APPEAL NO. 93556

This appeal is brought pursuant to the Texas Workers' Act, TEX. REV. CIV. STAT. ANN. art. 8303-1.01 *et seq*. (Vernon Supp. 1993) (1989 Act). On June 3, 1993, a contested case hearing (CCH) was held in (city), Texas, with (hearing officer), presiding. The issues at the CCH were whether the appellant (claimant herein) had reached maximum medical improvement (MMI), and if so, what date did she reach it and what was her percentage of permanent impairment. The hearing officer, based upon the assessment of a designated doctor selected by the Texas Workers' Compensation Commission (Commission), found that the claimant had reached MMI on July 6, 1992, with a 4% impairment rating. The claimant appeals alleging that her due process rights were violated, that the designated doctor was not properly designated, that the designated doctor's exam of her was inadequate, and that, essentially, the great weight of the other medical evidence was contrary to the opinion of the designated doctor as to MMI and impairment rating. The respondent (carrier herein) replies that the claimant's due process rights have not been violated, that the issue of validity of the appointment of the designated doctor had not been properly raised as an issue, that the designated doctor was properly designated by the Commission and his opinion is entitled to presumptive weight, and that the opinion of the designated doctor was supported by the other medical evidence.

DECISION

After reviewing the evidence we reverse the decision of the hearing officer and remand for further development of the evidence in order to resolve the issue of whether and when the claimant attained MMI and what, if any, permanent impairment she may have. We take such action because we hold that the evidence in the record does not establish that (Dr. AR) was a proper Commission selected designated doctor if prior to his appointment the parties had agreed to a designated doctor.

The claimant was injured on (date of injury), at work when she was crawling under a desk to retrieve an item and fell backwards striking a chair. At the time of the accident the claimant was 7 1/2 months pregnant. The following day she was seen at Humana Hospital because she was concerned that after the accident there was lack of movement by her unborn child. The claimant testified that she attempted to see (Dr. G), an orthopedic surgeon who had treated her in the past, for her injury but initially was unable to get an appointment because of difficulty in determining who was her employer's workers' compensation carrier so that a visit with Dr. G could be authorized. She was finally seen by Dr. G in November of 1991, who according to the testimony of the claimant recommended bed rest, but was unable to institute diagnostic procedures due to her pregnancy. Eventually, a lumbar MRI was done which showed a bulging disc at L4-5.

The carrier apparently requested a medical examination order to require an examination by a (Dr. N), who examined the claimant on May 7, 1992, and who later certified, without subsequent examination, that the claimant had reached MMI on July 6, 1992, (which raises questions about the efficacy of this certification) with a zero physical

impairment on a Report of Medical Evaluation (TWCC-69). The claimant testified that Dr. N's examination was inadequate and only lasted 7 minutes. Between her visit with Dr. N and the issuance of his TWCC-69, an MRI of the claimant's thoracic spine was performed which indicated herniated discs at T7-8 and T8-9. The claimant testified that she, after receiving Dr. N's TWCC-69, checked with the Commission and was told she needed to agree with the carrier on a designated doctor. The claimant testified that in August 1992, she agreed with the carrier to a designated doctor from a list of doctors provided to her by the carrier. She states that this doctor was a (Dr. K) and that she and the carrier agreed he would be the designated doctor. The claimant also testified that the carrier told her that the carrier would set up an appointment for her to see Dr. K and that she later received a telephone call from the carrier telling her that an appointment had been set up for her to see Dr. K on November 3, 1992.

The claimant testified that she was the primary wage earner in her family which included several children. The claimant testified that after the certification of MMI by Dr. N, the carrier cut off her income benefits and the stress from this as well as her physical problems resulted in a "nervous breakdown" requiring hospitalization. The claimant testified that she called Dr. K's office on November 2, 1992, to confirm her appointment for the next day and was told by the appointment secretary that there was no appointment for her through the end of the year. The claimant testified that she called the carrier's handling adjuster and was told not to worry about this as the carrier would straighten it out. The claimant testified that she later received a notice that a Dr. AR had been selected by the Commission as a designated doctor and she was to be examined by him. The claimant was examined by Dr. AR on December 30, 1992, and he certified that she had reached MMI on July 6, 1992, with a four percent permanent impairment. The claimant testified that Dr. AR's examination was inadequate. The claimant introduced a report dated March 29, 1993, from South Texas Work Assessment and Rehabilitation Center which rated her physical impairment at 36%. The claimant testified that this assessment had been ordered by Dr. G. The claimant also introduced a TWCC-69 signed by a (Dr. AV), who she testified was a neurologist who had treated her injury, certifying MMI on February 26, 1993, and with a 22% impairment rating.

The Appeals Panel has held that we have no jurisdiction concerning constitutional questions; we therefore decline to examine the claimant's due process argument. *See* Texas Workers' Compensation Commission Appeal No. 92275, decided August 11, 1992. We also recognize that the report of a Commission selected designated doctor is entitled to presumptive weight on the issue of both MMI and impairment. Article 8308-4.25 and 4.26. We have also held that the testimony of the claimant in itself may well be insufficient to establish the inadequacy of an examination. *See* Texas Workers' Compensation Appeal No. 92255, decided July 27, 1992. What troubles us concerning this case is whether it was proper for the Commission to designate a doctor when there was, according to the uncontradicted testimony of the claimant, an agreement between the parties as to a

designated doctor. This question underlies the issue of whether the report of Dr. AR is entitled to be accorded the presumptive weight of a report of a designated doctor or whether an agreed upon doctor needs to render the required certification of MMI and impairment rating.

Both Article 8308-4.25 and 4.26 provide that the Commission will only appoint a designated doctor if the parties fail to agree on a designated doctor. Obviously, agreement of the parties is a desired course, and it is certainly what Tex. W. C. Comm'n, 28 TEX. ADMIN. CODE §130.6 (Rule 130.6) contemplates. Here we have uncontradicted testimony from the claimant that such an agreement existed with no explanation as to whether it was ever properly rescinded or why it was not carried out. If the problem was one of scheduling, Rule 130.6(f) clearly provides that the solution was to reschedule the appointment with the agreed designated doctor, not to select a second designated doctor. As we stated in Texas Workers' Compensation Commission Appeal No. 93045, decided March 3, 1993, "[t]he need or desirability for the Commission to select a second designated doctor should be very limited and restricted . . . ."

The present state of the record therefore will not allow us to affirm the decision of the hearing officer giving presumptive weight to the report of Dr. AR without further development of the evidence. We therefore remand this case for this purpose.

Pending resolution of the remand, a final decision has not been made in this case. However, since reversal and remand necessitate 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 8308-5.41. *See* Texas Workers' Compensation Commission Appeal No. 92642, decided January 20, 1993.

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Gary L. Kilgore
Appeals Judge

CONCUR:

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Stark O. Sanders, Jr.
Chief Appeals Judge

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Joe Sebesta
Appeals Judge