APPEAL NO. 931095

This appeal is brought pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act) (formerly V.A.C.S., Article 8308-1.01, *et seq*.). A contested case hearing (CCH) was held on October 19, 1993, in (city), Texas, with the record closing on November 12, 1993. (hearing officer) presided as hearing officer. The issues at the hearing were maximum medical improvement (MMI) and impairment rating (IR). The hearing officer decided that in accordance with the report of the agreed designated doctor, the appellant (claimant) reached MMI on September 23, 1992, with a zero percent IR. The claimant disagrees with the hearing officer's decision. The respondent (carrier) responds that the decision is supported by the evidence.

DECISION

The decision of the hearing officer is affirmed.

The claimant sustained a compensable injury to his left hand and right elbow. The date of injury was (date of injury). (Dr. S), the claimant's treating doctor, referred the claimant to (Dr. C) for examination. On June 15, 1992, Dr. C stated that he did not recommend any further medical treatment and that the claimant did not have any permanent impairment of a significant degree. On September 3, 1992, Dr. S completed a Report of Medical Evaluation (TWCC-69) in which he certified that MMI was reached on July 30, 1992, with a 23% IR. Subsequently, on September 8, 1993, Dr. S reduced the IR to five percent by eliminating any rating for sensory deficit or pain in the right median nerve. His explanation for the change was: "I am not really sure that median nerve involvement can be included in his current impairment rating."

By letter of August 20, 1992, to the Texas Workers' Compensation Commission (Commission) the carrier disputed Dr. S's first impairment rating. In an August 28, 1992, letter to the claimant with a copy to the carrier, the Commission advised the parties of the dispute and directed the parties to attempt agreement on a designated doctor. The parties were also advised that the report of an agreed designated doctor regarding IR would be binding on the parties (Section 408.125(d)) and, absent an agreement, the Commission would appoint a designated doctor. By letter of September 22, 1992, to the Commission, the carrier stated:

This is to notify you that I, along with [claimant's attorney], have agreed on [Dr. G] as the designated doctor to determine the MMI date & I.R.

The letter included the name of the claimant, the insured, the date of injury and the claimant's social security number. On the same date (September 22, 1992), the claimant's attorney also wrote the Commission as follows:

Please be advised that [Dr. G] has been mutually agreed to as the designated doctor in this matter. Arrangements have been made for the evaluation.

Dr. G examined the claimant on September 23, 1992, and in a TWCC-69 certified that the claimant reached MMI on September 23, 1992, with a zero percent IR. Dr. G

provided a narrative report with his TWCC-69.

At the hearing the claimant testified that he hired his attorney in August 1992 to represent him in all matters in connection with his workers' compensation claim. He stated the relationship ended in December 1992 when the attorney withdrew from representation. The claimant does not argue that his attorney had no authority to commit and agree to a designated doctor. Rather he asserts that he did not "understand everything about what [Dr. G] was to do," and that the "agreement" did not comply with Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 130.6 (c) and (d). (Rule 130.6 (c) and (d)).

Rule 130.6(c) states that if the claimant and carrier agree on a designated doctor, the carrier "shall, within ten days, send a confirmation letter to the employee, with a copy to the commission." The confirmation letter must include:

(1)the workers' compensation number assigned to the claim by the commission;

(2)the employee's name, address, and social security number;

(3)the date of the injury; and

(4)the designated doctor's name, business address, and telephone number, and the time and date of the examination.

Rule 130.6(d) requires that the Commission contact the worker "to confirm the agreement." If the Commission is not notified within 10 days that an agreement is reached, the Commission will then choose a designated doctor.

The Appeals Panel has in the past addressed the importance of Rule 130.6 in determining whether in fact the parties reached agreement on the selection of a designated doctor. *See, e.g.* Texas Workers' Compensation Commission Appeal No. 92511, decided November 12, 1992; Texas Workers' Compensation Commission Appeal No. 92312, decided August 19, 1992, and Texas Workers' Compensation Commission Appeal No. 93170, decided April 22, 1993. In Texas Workers' Compensation Commission Appeal No. 92511, *supra*, we stated: "[w]hile an agreement on a designated doctor need not be a signed contract, Rule 130.6(d) plainly requires that any verbal agreement be memorialized in a written letter of confirmation."

The claimant in this case was represented by an attorney at the time the agreement was entered into. In addition, the evidence clearly shows that the claimant was informed by the Commission by letter of August 28, 1992, that there was a dispute about MMI and IR and that "[t]o resolve the . . . dispute, the (claimant) and (carrier) shall contact one another and attempt to agree on a 'designated doctor.' . . . <u>If the parties agree on a designated doctor then that doctor's findings shall be adopted by the Commission</u>." (Emphasis in original) Writings confirming an agreement on a designated doctor were sent to the Commission by the carrier and the claimant's attorney on September 22, 1992, one day

before the examination by Dr. G. As is pointed out by the carrier's attorney both at the hearing and in his response to the claimant's appeal, these letters when combined, contain all the necessary information except Dr. G's business address, telephone number, and the time and date of the examination. However, there is no dispute that the claimant met with Dr. G and submitted to an examination. Because the examination took place one day after the date of the letters to the Commission, it is not surprising that the Commission did not send a letter to the claimant confirming the appointment. Based on his evaluation of the evidence presented, the hearing officer found as a matter of fact that "[t]he Claimant and Carrier agreed that [Dr. G] would serve as an agreed designated doctor to resolve the disputes (MMI and IR)."

