APPEAL NO. 931122

This appeal arises under 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*.). On October 28, 1993, a contested case hearing (CCH) was held in (city), Texas, with (hearing officer) presiding. The issues presented for resolution were:

1.Has Claimant reached maximum medical improvement [MMI]; and

2.What is the Claimant's impairment rating [IR]; and

3.Was the designated doctor properly appointed according to Rule 130.6.

The hearing officer determined that the claimant reached MMI by operation of law on September 11, 1993; that a designated doctor had not been appointed pursuant to Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 130.6 (Rule 130.6); and that since claimant's treating doctor has been unable to provide an IR, the matter is remanded "in order to provide for a medical examination order so that claimant will be examined by a doctor selected by the Commission [Texas Workers' Compensation Commission] as provided by Section 408.004 of the Act."

Appellant, carrier herein, contends that a designated doctor was properly appointed pursuant to Rule 130.6, that this doctor's assessment of MMI and IR should have presumptive weight, and that the parties had more than 10 days to agree on a designated doctor. Carrier requests that we reverse the hearing officer's decision and render a decision in its favor. Respondent, claimant herein, did not file a response to carrier's request for review.

DECISION

The decision of the hearing officer, as modified, is affirmed.

The hearing officer's statement of evidence is a fair and accurate recitation of the evidence and we adopt it for purposes of this decision. It is undisputed that claimant was injured while working in bakery sales for (employer), employer herein, on (date of injury), when a box weighing approximately 65 pounds fell on her injuring her head, neck and back. Claimant was initially seen by (Dr. T), a chiropractor, who eventually referred claimant to (Dr. A) for an IR. Dr. A, by Report of Medical Evaluation (TWCC-69) and report dated August 4, 1992, certified MMI on August 5, 1992, with a zero percent IR. Dr. T was made aware of this assessment and agreed with the assessment on a TWCC-69. On or about August 11, 1992, claimant relocated to (N.C.) and began treating with (Dr. F) in (city), N.C. On October 5, 1992, claimant disputed Dr. A's IR by letter dated September 30, 1992. Subsequently, claimant began treating with (Dr. W), a neurologist, who conducted comparative nerve conduction studies. By Request for Medical Examination Order (TWCC-22) dated October 20, 1992, at the Commission's request, claimant was directed to be examined by (Dr. M) in, N.C. The purpose of the examination was stated to be: "Designated doctor in accordance with Rule 130.6 to resolve dispute of impairment rating."

Although the order recited that Dr. M was appointed as a designated doctor pursuant to Rule 130.6, the hearing officer found, as fact, that Dr. M was a doctor appointed pursuant to Rule 126.6 to perform a required medical examination. Claimant testified that she contacted the carrier's representative about seeing a doctor closer to her residence, in that (city) was 65 or 70 miles away, one way. Claimant states that carrier's representative told claimant that she had to see Dr. M because that is who the Commission had selected as a designated doctor. Dr. M examined claimant on November 11, 1992, and by TWCC-69 and narrative report dated January 15, 1993, certified MMI on January 15, 1993, with a zero percent IR. Claimant contends that Dr. M did not adequately examine her, did not use an inclinometer and did not perform a physical examination of her. Claimant testified that she is not yet at MMI, that she continues to improve in a work hardening program and that Dr. W agrees she was not at MMI. A benefit review conference (BRC) was held on July 7, 1993, in Victoria, Texas, with claimant participating telephonically from N.C. The only issues at the BRC were MMI and the IR. Claimant apparently did not have the assistance of an ombudsman in that she referred to the benefit review officer (BRO) as the ombudsman. Claimant subsequently raised the issue that Dr. M had not been properly appointed as a designated doctor pursuant to Rule 130.6 in a response to the BRC report. Dr. W, in a report dated May 7, 1993, gives a diagnosis of "post-traumatic headache syndrome which I feel is genuine . . . strong suggestions of a C-5-6 radiculopathy on the right." Dr. W stated he believed claimant's complaints genuine, that she is slowly improving and "should probably be able to get back to her previous type of occupation in about six months."

