APPEAL NO. 93040

This appeal arises under the Texas Workers' Compensation Act, TEX. REV. CIV. STAT. ANN. art. 8308-1.01 *et seq*. (Vernon Supp. 1993) (1989 Act). On December 11, 1992, a contested case hearing was held in (city), Texas, with (hearing officer) presiding as hearing officer. The hearing officer determined that the appellant, claimant herein, reached maximum medical improvement (MMI) on September 18, 1992 with a zero percent whole body impairment rating.

Claimant disagrees with the impairment rating and requests that we "grant" the treating doctor and first designated doctors' impairment rating of "25 to 50 percent." Respondent, carrier herein, responds that the decision is supported by the evidence and requests that we affirm the decision.

DECISION

The decision of the hearing officer is reversed and remanded for the development of appropriate evidence, if any, and reconsideration not inconsistent with this opinion.

Carrier in its response objects to claimant's appeal because claimant ". . . has failed to clearly and concisely rebut each of the issues and to state the relief which [claimant] seeks by way of appeals panel review." Carrier, although not citing a particular statutory section or rule, is clearly referring to Article 8308-6.41(b) and Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 143.3 (Rule 143.3). We have repeatedly held that no particular form of appeal is required and that an appellant's appeal, even though terse, or inartfully worded, will be considered. *See* Texas Workers' Compensation Commission Appeal No. 91131, decided February 12, 1992, Texas Workers' Compensation Commission Appeal No. 92081, decided April 14, 1992, Texas Workers' Compensation Commission Appeal No. 92292, decided August 17, 1992, and Texas Workers' Compensation Commission Appeal No. 92079, decided April 14, 1992. The issue claimant is appealing in this case is clear and was stated many times. Claimant does not agree with the zero percent impairment rating of Dr. Osborne. Carrier has not, in any way, been prejudiced or mislead as to the issue being appealed. Carrier's contention is without merit.

The disputed issues presented and agreed upon by claimant and carrier at the benefit contested case hearing for resolution were:

1.Has Claimant reached maximum medical improvement for the injury he contended he sustained on (date of injury), with Employer?

2.If so, what date did Claimant reach maximum medical improvement?

3.Did Claimant have an impairment as a result of the injury he contended he sustained on (date of injury), with Employer?

4.If so, what is Claimant's correct impairment rating?

As indicated above, the hearing officer, in response to the first two issues, found that MMI was reached on September 18, 1992. This finding was not appealed and consequently the hearing officer's decision on MMI is considered correct and will not be addressed in this opinion.

The facts, as found by the hearing officer and supported by the testimony and evidence, are fairly straight forward. Claimant, at the time, was a 52-year-old machinist employed by (employer) to design specialized oil field equipment utilizing a turret lathe which had carbide tipped blades and required chemical coolants and oils when in use. Claimant testified he had worked for this employer since October 1, 1990. Before that time, he had worked as an air conditioning maintenance helper and had not always strictly been a machinist. In his job for the employer, claimant testified coolants sometimes splatter on his hands and legs. On May 6, 1992, claimant developed a reaction on his hands and body, reported the reaction to his supervisor and was sent, claimant states, to the (Clinic) where he was seen by (Dr. NJ). Dr. NJ and Dr. D (Dr. WW) at the Clinic saw him once or twice more before claimant sought out (Dr. RW), a dermatologist in (city). Dr. RW began tests and treated claimant before referring claimant to (Dr. RG), a board certified dermatologist. Eventually it was determined that claimant suffered from contact dermatitis caused by Oakite, Seco II and nickel (hereinafter referred to as offending chemicals). Claimant stated he returned to work for the employer approximately 60 days between (date of injury) and August 1991 and has not worked since. Claimant acknowledged that when he was not working in the machine shop and when he did not come in contact with the offending chemicals, or diesel fuel, his medical condition improved. Claimant further testified that he was also allergic to certain metals which contain nickel and that Dr. RG had recommended he not use metal flatware to eat, and that he had to take certain precautions around the home. Claimant acknowledged that when he used the prescribed medications (creams for his hands and face) his contact dermatitis subsided and claimant could continue his daily activities.

Dr. RG, the principal treating physician, submitted reports and records dated October - November 1991, a January 20, 1992 report, and a February 10, 1992 letter to carrier. Dr. RG, in the January 22, 1992 report, states using the AMA "edition of Guides to Evaluation of Permanent Impairment Third Edition Revised" he believes claimant to be in "class 3" category with an impairment of 25-50 percent and "the whole body rating would be, for the time being, 50 percent pending job retraining."

