APPEAL NO. 93247

On February 24, 1993, a contested case hearing was held in (city), Texas, with (hearing officer) presiding as the hearing officer. The hearing was held under the provisions of the Texas Workers' Compensation Act, TEX. REV. CIV. STAT. ANN. art. 8308-1.01 *et seq*. (Vernon Supp. 1993) (1989 Act). On or about (date of injury), the respondent (claimant herein) sustained an injury in the course and scope of her employment with her employer, Kelly Services, Inc. The issues at the hearing were whether Dr. E, M.D., was an agreed designated doctor, and what is the claimant's correct whole body impairment rating. The hearing officer determined that Dr. E., was not a designated doctor under Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 130.6 (Rule 130.6); that Dr. H., was a designated doctor; and that, based on Dr. H Report of Medical Evaluation (TWCC-69), the claimant reached maximum medical improvement (MMI) on January 31, 1992, with a 13 percent whole body impairment rating. The hearing officer further determined that the great weight of the other medical evidence is not contrary to Dr. Hs report. The hearing officer ordered the appellant (carrier herein) to pay impairment income benefits based on the 13 percent impairment rating.

The carrier contends that certain findings of fact and conclusions of law are not supported by sufficient evidence and are against the great weight and preponderance of the evidence. The carrier requests that the hearing officer's decision be reversed and a decision rendered that Dr. E was an agreed designated doctor and that the claimant's whole body impairment rating is seven percent. In the alternative, the carrier requests that the case be reversed and remanded for further proceedings. The claimant requests that the decision of the hearing officer be upheld.

DECISION

The decision of the hearing officer is affirmed.

The claimant was not present at the hearing, but was represented by Mr H, an attorney with the law firm of (S & G).

The first issue at the hearing was whether Dr. E, who examined the claimant on May 6, 1992 and assigned the claimant a seven percent impairment rating, was an agreed designated doctor. It is the claimant's position that Dr. E is not an agreed designated doctor, and it is the carrier's position that he is.

Article 8308-4.26(g) provides as follows:

(g)If the impairment rating is disputed, the Commission shall direct the employee to be examined by a designated doctor selected by the mutual agreement of the parties. If the parties are unable to agree on a designated doctor, the Commission shall direct the employee to be examined by a designated doctor selected by the Commission. The designated

doctor shall report to the Commission in writing. If the parties agree on a designated doctor, the Commission shall adopt the impairment rating made by the designated doctor. If the Commission selects a designated doctor, the report of the designated doctor shall have presumptive weight and the Commission shall base the impairment rating on that report unless the great weight of the other medical evidence is to the contrary, in which case the Commission shall adopt the impairment rating of one of the other doctors.

Rule 130.6 (Designated Doctor: General Provisions) provides, in part, as follows:

(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 the 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.

(c)If the employee and the insurance 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 letter shall 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.

(d)The Commission shall contact the worker to confirm the agreement. If the Commission is not notified by the end of the tenth day that an agreement has been reached, the Commission shall issue an order directing the employee to be examined by a designated doctor chosen by the Commission. The examination shall be held within a reasonable time after the order is made. The order shall specify the

name, business address, and telephone number of the designated doctor, and the date and time or the examination.

The claimant was injured at work on or about (date of injury), and sometime thereafter her treating doctor, Dr. N, assigned her a 40 percent impairment rating. No reports from Dr. N were in evidence.

Ms K, a senior claims representative for the carrier, testified that she has been involved in the processing of the claimant's claim. She said that on some unspecified date she called Ms G, a paralegal with S & G, and "verbally agreed on a designated doctor appointment with Dr. El;" that the agreement was for Dr. E to be a designated doctor to resolve the "dispute of impairment assessed by Dr. N;" and that it was her understanding that Dr. E' opinion would be final. She further testified that she had no discussion with Ms. G concerning Dr. E "just being an independent medical examination doctor," and that her notes reflected that she did not speak with anyone at S & G other than Ms. G. This witness also testified that after her conversation with Ms. G she sent a letter to S & G dated March 20, 1992, with a copy to the Commission. Three copies of the letter were in evidence. The letter is addressed to Mr S, Attorney, ATTN: Judith, and gives the claimant's name, the date of injury, the employer's name, a "claim number," and a "TWCC No." The letter is signed by Ms K and states as follows:

Dear Mr. S:

This letter is to confirm our agreement on 3/13/92 for Dr. Oren Ellis as a designated doctor on the disputed 40% Impairment Rating assessed by Dr. Neustein.