Carrier contested, in whole or in part, the following hearing officer determinations:

FINDINGS OF FACT

12. On October 20, 1992, the Commission, ostensibly pursuant to Rule 130.6, but in fact pursuant to Rule 126.6, issued an order for Claimant to undergo a Required Medical Examination on November 11, 1992, at 10:30 a.m., to be conducted in (city), N C, by Dr. [M] for an IR.

13. On November 11, 1992, Dr. [M] evaluated the Claimant pursuant to the RME order, and found that Claimant reached MMI on January 15, 1993, with a 0% IR.

14. Although the Commission stated in its order of October 20, 1992, that it was an order pursuant to Rule 130.6, it was not, because 130.6(b) was not followed in that the Claimant and insurance Carrier were not allowed ten days to agree on a Designated Doctor nor did the Commission inform the unrepresented Claimant that an ombudsman was available to explain the contents of the agreement for a Designated Doctor, and in actuality, procedure-wise, it was pursuant to Rule 126.6.

16. Dr. [M] is not to be considered the Designated Doctor pursuant to Commission Rule 130.6, but rather is a doctor appointed pursuant to Rule 126.6 to perform a RME.

17.With regard to the Claimant, the medical evidence is contradictory at best, but a Claimant by definition, reaches [MMI] on the day after expiration of 104 weeks from the date income benefits begin to accrue, and benefits began to accrue on September 15, 1991. Claimant had reached [MMI] by operation of law on September 11, 1993.

18.Claimant's treating physician, Dr. [W], has been unable to provide an impairment rating by the end of the 104th week. Claimant will be ordered to submit to a medical examination by a doctor selected by the Commission as provided by Section 408.004 of the Act in order to resolve the impairment rating issue.

CONCLUSIONS OF LAW

3.Dr. [M] was not a Designated Doctor pursuant to Commission Rule 130.6, but rather was a doctor ordered to evaluate Claimant for an impairment rating per Rule 126.6.

4.By operation of law, the Claimant reached [MMI] on September 11, 1993, and the preponderance of the evidence in this fact situation indicates that Claimant needs to be evaluated for an impairment rating. Since Claimant's treating doctor, Dr. [W], has not been able to provide an impairment rating by the end of the 104th week, Claimant will be ordered to submit to a medical examination by a doctor selected by the Commission to resolve the IR dispute.

Carrier argued at the CCH, and on appeal, that claimant was seen by Drs. T and A, claimant's treating and referral doctors, both of whom assessed a zero percent IR. Carrier contends that claimant disputed her own physician's IR and that Dr. M "was a properly [appointed] designated doctor, pursuant to Rule 130.6, and as such, his finding of MMI on January 15, 1993, and zero percent impairment holds presumptive weight." Carrier argues that the parties "were allowed not only ten, but fifteen days in which to reach an agreement." Carrier's computation is apparently that claimant disputed her treating/referral doctor's rating by letter dated September 30, 1992, on October 5, 1992, and the Commission's order requiring the examination was dated October 20th.

Rule 130.6(a) and (b) state:

Rule 130.6: Designated Doctor: General Provisions

(a)If the commission receives a notice from the employee or the insurance carrier that disputes either maximum medical improvement or an assigned impairment rating, the commission shall notify the employee and the insurance carrier that a designated doctor will be directed to examine the employee.

(b)After notifying the employee and the insurance carrier, the commission shall allow the employee and insurance carrier ten days to agree on a designated doctor. The commission shall inform an unrepresented employee that an OMBUDSMAN is available to explain the contents of the agreement for a designated doctor.