By letter dated May 14, 1992, the Texas Workers' Compensation Commission (Commission) designated F.A.A.D. (Dr. SG), "to clarify maximum medical improvement and impairment rating." Dr. SG submitted a signed Report of Medical Evaluation (TWCC-69) and attached a signed and dated medical report dated June 4, 1992. Dr. SG states:

> I think the patient probably has reached his maximum medical improvement as it has been one year now since his original problem began. . . . it is very difficult in daily life to avoid contact with nickle. (sic) He has been counseled to modify his lifestyle to avoid contact with nickel at home in his daily activities as well as work and avoiding nickel ingestion through cooking with metal pots, etc.
>
> There is no further objective evidence of his impairment . . .
>
> His impairment rating, I would think, best fit (sic) class III finds 25-50% because signs and symptoms of his disorder are still present and will require continous (sic) treatment and there are limitations of many of the activities of daily living. He certainly can not go back to work as a machinist, as it would be impossible to avoid the contact with nickel and coolants. Therefore I think he would rate about a 50% impairment, however he certainly can not go back to do his regular job and impairment of his ability to earn a living would also depend on whether he could be retrained for another job. Therefore, even if there is not whole body impairment, he is certainly 100% impaired as far as doing his regular job.

The carrier responds to Dr. SG's report by letter dated July 29, 1992 to the Commission stating:

> This letter is in reference to the above claim. You designated a doctor on this file. The doctor's name was Dr. S G. The appointment was on June 4, 1992. However, the doctor did not give a specific date of MMI. Secondly, the doctor did not give us a specific impairment rating. This report was sent to you on June 24, 1992.
>
> Now what do we do? Please advise as to the next step. Should <u>we</u> designate another doctor? (Emphasis added)

Carrier then writes "CIDEC" (the testimony was this probably meant the Dallas Impairment and Disability Evaluation Center) and the claimant advising them of the date, time, and purpose of claimant's appointment to be examined by another doctor. Carrier's letter to the claimant states that ". . . an appointment . . . has been scheduled for [claimant] by . . . the Texas Workers' Compensation Commission." Although there is nothing in the record documenting the appointment of (Dr. PO) by the Commission as a designated doctor or for what purpose, the benefit review officer and hearing officer both describe Dr. PO as the designated doctor and this is not disputed by claimant.

Dr. PO subsequently submitted a TWCC-69 and a detailed narrative dated

September 18, 1992 referencing the AMA Guides and assigning MMI as of September 18, 1992 and assessing a zero percent impairment rating. The hearing officer found (Finding of Fact No. 13) that because Dr. SG, the first designated doctor, "did not comply with her duties and responsibilities," another designated doctor was appointed. In Conclusion of Law No. 2 the hearing officer determined that the report of Dr. SG ". . . is not entitled to presumptive weight because the greater weight of the medical evidence is to the contrary." The hearing officer went on to accord Dr. PO's, the second designated doctor, report ". . . presumptive weight and must be adopted because the greater weight of the other medical evidence is not to the contrary." Claimant appealed, disagreeing with the zero percent impairment rating of Dr. PO and asks for the impairment ratings assessed by Dr. RG and Dr. SG be rendered.

Although there is some Texas case law regarding contact dermatitis, including TEIA v. Turner, 634 S.W.2d 364 (Tex. App.-Waco 1982, no writ) cited in Texas Workers' Compensation Commission Appeal No. 91002, decided August 7, 1991, that case and others merely indicate that contact dermatitis is compensable as an occupational disease. TEIA v. Turner, *supra*, was a case where the worker became allergic to chromate in cement and "cement dermatitis is not the especially common type contact dermatitis that we see." The same can be said in the instant case where a contact dermatitis to certain coolants and nickel is not a common type of dermatitis. As the carrier is not contesting compensability, we do not need to address this issue further.

We also note, to avoid any possible confusion in this case, the partial copy of the AMA Guides to the Evaluation of Permanent Impairment, Third Edition, furnished to claimant by Dr. GR, is the "Revised" edition and is not the edition mandated by the Legislature in Article 8308-4.24. Further ratings should be in accordance with Chapter 13 of the edition mandated by section 4.24.

The initial problem with this case is the appointment of two designated doctors. We note that the appointment of multiple designated doctors to render opinions on the same issue does not appear to have been contemplated by the 1989 Act, given the presumptive weight to be accorded to the designated doctor's opinion. This is not to say, and we do not hold, as a matter of law, that a second appointment could never be made. In a factual situation, where a first designated doctor is unable or has declined to assign an impairment rating, the appointment of a second designated doctor may be proper.

We further note that, if a designated doctor is not agreed to, but is appointed by the Commission, this is done by order, as described in Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 130.6 (Rule 130.6). If Dr. PO was so appointed it is not evident in the record. While the letter appointing Dr. SG is in the record, the circumstances appointing Dr. PO are at best unclear. The record reflects a letter from the carrier to the Commission, after receipt of Dr. SG's report, saying "[n]ow what do we so? Please advise as to the next step.