The appointment has been set for Monday, May 4, 1992 at 2:30 with Dr. Oren Ellis 1700 Murchison, (city), TX 79902 phone 533-7465.

I have forwarded all medical records contained in my file to Dr. E. Please have the claimant bring all prior xrays (sic).

Should you have any questions or comments, please feel free to call me.

The letter shows copies to "TWCC Reviewer" and "JM, Attorney." Mr. M's role in this case was not identified. A handwritten note at the top of the page reads "Notify Client." Mr. Hickman, who represented the claimant at the hearing, identified the handwritten note as being that of Mr. G, an attorney with S & G. At the bottom of the page is another handwritten note which reads "You have to go to this appointment. Please call me. Judith." No testimony was elicited regarding this handwritten note.

Ms. K further testified that after she sent the letter of March 20th the date of the

appointment with Dr. E changed so she sent S & G a second letter. Two copies of the second letter were in evidence. It is the same letter as the letter of March 20th and is dated March 20th. However, in the paragraph which notifies of the date of the appointment, the word "Monday" is whited out and replaced with the handwritten abbreviation "Wed," and the number "4" is whited out and replaced with the number "6," thus making the date of the rescheduled appointment with Dr. E Wednesday, May 6, 1992 at 2:30. In the upper right hand corner of both copies of the letter is a handwritten note with the date "4-3-92" and states "J - Dr. E rescheduled (sic) Please note new appointment date. Thanks! P. K." At the bottom of one copy of the letter is the handwritten notation "sent cert. of mail PK 4-3-92." At the top of the other copy of the letter is the handwritten notation "Notify Client." Mr. H testified that he made that notation. Ms. K testified that after she sent the two letters to S & G she did not receive any correspondence from S & G or JG disputing the agreement that Dr. E was the designated doctor, but then explained that she did receive a letter from Mr. Hickman dated June 25, 1992, which disputed that Dr. E was a designated doctor and which disputed the impairment rating assigned by Dr. E. This witness said that she had never received any correspondence from attorney S, the person to whom her March 20th letter is addressed. She also named three doctors, one of which was Dr. E, whom she has chosen on prior occasions to perform "independent medical examinations."

Ms G testified that she is a paralegal at S & G and that she works with attorneys S, H, and G. She said she has worked for that law firm for 10 years and is involved primarily with personal injury and workers' compensation cases. Ms. G testified that she has authority to agree as to an "IME" doctor, but has no authority to agree to a designated doctor. She testified that on or about March 20, 1992, she had a conversation with Ms. K wherein she agreed to have the claimant examined by Dr. Ellis as an "IME doctor." She said she agreed "not to fight the IME." Ms. G explained that she understood that an IME doctor is a doctor "designated" by the insurance company, and that if the claimant does not agree with the IME doctor, the claimant can "fight it and go to the Board over it." She further explained that she understood that a designated doctor is a third doctor that "the Board is going to designate if our two doctors cannot agree." This witness further testified that she understands that the parties can agree to a designated doctor, but that she had not been in the position of designating a doctor in any of her cases. She said that she knows that Mr. S did not talk to Ms. K about the claimant's case because it is not Mr. Smith's case, that it would be unusual for Mr. G to have talked to Ms. K about the claimant's case because it is also not his case, and that Mr. H and she are responsible for "any conversations - - what's going on in this case."

Ms. G further testified that she received Ms. K letter of March 20, 1992, on or about March 25, 1992. When asked if she knew why the letter was addressed to Mr. S, Ms. G said that it was probably because some of the documents might have been signed by him when they first opened the case. When Ms. G was asked if she saw the term "designated doctor" in the letter of March 20th, she responded as follows: "No, I wasn't aware. I saw

the letter, I read the letter. I just observed it as confirming the appointment, that was it." This witness further testified that when she received the letter of March 20th she did not do anything to confirm or deny that Dr. E was the designated doctor. She said that it was not necessary to call Ms. K because "I had agreed on an IME doctor." She said it would be routine for Ms. K to confirm an IME by using other words. She also said that she didn't think that there had been any other IME doctors in the claimant's case.