Sections 408.122(b) and 408.125 are the Labor Code provisions that require the Commission to direct the employee to be examined by a designated doctor selected by mutual agreement of the parties. Section 402.061 provides that the Commission shall adopt rules necessary for the implementation and enforcement of the 1989 Act. Rule 130.6 implements the designated doctor provisions of Sections 408.122(b) and 408.125. In particular, Subsection (b) of Rule 130.6, quoted above, provides that, after notifying the employee and the carrier [that a designated doctor will be directed to examine the employee], the Commission shall allow the employee and carrier 10 days to agree on a designated doctor. We have previously noted that Rule 130.6 "provides a mechanism for obtaining a designated doctor which includes the receipt by the Commission of a notice of dispute over MMI or the assignment of an impairment rating, and the allowance of 10 days for the employee and insurance carrier to agree on a designated doctor before a selection by the Commission." Texas Workers' Compensation Commission Appeal No. 92233, decided July 16, 1992; Texas Workers' Compensation Commission Appeal No. 93099, decided March 25, 1993. In our opinion, Rule 130.6(b) is in harmony with Sections 408.122(b) and 408.125 to allow the parties an opportunity to agree on a designated doctor before the Commission selects a designated doctor. It seems reasonable to conclude that one of the main objectives of allowing the parties an opportunity to mutually agree on the selection of a designated doctor is to lessen the likelihood of a dispute over the designated doctor's findings. Texas Workers' Compensation Commission Appeal No. 93099, *supra*. In the instant case, claimant by letter dated September 30, 1992, disputed the MMI and IR assessments of Dr. A and requested "a second opinion from another Dr. here in [N.C]." The Commission did not notify the parties that a designated doctor would be appointed to examine claimant or allow claimant and carrier 10 days to agree on a designated doctor. Rather, the Commission by order dated October 20, 1992, directed that claimant be examined by Dr. M. When claimant objected that Dr. M was located some 65 to 70 miles away, it was claimant's unrefuted testimony, that the carrier's representative told claimant that the Commission had already selected Dr. M as the designated doctor and claimant had to see him. Claimant further testified that, if given an opportunity, she believed she could have reached an agreement with carrier on a designated doctor much closer to where claimant was located in N.C. and that there were plenty of hospitals and doctors closer than (city). In summary, we believe Rule 130.6 clearly provides that if the Commission receives a notice from the employee or the insurance carrier of a dispute either to MMI or impairment rating that it will give the parties 10 days to agree to a designated doctor. We have held that failure to provide the parties this opportunity to agree to a designated doctor, prior to the Commission selecting one, invalidates the selection by the Commission of a designated doctor. *See* Texas Workers' Compensation Commission Appeal No. 93992, decided December 13, 1993 and Appeal No. 93099. The hearing officer's determination that Rule

130.6(b) was not followed in that the parties had not been allowed the days to agree on a designated doctor is affirmed.

It is clear that an ombudsman was not involved in the appointment of Dr. M, as there was no agreement and the parties had not been given an opportunity to agree on a designated doctor. In Texas Workers' Compensation Commission Appeal No. 93170, decided April 22, 1993, the Appeals Panel reversed a hearing officer who found "substantial compliance" with Rule 130.6. In that case the Appeals Panel noted that Rule 130.6 had been violated in numerous ways, including that "the Commission failed to notify the employee and the carrier that a designated doctor would be directed to examine the employee . . . [and] the Commission failed to inform him [the employee] of the fact that an ombudsman was available to explain the contents of the agreement for a designated doctor." Further, in Texas Workers' Compensation Commission Appeal No. 92511, decided November 12, 1992, the Appeals Panel held: "Our insistence upon compliance with the very simple procedures set out in Rule 130.6 is not elevation of form over substance; it is the very means to preserve the designated doctor's status as the impartial decision maker. . . ."

In Texas Workers' Compensation Commission Appeal No. 92608, decided December 30, 1992, we held it error for the Commission to fail to tell an unrepresented claimant that a Commission ombudsman was available to explain the role of a designated doctor. Thus, by both its terms and prior Appeal Panel decisions, there is a requirement that "the unrepresented employee be informed that an ombudsman is available to explain the contents of the agreement for a designated doctor." Appeal No. 93170, *supra*.