Should we designate another doctor?" (Emphasis added) It is imperative that the Commission be perceived as being totally fair and impartial. While we do not attribute bad motives to any of the parties, a perception that the carrier is appointing the designated doctor might arise in this fact situation. This perception might be further advanced when the only evidence regarding scheduling the appointment with the second designated doctor is in the form of letters from the carrier to the doctor and the claimant. We have held in Texas Workers' Compensation Commission Appeal No. 92595, decided December 21, 1992, direct contact between the Commission and its appointed designated doctor serves to discourage unilateral contacts which could serve to undermine the perception that the designated doctor is impartial. *Also see* Texas Workers' Compensation Commission Appeal No. 92511, decided November 12, 1992.

A further problem is one of presumptive weight. The hearing officer recites that Dr. SG's report "is not entitled to presumptive weight because the greater weight of the medical evidence is to the contrary." In fact, the only medical evidence to the contrary, on the issue of impairment, is that of Dr. PO, the second designated doctor, whose report the hearing officer accorded "presumptive weight and must be adopted because the greater weight of the other medical evidence is not to the contrary." It therefore appears that we have two designated doctors and the hearing officer gives greater credence to one by saying the other (first) designated doctor's opinion is contrary to the second designated doctor's report and thereby is contrary to the great weight of other medical evidence. In fact, there is other medical evidence in the form of Dr. RG's reports, which tend to support Dr. SG's opinion rather than Dr. PO's.

While we do not disagree with the hearing officer that the report submitted by Dr. SG, the first designated doctor, is not sufficiently definite for use, rather than summarily discarding the report, at what appears to be the request of the carrier, some effort should be made by the Commission to clarify the report. The language we used in Appeal 92595, *supra*, precisely fits this situation and is quoted as follows:

> The use of a designated doctor is clearly intended under the Act to assign an impartial doctor to finally resolve disputes over MMI and impairment rating. As we noted recently in Texas Workers' Compensation Commission Appeal No. 92570, decided December 14, 1992, it is important to realize that the designated doctor, unlike a treating doctor or a doctor for whom a carrier seeks a medical examination order under Article 8308-4.16, serves at the request of the Commission. We believe that it is the responsibility of the Commission, and not of either of the parties, to ensure that the designated doctor completes the TWCC-69 form or otherwise supplies the information required under Texas Workers' Compensation Commission Rules, 28 TEX. ADMIN. CODE § 130.1 (Rule 130.1). If information is nevertheless missing or unclear by the time that the contested case hearing officer is asked to

evaluate the designated doctor's report, it is appropriate for the hearing officer, in carrying out his or her responsibilities to fully develop the facts required, in accordance with Article 8308-6.34(b), to seek that additional information.

As indicated, we do not say a second appointment of a designated doctor can never be made, but we do advance the proposition that when a designated doctor submits a report which is unclear or does not contain the required information, some effort be made by the Commission to seek clarification or obtain the required information before appointing another designated doctor.

We would note that impairment as defined by the 1989 Act, does not mean the inability to return to claimant's preinjury job. Article 8308-1.03(24) defines impairment as any anatomic or functional abnormality or loss existing after MMI that results from a compensable injury and is reasonably presumed to be permanent. Under this definition claimant's inability to return to work as a machinist, or to be retrained for another job, is not a consideration to be used in determining the impairment rating. The items to be considered, in this case where it is undisputed that contact dermatitis is present, are whether the anatomic or functional abnormalities or loss (contact dermatitis) is permanent, requires treatment, and whether there are limitations, if any, in the performance of claimant's activities of daily living, as set out in section 13.6 of the AMA Guides. Impairment of claimant's "ability to earn a living" or being "retrained for another job" is not a consideration for a Texas Workers' Compensation Commission impairment rating in this case.

Consequently, we reverse and remand for the development of further evidence, including a request for Dr. SG to provide a more definitive impairment rating, given an MMI date of September 18, 1992. Dr. SG should be provided with all medical tests, medical records and medical reports previously performed and prepared by claimant's health care providers regarding claimant's possible impairment, if any, due to his contact dermatitis. The doctor should be advised that inability to return to claimant's old job or retraining for a new job are not factors which should be considered in assessing impairment. Dr. SG should be requested to provide a specific percentage rating (to include zero percent if thought appropriate) instead of a percentage range. Dr. SG is also to be provided with a copy of the AMA Guides, mandated in Article 8308-4.24, particularly Chapter 13. Only if it is evident that Dr. SG cannot, or will not, comply with the 1989 Act, should consideration be given to the appointment by the Commission of another designated doctor (which in this case has already been done).

Pending resolution of the remand, a final decision has not been made in this case. However, since reversal and remand necessitates the issuance of a new decision and order by the hearing officer, a party who wishes to appeal from such new decision must file a request for review not later than 15 days after the date on which such new decision is received from the Texas Workers' Compensation Commission's division of hearings,

pursuant to Article 8308-6.41. *See* Texas Workers' Compensation Commission Appeal No. 92642, decided January 20, 1993.

Thomas A. Knapp
Appeals Judge

CONCUR:

Robert W. Potts
Appeals Judge

Susan M. Kelley
Appeals Judge