In a six page letter to Ms. K (the carrier's claims representative) dated May 12, 1992, Dr. E wrote that he had seen the claimant on May 6, 1992, and that the purpose of seeing the claimant was "MEO as requested by your company." Dr. E set forth his findings on his examination of the claimant, and stated that the claimant had reached MMI. He further stated that he believed the claimant reached MMI at three months following the date of her injury with a whole body impairment rating of seven percent taken from the "AMA Guides." In an undated Report of Medical Evaluation (TWCC-69), Dr. E certified that the claimant reached MMI on April 31, 1991, with a seven percent whole body impairment rating.

Also in evidence was a TWCC-21 form (Payment of Compensation or Notice of Refused/Disputed Claim) dated June 18, 1992. In this form the carrier stated as follows:

> IIB [impairment income benefits] has expired; Dr. E is a mutually agreed doctor for the IIB dispute and has assessed 7% impairment 21 weeks of IIB have been paid IIB paid in full.

In a letter to Ms. K dated June 25, 1992, Mr. Hickman wrote:

> We received the report of Dr. E written on May 12, 1992. We at no time ever consented to Dr. E determining a final impairment rating or MMI. Dr. E was your IME doctor. We only agreed to let you have you (sic) second opinion.
>
> I am requesting the board to appoint a third doctor and to set a hearing because you discontinued my clients (sic) benefits based on a second doctors (sic) impairment rating.

A copy of the June 25th letter is shown as having been sent to the Commission. In a letter to the Commission dated June 25, 1992, Mr. H stated: "Pursuant to Sec. 130.6(d) of the Rules of the Texas Workers' Compensation Commission, I am requesting that the Commission issue an order for the Claimant to be examined by a designated doctor chosen by the Commission." A copy of this letter is shown as having been sent to the carrier.

On July 3, 1992, Ms F, a disability determination officer (DDO) ordered the claimant to be examined by Dr. H. The order is contained in a Request for Medical Examination Order which indicates at the top of the form that the Commission requested the examination.

The purpose of the examination is stated to be: "Designated doctor requested to resolve dispute over impairment rating."

In a TWCC-69 dated August 24, 1992 and dated August 28, 1992, Dr. H certified that the claimant reached MMI on January 31, 1992, with a 13 percent whole body impairment rating.

In an undated Request for Setting a Benefit Review Conference, which is shown as being received by the Commission on October 7, 1992, the carrier requested a benefit review conference (BRC) for the following reason: "Disputing second designated doctor assessment - Dr. H. Carrier agreed with attorney Smith on Dr. E as the 1st designated doctor for disputed IIB. This was confirmed in writing to atty (sic) Smith and TWCC. TWCC erroneous in designated (sic) Dr. H all evidence is attached." On January 7, 1993, a BRC was held to resolve the issue of whether Dr. E is a designated doctor, and the issue of what is the correct impairment rating. The benefit review officer recommended that Dr. E was not a designated doctor, that Dr. H is the designated doctor, and that the claimant has a 13 percent impairment rating based on Dr. H's report.

Mr. H (the attorney who represented the claimant at the hearing) testified that it is the policy of S & G never to agree to a designated doctor with "The Group" (apparently referring to The (city) Orthopaedic Surgery Group with whom Dr. E associated), particularly Dr. E, because, according to Mr. Hi Dr. E has a reputation of being notably pro-insurance. Mr. H said that "In this case, we did agree to basically an independent medical examination for the insurance company to name their own doctor, which in this case would be Dr. E." He said that Mr. Smith (to whom the carrier's March 20th letter was addressed) is semi-retired and has nothing to do with new law workers' compensation cases, and that in his opinion, Mr. S was never contacted by the carrier and would never agree to a designated doctor. Mr. H testified that the carrier's letter of March 20, 1992, was received in his office on March 25, 1992, and that he probably saw it around March 25, 1992. He testified that he read that the carrier had used the term "designated doctor" in the letter, but that that did not confirm in his mind that Dr K would be the designated doctor. He further stated that he had had no conversations with Ms. K about the claimant's file and that he had no idea why the carrier's letter of March 20th was addressed to Mr. S. He said that Ms G entered into the agreement to have Dr. E examine the claimant. He said that in March 1992 Ms. G was familiar with what a designated doctor is and with the ramifications of having a designated doctor examine an employee. After pointing out that a copy of the carrier's March 20th letter had a handwritten notation of "Notify Client," the carrier asked Mr. H "whether the client was notified?", to which Mr. H responded "Yes, the client was notified and directed to attend that particular appointment or rescheduled appointment."