On the issue of MMI, Dr. A and Dr. T certified MMI on August 5, 1992. Although Dr. M certified MMI on January 15, 1993 (in his January 15th report), an earlier November 11, 1992, report indicated Dr. M's opinion on MMI "should be abeyed pending an appointment . . . with [Dr. W]." In the January 15th report Dr. M states he concurs with "[Dr. W's] feeling that she is ready to return to work with a restriction on lifting . . . . " Dr. W gave no certification of MMI and claimant testified that while she has continued to improve during 1993, she has still not reached MMI. Claimant testified that Dr. W supports the position that she has not reached MMI. The hearing officer is the sole judge of the weight and credibility of the evidence (Section 410.165(a)) and she could have found MMI was reached on August 5, 1992 (reports by Drs. A and T), or on January 15, 1993 (a report by Dr. M). The hearing officer found MMI was reached by operation of law on September 11, 1993. While this may be a statement that September 11, 1993, is the expiration of 104 weeks from the date on which income benefits began to accrue (Section 401.011(30)(B)), this statement would not preclude a designated doctor, should one be appointed or agreed upon, from finding an earlier date of MMI based on Drs. A's and T's certification of MMI on August 5, 1992, or Dr. M's certification of MMI on January 15, 1993. MMI is defined in Section 401.011(30)(a) as "the earliest date after which, based on reasonable medical probability, further material recovery from or lasting improvement to an injury can no longer reasonably

be anticipated."[1] Further, Section 408.123(a) requires certification of MMI by a doctor and requires a "certifying doctor" to issue a report. Texas Workers' Compensation Commission Appeal No. 92164, decided June 5, 1992, held that "a finding of `maximum medical improvement' is to be certified by a doctor" and a claimant by claimant's testimony alone ". . . cannot support a determination of maximum medical improvement. . . ." In the instant case, although the claimant testified MMI has not been reached, there is no certification by a doctor of MMI, other than as noted above. Upon return of this case to the disability determination officer (DDO), and presumably the appointment of a designated doctor, the doctor may certify the date the doctor believes MMI to have been reached. If the certified date of MMI is after September 11, 1993, the statutory date of MMI will control in accordance with Section 401.011(30).

On the issue of impairment, Dr. A and T assessed a zero percent IR as did Dr. M. Dr. W on the other hand has not yet given an IR, or was unable to provide an IR by the time claimant reached statutory MMI. The hearing officer could have accepted the zero percent IR of Drs. A, T, and M, particularly as the hearing officer found, as fact, that Dr. M, while not a designated doctor "was a doctor ordered to evaluate claimant for an (IR) per Rule 126.6." Dr. M apparently did so, assessing a zero percent IR. Nonetheless, the hearing officer chose not to accept the assessments of any of these doctors, instead apparently believing claimant has some form of impairment. In that the hearing officer chose to reject the IRs of the doctors it is appropriate to return the matter to a DDO for resolution of MMI and impairment by proper appointment of a designated doctor. We, however, find the hearing officer's determination that "Claimant will be ordered to submit to a medical examination by a doctor selected by the Commission as provided by Section 408.004 [the required medical examination provision] of the Act in order to resolve the [IR] issue" to be too narrow. Consequently we form the determination in broader language to the effect that claimant's MMI and impairment is to be determined utilizing the dispute resolution process. We so reform the hearing officers's language omitting reference to a required medical examination under Section 408.004 and substituting the dispute resolution process to resolve the MMI and impairment issues.

The decision of the hearing officer as modified, is hereby affirmed.

Thomas A. Knapp
Appeals Judge

CONCUR:

Stark O. Sanders, Jr.
Chief Appeals Judge

Joe Sebesta
Appeals Judge

[1]Subsection 401.011(30)(B) contains the provision for statutory MMI on the expiration of 104 weeks from the date on which income benefits begin to accrue.