment rating. Claimant responded in essence that the designated doctor's report was valid and that the carrier did not adequately follow applicable rules in order to determine whether the correct guidance was used; he requests that the decision be affirmed.

DECISION

Finding that the designated doctor's report does not adequately state an impairment rating or the basis for the rating given, we reverse and remand.

Claimant is an employee of (employer) who tripped over some pipe and fell backward onto a valve that struck him on the lower back on (date of injury). The issues for this hearing were framed as "has claimant reached maximum medical improvement" and "is the impairment rating assigned by the designated doctor correct." The first issue was later redefined to include a question as to the date of MMI--if claimant had reached it. Medical records indicate claimant saw Dr. K between (month year) and February 1992, although claimant recalls that he began to see Dr. K in March of 1991. In February 1992, Dr. K found claimant had reached MMI with no impairment. Claimant disputed that report. While the hearing officer did not take notice of the order appointing Dr. F as a designated doctor, he did take notice of the benefit review conference (BRC) report. The BRC was held on August 12, 1992, and the disputed issue page of that report shows that the Commission selected Dr. F as the designated doctor. (The BRC report also indicates that Dr. K was the treating doctor.)

At the hearing, the carrier moved for a continuance in order to take the deposition of Dr. F. The hearing officer denied that request, pointing out that he had also denied the carrier's request dated August 31, 1992 for permission for additional discovery. The hearing officer said that he perceived the August request to be in regard to a deposition of Dr. F but that such was not spelled out. When a call to the carrier's attorney about the matter was not returned, the hearing officer said he then sent an order, on September 11, 1992, denying the "request for permission to take the doctor's deposition by written questions." The hearing officer continued by stating that the carrier had not complied with Tex. W. C. Comm'n, 28 TEX. ADMIN. CODE § 142.13 (Rule 142.13) because no attempt to obtain the information voluntarily was shown. Rule 142.13(a) was quoted as saying, "(i)f

the evidence is not produced voluntarily, the party may request a subpoena." (The complete sentence from which the above quote was made, reads, "(i)f the evidence is not produced voluntarily, the party may request a subpoena, as provided in § 142.12 of this chapter [relating to Subpoena].") Before reviewing Rule 142.12, Rule 142.13(b) is pertinent also and provides as follows:

> Sequence of discovery. Parties shall exchange documentary evidence in their possession not previously exchanged, as described in subsection (c) of this section, before requesting additional discovery by interrogatory, as described in sub-section (d) of this section, or deposition, as described in subsection (e) of this section. Additional discovery shall be limited to evidence not exchanged, or not readily derived from evidence exchanged.

As is evident, Rule 142.13(b) imposes no condition that a request for deposition must be preceded by a showing that a request was made to the subject and was rejected. Similarly, Rule 142.13(d) and (e) which relate to interrogatories and depositions, do not require a showing that a request to the subject was first made. Rule 142.13(e) in setting forth the request for a deposition, does refer to Rule 142.12, as did Rule 142.13(a).

Rule 142.12(c) says, "(r)equest for subpoena. A party may request a subpoena in the following manner:" This subsection then lists five requirements for the request; none address a need to show, or even reference, a prior request to the subject to voluntarily provide the information in question. (Another subsection, Rule 142.12(d) does specify an alternative to the issuance of a hearing subpoena.) In contrast to interpreting Rule 142.13(a) as requiring a party to show its prior effort to request information, this subsection can be reasonably interpreted as explanatory of a possible remedy if documentary evidence was not freely exchanged. This interpretation is consistent with the provisions of Rule 142.12, which require no showing that a prior request was made to the subject before seeking a subpoena.

The hearing officer may have acted arbitrarily if he denied the motion for discovery as a result of his imposition of additional requirements not contained in rules applicable to discovery. However, the hearing officer could have denied the request for discovery on other valid grounds. As a result, the hearing officer's discussion of the motion will be examined further to see if there was a valid reason to deny. His decision also says that the request for additional discovery dated August 31, 1992, was "probably a little premature." He states, "whether or not I have jurisdiction in them (contested case hearing) really depends on them being set in (city) with an official time. This motion was made during the time between the Benefit Review Conference and before the Hearings In Review (sic) had issued the Benefit Review Conference report." (The cover letter which distributed the BRC report was dated September 28, 1992 and shows that the hearing was scheduled for October 6, 1992.) The hearing officer also observed that the proposed written interrogatories included very limited inquiry into the question of whether the doctor had used the correct statutory guidance by saying, "I really believe that the manner in which you have offered to take (Dr. F's) deposition is designed and calculated to torture the designated