In his appeal, the claimant contends that he "did not understand everything about what [Dr. G] was to do." He also states that he did not get a copy of an unspecified letter the carrier sent to his attorney; that this letter did not contain all the information specified in Rule 130.6; that the Commission did not confirm the agreement; and that he never got to talk to an ombudsman. Since the claimant doesn't specify what letter from the carrier to his attorney he is referring to, there is nothing for us to review on appeal in regard to his assertion that he didn't get a copy of the letter. As noted above, it is important that Rule 130.6 be substantially complied with in all cases. And, failure to comply with the listed requirements carries a risk that a purported agreement will not be given effect. However, a confirmation letter from the Commission is not always essential in order to find that the parties reached an agreement on a designated doctor where correspondence from the parties confirms that such an agreement was made. Texas Workers' Compensation Commission Appeal No. 92312, *supra*. In this case, both the claimant's attorney and the carrier confirmed with the Commission that an agreement had been reached regarding a designated doctor, and these written confirmations from the parties constitute sufficient evidence in this case to support the finding that Dr. G was an agreed designated doctor.

We observe that Rule 130.6(b) provides that the Commission shall inform an "unrepresented" employee that an ombudsman is available to explain the contents of the agreement for a designated doctor. Here, the claimant was represented by an attorney at the time the agreement was made. We believe that in this case, the Commission was entitled to rely on claimant's attorney to not only advise the claimant of his rights under the 1989 Act and implementing rules, but to make representations to the Commission and carrier that were binding on the claimant. *See* Texas Employers Insurance Association v. Wermske, 349 S.W.2d 90 (Tex. 1961). There is no evidence that the claimant lacked counsel in arriving at the agreement and there is no requirement that the Commission afford him assistance from an ombudsman to explain the contents of such an agreement when he is already represented by an attorney. Rule 130.6(b); *see also* Appeal 93170, *supra*. We therefor agree with the hearing officer that there was sufficient evidence of an agreement by the parties for Dr. G to serve as the designated doctor. His decision is not so against the great weight and preponderance of the evidence as to be clearly wrong and manifestly unjust. Atlantic Mutual Insurance Company v. Middlemen, 661 S.W.2d 182 (Tex. App.-San Antonio 1983, writ ref'd n.r.e.).

At the hearing, the claimant argued that there was no evidence that Dr. G used the Guides to the Evaluation of Permanent Impairment published by the American Medical Association (AMA Guides) in evaluating his impairment rating. The hearing officer recessed the hearing and wrote Dr. G to specifically inquire whether he used the AMA Guides, "Third Edition, Second Printing February 1989." Dr. G responded that he used the "AMA Guides, 3rd Edition." On appeal, the claimant simply states that "I don't think he [Dr. G] used the right guides." While Dr. G could have been more specific as to the use of the second printing, we conclude that his answer, given directly in response to the hearing officer's inquiry, was sufficient evidence to support a finding impliedly made by the hearing officer that Dr. G used the correct AMA Guides, especially in view of the claimant's unsupported allegation on appeal. The claimant also contended that Dr. G did not include the claimant's right elbow in assigning an IR. In response to the same letter from the hearing officer, Dr. G confirmed that he considered injury to the claimant's right elbow in arriving at his IR. In fact, a review of the report attached by Dr. G to his TWCC-69 explicitly references the right elbow. Where, as here, there is sufficient evidence to support the hearing officer's determination, there is no sound basis to disturb the decision of the hearing officer. Cain v. Bain, 709 S.W.2d 175 (Tex. 1986). Pool v. Ford Motor Company, 715 S.W.2d 629 (Tex. 1986).

The finding of fact that Dr. G was an agreed designated doctor is supported by sufficient evidence. Pursuant to Section 408.125(d), the Commission "shall adopt" the impairment rating made by the designated doctor chosen by the parties. In this case, the agreed designated doctor assigned the claimant a zero percent impairment rating, and accordingly, the hearing officer did not err in adopting a zero percent impairment rating.

With regard to the date of MMI, the parties agreed that Dr. G would be the designated doctor for determining MMI and IR. Dr. G's IR is to be adopted by the Commission under Section 408.125(d). However, the determination of MMI by Dr. G is accorded presumptive weight and the Commission must base its determination of MMI on Dr. G's report unless the great weight of the medical evidence is to the contrary. Section 408.122(b). Having reviewed the record, we find sufficient evidence to support the hearing officer's decision that the claimant's correct MMI date is September 23, 1992, and that the great weight of the other medical evidence did not overcome the "presumptive weight" afforded the opinion of the designated doctor in regard to a determination of MMI.

The decision of the hearing officer is affirmed.

Robert W. Potts
Appeals Judge

CONCUR:

Stark O. Sanders, Jr.
Chief Appeals Judge

Joe Sebesta
Appeals Judge