Mr. H further testified that he did not call Ms. K when he read her letter because he was familiar with Rule 130.6 and knew that the Commission had to "confirm it," and that a

lot of adjustors had problems understanding the difference between medical examination orders and designated doctors. He said that the carrier's adjustors kept confusing designated doctors with what "we" refer to as "IME" doctors, so he didn't want to embarrass anybody and tell them "look that's not the right term to use . . . particularly since I knew what we agreed to would be an IME doctor." Mr. Hickman said that Ms G has the authority to agree to IME doctors, but not designated doctors. Mr. H also stated that he found a note from Ms. G dated around March 20th in his office's computer file which basically said "agreed with adjustor to IME with Dr. Ellis." The computer file note was not introduced into evidence.

Ms L testified (by speaker phone) that up until about March 6, 1992, she was a DDO in the (city) field office (she began working at another field office after that), that she recalled the claimant's name, that she could not recall if Dr. E was a doctor she had designated, and that she could not recall if the parties agreed on a designated doctor. Ms. L also testified as follows:

Q:So, can you tell me what the procedure was back in March 1992 here in the (city) Office when the parties would agree to a designated doctor and the claimant was represented by an attorney, what would the Commission do?

A:Basically, we would receive a copy of the agreement from all parties and not contact the claimant, and the Commission would receive the report from the designated doctor and go with that report.

Q:So it was not the procedure at that time for the Commission then to confirm the agreement with the employee?

A:I never did call to confirm, no. The letter that the carrier would send to us would indicate that all parties have agreed to this.

Q:And you would adopt that letter from the carrier to the employee as confirmation of the agreement?

A:That's correct.

Ms. Ls further testimony was to the effect that she did not get involved with advising a claimant regarding a designated doctor when the claimant was represented by an attorney, but when the claimant was not represented she would ask the carrier to have the claimant call her so that she could advise the claimant on the ramifications of an agreement to see a designated doctor.

Cindy Flores, who is currently a DDO in the (city) field office, testified that currently the field office confirms agreements for designated doctors with the employee, but that in March 1992, such agreements may not have been routinely confirmed. She said that Ms L and Ms B (who no longer works for the Commission) would have been in charge of the claimant's file in March 1992. She testified that she checked the computer terminal concerning the claimant's file and found no indication that "this agreement" was confirmed with the claimant by the Commission. She said that "this letter (referring to the carrier's letter of March 20, 1992) . . . was our confirmation in the file that the parties were all agreeing. . . ." She further said that the Commission would not have sent out an "acknowledgment" in response to the carrier's letter of March 20th. She didn't know if the Commission verbally confirmed the designated doctor agreement with the claimant, but said that there "possibly could have been verbal confirmation of the agreement." She said she wasn't involved with the agreement concerning Dr. E, but was involved with designating Dr. H as the designated doctor in response to Mr. Hi's letter of June 25th. She further testified that she didn't make an "independent determination" that Dr. E was not a designated doctor, but that she understood that one party would be saying that Dr. E was mutually agreed upon and the other party would say he wasn't so she was instructed to designate a doctor in this case. As previously noted, on July 3, 1992, Ms. Flores ordered the claimant to be examined by Dr. H.

The carrier's position is that the parties agreed on Dr. E as the designated doctor and that all the requirements of Rule 130.6 were met in agreeing on Dr. E as the designated doctor. The carrier points out that the testimony shows that in March 1992, the (city) field office would, in the case of a represented claimant, adopt the carrier's letter as the Commission's confirmation of the parties' agreement on a designated doctor. The claimant's position is that the claimant did not agree to have Dr. E be the designated doctor, but only agreed to an "independent medical examination" by Dr. E at the carrier's request, and that Rule 130.6(d), which states that "the Commission shall contact the worker to confirm the agreement," was not complied with by the Commission in regard to Dr. E.

The carrier contends that there is insufficient evidence to support the hearing officer's findings that the Commission did not notify the parties of a dispute; that no Commission action was involved in arranging claimant's appointment with Dr. E, that Dr. E was not a designated doctor under Rule 130.6, that Dr. Halaby was a designated doctor and certified claimant as reaching MMI on January 31, 1992, with a 13% impairment rating, and that the great weight of the other medical evidence is not contrary to the designated doctor's opinion. The carrier also disputes the hearing officer's conclusions that Dr. H was the designated doctor on this claim, and that claimant reached MMI on January 31, 1992, with a 13% percent whole body impairment rating.