doctor to a large degree with questions about where he went to school and what his license is and that thing." Finally, the hearing officer referred to carrier's request for additional discovery in August 1992, as incorrectly referencing the rules as "Rule 142.13, Section 6.33(f)." None of these matters discussed by the hearing officer appears to be a valid reason under the applicable rules to deny the motion for discovery, which was described as a deposition of the designated doctor, but as will be shown subsequently, a basis for remand exists even without the questionable denial of discovery. Before moving to the basis for remand found in the Report of Medical Evaluation, TWCC Form 69 of the designated doctor, we would point out that the person sought to have been deposed is the doctor designated by this Commission; his opinion is often given presumptive weight in regard to payment of benefits. The deposition was to have addressed a matter not disclosed in forms provided by the Commission or in the body of the doctor's opinion--whether the doctor used the statutorily required criteria as a basis for impairment. The Appeals Panel in Texas Workers' Compensation Commission Appeal No. 92393, dated September 17, 1992, has said that a hearing officer's decision should not have required evidence that a designated doctor used the correct criteria when that issue was not raised at the hearing. No Appeals Panel decision has said that an inquiry as to whether the correct criteria was used by the designated doctor cannot be raised in a timely manner.

The TWCC Form 69 prepared by the designated doctor and his narrative summary do not provide sufficient data in one area and provide conflicting data in another. Both points were raised in argument at the hearing. First, no information in item 15 of the TWCC 69 is provided. This absence would not be noteworthy if the information were provided in the attached narrative summary. It is not. Item 15 provides for ratings to be set forth for various body parts. The designated doctor, both on the TWCC Form 69 and in his narrative refers to different problems with the claimant's back: one in the cervical area and two in the lumbar area. Guides to the Evaluation of Permanent Impairment, Third Edition, American Medical Association, (Guides) provide at "Table 49. Impairments Due to Specific Disorders of the Spine" that different percentages of impairment occur within different parts, such as cervical and lumbar. In addition, the impairment amounts within each part depend on several factors, such as whether a fracture or spondylolysis is evident. Without a breakdown based on body parts, an overall figure, such as 25% in this case, is difficult to examine. In addition, providing ratings for body parts enables the hearing officer to determine whether the designated doctor then applied the Combined Values Chart which factors in the ratings for body parts to get the overall impairment rating. *See* pp. 72-74 of the Guides.

Based on the designated doctor's "Impression" on page 3 of his narrative summary, there is also some doubt whether all the problems the doctor examined were "based on the compensable injury alone." The doctor states in regard to a fracture, "could be related to head strike." When the case is considered on remand, the designated doctor should be given an opportunity to properly certify MMI and impairment. (*See* Texas Workers' Compensation Commission Appeal No. 92335, dated August 28, 1992). The request to the designated doctor should emphasize the requirement for relationship to the compensable injury not just for the fracture but also as to the degenerative disc and

spondylolysis specified in the doctor's report.

Finally, the TWCC 69, in item 14, says that impairment is 25% with a date of MMI of May 7, 1992. The narrative summary carries the same date, May 7, 1992, so there is no reason to infer that one was prepared at a time different from the other. The summary says, "(i)mpairment ratinng (sic) based on two level lumbar disease and one level cervical disease would be anticipated at approximately 25%. Will await completion of FCE and MMPI for a more definitive assessment." While the TWCC Form 69 appears to set forth a firm percentage rating, the summary is in conflict by providing an "anticipated" rating. Texas Workers' Compensation Commission Appeal No. 92198, dated July 3, 1992, has stated that an estimated or expected date of MMI is not a date that MMI was reached. We see no basis for deviating from that standard and upholding an "expected" impairment rating--when, as here, a question of whether such language constitutes an impairment rating is raised at the hearing. *Also See* Texas Workers' Compensation Commission Appeal No. 92193, dated July 2, 1992, which found impairment unanswered in a report of medical examination which said, "little or no impairment."

The decision is reversed and remanded for the expedited development of evidence from the designated doctor to include his identification of the guidance he used in approaching the question of impairment, what ratings he assigned to body parts as per item 15 of the TWCC 69 and his method of combining those ratings, whether his ratings all pertained to the compensable injury, and whether he assigned an overall rating or only anticipated a rating. Based on these questions, his impairment rating under the Guides may or may not be different from that found in item 14 of the TWCC 69. Reconsideration and additional or different findings may be appropriate, consistent with this opinion, based on the information forthcoming from the designated doctor. Pending resolution of the remand, a final decision has not been made in this case.

Joe Sebesta
Appeals Judge

CONCUR:

Lynda H. Nesenholtz
Appeals Judge

Thomas A. Knapp
Appeals Judge