APPEAL NO. 93001

This appeal arises under the Texas Workers' Compensation Act of 1989 (1989 Act), TEX. REV. CIV. STAT. ANN. arts. I.01 through 11.10 (Vernon Supp 1992). On October 26, 1992 a contested case hearing was held to determine the impairment rating of respondent, claimant herein, and to determine whether claimant committed an administrative violation by missing four designated doctor's appointments. (hearing officer) conducted the hearing in (city), Texas. He ordered claimant, on October 26, 1992, to be evaluated by the designated doctor before a decision would be rendered. With apparent agreement on the record for the hearing officer to receive the "agreed designated doctor's" report and compose a decision without resort to another hearing session, the hearing officer on December 2, 1992, determined that claimant had a 15 percent impairment. He also concluded that any administrative violation should he handled under Article 10 of the 1989 Act. Appellant, carrier hereafter, asserts that the designated doctor's report reached an impairment rating through erroneous calculations. Claimant did not respond to the appeal.

DECISION

Finding that the designated doctor's report is not sufficiently complete because it does not state ratings for various body parts upon which total body impairment is based and having received evidence on appeal that should be presented to the hearing officer, we reverse and remand.

Claimant was injured on (date of injury) when, in the course of breaking concrete, he lifted a large piece of broken concrete and hurt his back. Carrier paid benefits. Claimant's treating doctor, (Dr. D), found maximum medical improvement on January 8, 1992 with 15 percent impairment. Carrier disputed the impairment rating. One letter from the carrier to the Texas Workers' Compensation Commission (Commission) indicated that a Commission letter dated May 1, 1992 notified claimant that the Commission selected (Dr. G) as the designated doctor. A hearing officer's exhibit, however, indicates that at a Benefit Review Conference dated May 20, 1992, both parties agreed in writing, and so signed, that Dr. G render an impairment rating. During the course of the hearing, the hearing officer questioned claimant as to whether he still agreed to Dr. G as a designated doctor to assess an impairment rating, and claimant said "yes" through the interpreter. Carrier did not object to characterizing Dr. G as the "agreed designated doctor."

Much of the hearing concerned itself with the reasons why claimant did not attend appointments with the designated doctor. Since that issue was not raised on appeal, it will only be referred to in passing because the missed appointments led to this hearing and were the basis for the hearing officer to order the claimant to attend the next appointment that could be scheduled with the designated doctor, Dr. G.

Article 8308-4.26(g) provides that the impairment rating of a designated doctor agreed upon by the parties will be adopted by the Commission. That requirement was said, in Texas Workers' Compensation Commission Appeal No 92608, dated December 30,

1992, to prevent the Commission from considering medical evidence to the contrary. Texas Workers' Compensation Commission Appeal No 92469, dated October 15, 1992, affirmed a hearing officer's decision which considered an initial rating by the agreed designated doctor and did not limit "adoption" to just the final explanation of his rating given by that doctor.

The above decisions do not indicate that the Commission must accept (adopt) the whole body impairment rating of an agreed designated doctor irrespective of how he arrived at it or irrespective of how thorough his report was. In this instance the narrative report of the designated doctor, showing that claimant was seen on November 19, 1992, is stamped as arriving at the Commission on December 1, 1992, with a signed TWCC Form 69 arriving on December 4, 1992. The hearing officer signed his decision on December 2, 1992 with no indication that the parties had received the designated doctor's report and been permitted to respond to it. The carrier in its appeal states that it received a copy of the designated doctor's report on December 7, 1992. Had a period of time been specified for comment by the parties regarding the designated doctor's report prior to the decision, this remand may have been avoided.

Clearly, the designated doctor's report was not available to carrier at the time of the hearing. While the carrier knew this evidence would be available in the future, it did not know of the problems within the designated doctor's report. Neither the designated doctor's report, nor the information obtained about it from the doctor by the carrier, is cumulative of evidence at the hearing. In addition, the report, and the doctor's explanation of it, are material and could affect the decision. There appears to be no lack of diligence on the part of the carrier in providing this information.

The carrier asserts that the report and the doctor's explanation show that the 15 percent total body impairment was miscalculated and should have been a total body impairment of 14 percent. Neither the form nor the narrative of the designated doctor's report specifies what ratings were given for various body parts. In Texas Workers' Compensation Commission Appeal No. 92613, dated December 28, 1992, the Appeals Panel said, "(w)ithout a breakdown based on body parts, an overall figure, such as . . . 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." That decision reversed and remanded, in part, because of the failure to provide body part ratings as called for in item 15 of the TWCC Form 69.

The hearing officer is the sole judge of the evidence. *See* Article 8308-6.34(e) of the 1989 Act. The case must be reversed and remanded to enable him to determine what, if any, effect the absence of body part ratings in this designated doctor's report should have on the determination of this case. In addition, the 1989 Act and rules of the Commission

may allow him to admit evidence from the designated doctor and the appropriate AMA Guides to the Evaluation of Permanent Impairment relevant to his determination of what total body impairment rating should be adopted. *See* Article 8308-4.24. Reconsideration and additional or different findings may be appropriate, consistent with this opinion, based on the evidence admitted by the hearing officer.

Pending resolution of the remand, a final decision has not been made in this case.

Joe Sebesta
Appeals Judge

CONCUR:

Robert W. Potts
Appeals Judge

Philip F. O'Neill
Appeals Judge