The Appeals Panel has considered the requirements for an agreed designated

doctor in several decisions. In Texas Workers' Compensation Commission Appeal No. 92312, decided August 19, 1992, the employee asserted that Dr. R was not an agreed designated doctor and that he agreed to see Dr. R only for an independent medical examination. The employee had been examined by his treating doctor who found he had not reached MMI and by an insurance carrier doctor who found MMI and zero impairment. The carrier's adjustor wrote a letter to the claimant's attorney stating that the benefit review officer had requested that they agree on a designated doctor and asked the attorney to contact her as soon as possible. A second letter from the adjustor to the claimant's attorney stated that the letter was to confirm their telephone conversation in which they agreed to appoint Dr. R as the designated physician. A third letter from the adjustor to the claimant's attorney indicated that it confirmed the agreement to appoint Dr. R as the designated doctor to examine the employee, and purported to forward a copy of Dr. R's report. The employee testified that he had a conversation with his attorney to the effect that Dr. R would not be a designated doctor, but was strictly for another opinion, and the claimant's attorney assured the hearing officer that he had never agreed to a designated doctor. Apparently, the claimant's attorney was not under oath because the hearing officer said his arguments and assertions would not be taken as testimony. The Appeals Panel held that there was sufficient evidence to support the hearing officer's determination that Dr. R was agreed upon as the designated doctor. The Appeals Panel pointed out that the 180-day and the subsequent examination by the same doctor provisions of Article 8308-4.16 would have been violated if Dr. R were intended to act as a "Section 4.16" doctor (Article 8308-4.16 provides, in part, that the Commission may require the employee to submit to medical examinations, and that the Commission may require the employee to submit to a medical examination at the request of the carrier). These violations would have occurred because the employee had been examined by the carrier's doctor within 180 days of his examination by Dr. R. The Appeals Panel then noted that there were at least three letters in the record that were sent to the employee's attorney that referred to Dr. R as a designated doctor and that the evidence indicated that Dr. R's examination came after an apparent disagreement over the carrier's doctor's assessment. The Appeals Panel stated that:

> As noted by the hearing officer, the procedures undertaken by the parties as evidenced by the documents in the record parallel those set forth in Texas W.C. Comm'n, 28 TEXAS ADMIN. CODE § 130.6 (Rule 130.6) with respect to selection of a designated doctor. While we are concerned that there is no direct evidence whether persons from the Commission verified the existence of the agreement as provided for in Rule 130.6(d), it does not appear that Dr. R was appointed by a Commission order as would have been the case absent an agreement. Rule 130.6(d). Given all the evidence, the hearing officer's inference that an agreement was made for Dr. R to serve as designated doctor is sufficiently supported.
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> In Texas Workers' Compensation Commission Appeal No. 92511, decided

November 12, 1992, the employee contested the hearing officer's determination that Dr. S was a designated doctor and that based on Dr. S's report he had reached MMI with zero percent impairment. The employee was seen by several doctors of his own choosing and was given varying opinions concerning MMI and impairment rating. The employee was subsequently examined by Dr. S. The adjustor referred to Dr. S's examination as an "independent medical examination" in subsequent correspondence to Dr. S and specifically stated the absence of an agreement for Dr. S to be a designated doctor prior to his examination of the employee. In reversing and remanding the case to the hearing officer on the basis that his determination that Dr. S was a designated doctor was not supported by the record, the Appeals Panel stated that:

> If there was an "agreement," it came after the examination. And, contrary to the plain intent of the 1989 Act that the designated doctor be impartial, the evidence indicates that each party would have understood, at the time of the retroactive "agreement," that Dr. S's opinion would be favorable to its position. The record here is in stark contrast to that considered in Texas Workers' Compensation Commission Appeal No. 92312, decided August 19, 1992, where there was ample correspondence, consistent with Rule 130.6, to document the parties' agreement on a designated doctor prior to his examination, and to refute the contention that the doctor was to conduct only a required medical examination.
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> While an agreement on a designated doctor need not be a signed contract, Rule 130.6(c) plainly requires that any verbal agreement be memorialized in a written letter of confirmation. Moreover, the Commission's confirmation of the agreement is envisioned. Rule 130.6(d). While we can understand that there could be a situation where a clear agreement for a designated doctor is documented but the Commission is inadvertently left "out of the loop," we would point out that parties who did not seek confirmation could run the risk that the trier of fact will not give effect to an agreement. Such extra safeguards were apparently deemed necessary by the Commission, because an agreed designated doctor's report will, according to Art. 8308-4.26(g), conclusively bind the parties to the impairment rating, and prevent the Commission from considering medical evidence to the contrary.

In Texas Workers' Compensation Commission Appeal No. 92608, decided December 30, 1992, the Appeals Panel affirmed the decision of the hearing officer that Dr. H was not an agreed designated doctor, but reversed and remanded on other grounds. At the time the claimant was examined by Dr. H he was not represented by an attorney. The employee testified that she did not agree on Dr. H as a designated doctor; that no one explained to her, or told her that an Ombudsman was available to explain to her what a designated doctor is; and that she did not know what a designated doctor was at the time

she was examined by Dr. H. A memo from the carrier's adjustor written 41 days after Dr. H's examination did not indicate that the Commission notified the employee that she was to be examined by a designated doctor, did not indicate that a confirmation letter was sent to the claimant concerning an agreement on a designated doctor, and did not reflect that the Commission confirmed the purported agreement. The Appeals Panel, observing that the hearing officer is the sole judge of the weight and credibility of the evidence and citing Appeal No. 92511, held that the hearing officer's finding that Dr. H was not a designated doctor because Rule 130.6 was not followed, was supported by sufficient evidence. *See also* Texas Workers' Compensation Commission Appeal No. 93170, decided April 22, 1993, where the Appeals Panel reversed and remanded a decision of a hearing officer that an unrepresented employee had agreed to a designated doctor where the uncontroverted evidence showed that Rule 130.6 was violated in numerous ways, including failure of the Commission to notify the employee that a designated doctor would be directed to examine him, failure of the Commission to inform the employee that an Ombudsman was available to explain the contents of an agreement for a designated doctor, and failure of the carrier to confirm the agreement to see the designated doctor in writing.

In Texas Workers' Compensation Commission Appeal No. 93099, decided March 25, 1993, the Appeals Panel affirmed the hearing officer's decision that Dr. F was not a designated doctor. The evidence showed that the DDO had failed to comply with Rule 130.6(b) in attempting to select Dr. F as a designated doctor because no opportunity was given to the parties to agree on a designated doctor before the DDO wrote a letter informing the parties that there was a dispute and that a designated doctor had been selected by the Commission to resolve the dispute. In holding that the facts supported the hearing officer's conclusion that Dr. F was not a designated doctor because he was not appointed within the provisions of Rule 130.6, the Appeals Panel observed that the Commission failed to comply with Rule 130.6(b) by not giving the parties 10 days to agree on a designated doctor after notification that a designated doctor would be directed to examine the claimant and that noncompliance with Rule 130.6 was clearly put into issue by the testimony of the claimant and his wife, and by the documentary evidence. In arriving at its decision the Appeals Panel quoted the following passage from 2 TEX. JUR 3rd *Administrative Law*, Sec. 19 (1979):

> An agency's rules are generally regarded as having the force and effect of law. Consequently, an agency is bound by its own valid and subsisting rules. It is not privileged to violate these rules, nor does its action in violation of a rule confer any vested right upon a party in whose favor it acted. Even if the agency improperly agrees to violate, or acquiesces in the violation of, a rule, the party acquires no rights through such violation.
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> There is no absolute test by which it may be determined whether an administrative rule or regulation is mandatory or directory. The prime object is to ascertain

> and give effect to the intent of the rule or regulation. In determining whether the administrative agency intended the provision to be mandatory or directory, consideration should be given to the entire rule, its nature, objects, and the consequences that would result from construing it each way.

Having reviewed a number of our decisions concerning agreements for designated doctors, we conclude that the facts of the instant case are most closely aligned with the facts in Appeal No. 92312, *supra*, which involved both an employee who was represented at the time of the agreement for a designated doctor and letters from the carrier to the employee's attorney confirming an agreement for a designated doctor. However, as pointed out by the hearing officer in his "Discussion of the Case," in Appeal No. 92312 the employee had already been examined by a carrier doctor prior to the examination by the designated doctor, and if the designated doctor in that case had been a medical examination order (MEO) doctor as contended by the employee in that case, Article 8308-4.16 would have been violated. In the instant case there was no indication that an MEO doctor had been requested or ordered prior to the time that the carrier contends an agreement for a designated doctor was made. The absence of any involvement by a carrier doctor or doctor ordered by the Commission to examine the claimant prior to the time of the purported agreement for a designated doctor could be seen as adding some credence to the testimony of Ms. G and Mr. H that an agreement was made with the carrier not for a designated doctor, but rather for an independent medical examination by Dr. E at the request of the carrier. While Appeal No. 92312 can be cited for the proposition that that portion of Rule 130.6(d) which calls for the Commission to contact the worker to confirm the agreement is not strictly required where the evidence demonstrates that the carrier confirmed the agreement for a designated doctor in writing with the employee's attorney, we are equally aware of the language in our subsequent decision in Appeal No. 92511, *supra*, where we pointed out that parties who do not seek confirmation [from the Commission] could run the risk that the trier of fact will not give effect to an agreement. That, we believe, is precisely what occurred in this case. The hearing officer pointed out in his discussion that it is clear that no Commission action took place until the appointment of Dr. H, that it is clear that confusion existed as to what was being agreed, and that Rule 130.6 was specifically created to avoid such confusion. Although the two letters from the carrier to the law firm representing the claimant and the testimony of Ms. K is strong evidence that the parties agreed on Dr. E as a designated doctor, there is conflicting evidence as to the nature of the agreement from Ms. G and Mr. H. Due to the absence of a prior carrier doctor or MEO doctor in the instant case, we cannot say that the instant case is so factually similar to Appeal No. 92312 as to be controlled by that decision. Article 8308-6.34(e) provides that the hearing officer is the sole judge of the weight and credibility to be given to the evidence. We do not substitute our judgment for that of the hearing officer where, as here, his determination that Dr. E was not a designated doctor is not so against the great weight and preponderance of the evidence as to be clearly wrong and manifestly unjust. We also conclude that there is sufficient evidence to support the hearing officer's findings, conclusions, and decision that

Dr. H was the Commission designated doctor; that the claimant reached MMI on January 31, 1992, with a 13 percent whole body impairment rating as reported by Dr. H; and that the great weight of the other medical evidence is not contrary to the designated doctor's opinion. We further conclude that the complained of findings, conclusion, and decision are not so against the great weight and preponderance of the evidence as to be clearly wrong and manifestly unjust.

The decision of the hearing officer is affirmed.

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Robert W. Potts
Appeals Judge

CONCUR:

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Stark O. Sanders, Jr.
Chief Appeals Judge

CONCURRING OPINION:

Although another fact finder may well have reached a conclusion that the parties in this case had reached an agreement as to a designated doctor, we will not, as noted several times before, substitute our judgment on the facts for that of the hearing officer. I want to emphasize, however, that I don't regard the true issue in this case as whether Rule 130.6 was complied with by the Commission, because I believe, as stated in Texas Workers' Compensation Commission Appeal No. 92511, decided November 12, 1992, that clear agreements can be found to exist even where the Commission is left "out of the loop." (The facts in that decision which caused the Appeals Panel to hold that there was no agreement, of course, were vastly different from the record here.) The true issue raised by claimant's evidence is whether there was an agreement in substance, a true meeting of the minds, over appointment of a designated doctor, as that term is used in Article 8308-4.25 and 4.26.

In this case, the "agreement" from the claimant's side was not made with her attorney, but by a paralegal who testified that she believed her authority to forge agreements to be limited. It is believable, if not entirely excusable, that she perceived the term "designated doctor" in the carrier's confirming letter in the context of confirming a time and date for an

appointment that the paralegal says she understood to be for an "IME" doctor. That, coupled with the facts that there had not previously been a carrier doctor appointed and that Dr. E described himself as an "IME" doctor, constitute the sufficient evidence in support of the hearing officer's determination that Dr. E was not a designated doctor.

Had the claimant's attorney made the same agreement, however, in my opinion there would have been a "great weight" against the determination of the hearing officer and Texas Workers' Compensation Commission Appeal No. 92312, decided August 19, 1992, would clearly control. It may be that adjusters regrettably do use certain statutory terms interchangeably. However, attorneys are responsible for knowledge of the law in the areas in which they undertake to practice, and cannot be in the business of perpetuating, rather than swiftly dispelling, confusion where a client's rights hang in the balance, albeit embarrassing to the opposing party. Of course, had the Commission's field office determined that it was incumbent upon it to follow the rules and policies its governing board had promulgated, clarification of each party's position would have occurred early on, and perhaps obviated the need for the dispute, the time, and the further expense to all concerned.

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Susan M. Kelley
Appeals Judge