APPEAL NO. 93912

This appeal arises pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq*. (1989 Act) (formerly V.A.C.S Art. 8308-1.01 *et seq*.). A contested case hearing was held on September 7, 1993, in (city), Texas, to determine two issues: whether (Dr. S) was a mutually agreed designated doctor, and what is claimant's correct whole body impairment rating. The claimant, who is the appellant in this action, appeals hearing officer (hearing officer) determination that Dr. S was a designated doctor mutually agreed upon by the parties, and that the Texas Workers' Compensation Commission (Commission) accordingly adopts Dr. S's impairment rating of seven percent. The carrier, who is a self-insured governmental entity and the respondent herein, states that the evidence shows there was clear agreement between the parties that Dr. S was the designated doctor, and that the hearing officer correctly adopted his impairment rating.

DECISION

We affirm the hearing officer's decision and order.

It was stipulated that claimant was employed by carrier, the self-insured governmental entity, on the date on which he was injured, (date of injury). His treating doctor was (Dr. D).

(Mr. GS), carrier's claims representative, testified that he was present at a benefit review conference in 1991 at which the benefit review officer told the parties they could agree to a designated doctor in the event of a dispute. However, he said, no designated doctor was appointed as the result of that BRC because the carrier believed that Dr. D was about to release claimant to full duty work.

In January of 1992, Mr. GS said, Dr. D found claimant had reached maximum medical improvement (MMI) with a 34% impairment rating. Based on carrier's dispute of that impairment rating, the claimant saw Dr. S as designated doctor. On March 25, 1992, Dr. S found claimant had not reached MMI, a determination the carrier did not dispute.

On January 13, 1993, Dr. D again found claimant had reached MMI, this time with a 20% impairment rating. In evidence was a January 24, 1993 letter from Mr. GS to (Ms. C) at the Commission, copy to claimant, which enclosed Dr. D's TWCC-69, stated carrier's disagreement, and asked the Commission to designate a doctor to settle the dispute. Some time thereafter, Mr. GS spoke on the telephone with claimant and told him that his temporary income benefits (TIBS) had expired, that he was being paid impairment income benefits (IIBS), and that the carrier had disputed Dr. D's latest impairment rating. Mr. GS said he also told claimant that he had two options, either to agree to a designated doctor to resolve the dispute and ". . . live with whatever he says," or allow the Commission to pick someone. He said claimant told him he had talked with Ms. C at the Commission, who had told him the parties had ten days to agree among themselves. Claimant then suggested he go to a doctor at the Texas Back Institute (institute) and, although carrier preferred Dr. S, it agreed that a doctor from the institute would be acceptable. Because claimant said he

did not want to drive the distance to see Dr. S again, Mr. GS made an appointment for claimant at the institute; however, he said claimant called him back shortly thereafter and said he was agreeable to seeing Dr. S. Mr. GS could not recall whether claimant called him again after he saw Dr. S the second time, but he said he did know that he explained to claimant "that whatever [Dr. S] said, that was it, that would be his impairment rating;" he said he felt certain that the claimant understood. A February 1, 1993 letter from Mr. GS notifying claimant of the appointment with Dr. S (with copy to the Commission) says "[t]hank you for agreeing to see [Dr. S] as the designated doctor to resolve the impairment rating dispute on your claim," but Mr. GS acknowledged that it did not explain the implications of agreeing to a designated doctor. Following a February 17, 1993, appointment Dr. S certified MMI as of that date and assigned a seven percent impairment rating.

The claimant's testimony at the hearing was that he agreed to see Dr. S as a designated doctor, but only because he had seen that doctor once before; he said that he did not understand the ramifications of agreeing to a designated doctor. He said he spoke to Ms. C at a time he could not precisely remember but after he received the carrier's letter disputing Dr. D's impairment rating, and that she told him that if he and the carrier could not agree upon a doctor the Commission would appoint one. He also said he spoke to Mr. GS, and that he received a letter from Mr. GS telling him about the appointment with Dr. S, but it was not until he spoke with a Commission ombudsman, at a time he said was after he had seen Dr. S the second time, that he was fully apprised of the implications of seeing a mutually agreed upon designated doctor. Claimant said he would not have agreed to Dr. S had he understood this. He also said that it was the ombudsman who first mentioned using a doctor from the institute. His position at the hearing was that his impairment rating should be 20%, as found by Dr. D.

The hearing officer made the following findings of fact which are challenged by the claimant on appeal:

FINDINGS OF FACT

6.Claimant and . . . the claims handling entity for [carrier] agreed that claimant would see [Dr. S] as a designated doctor.

7.Claimant had previously seen [Dr. S] to resolve a dispute over maximum medical improvement on March 25, 1992.

8.The designated doctor provisions of the Texas Workers' Compensation Act were explained to claimant at the benefit review conference before claimant's first visit to [Dr. S] on March 25, 1992.

9.Claimant had contact with Ms. A, the (city) field office ombudsman, prior to agreeing to see [Dr. S] on the issue of impairment rating.

10.[Dr. S] was a mutually agreed designated doctor.

11.[Dr. S] assigned claimant a seven percent (7%) whole body impairment rating.

Because the 1989 Act provides the Commission "shall adopt" the impairment rating assigned by a designated doctor selected by mutual agreement of the parties, *see* Section 408.125(d), there must be sufficient evidence to support the hearing officer's determination that the parties had entered into such agreement, and in such manner as effectuates the procedures contemplated by the Commission.

Texas Workers' Compensation Commission Appeal No. 92312, decided August 19, 1992, concerned a claimant who contended that he did not agree to a designated doctor and that he believed the doctor who examined him was an independent medical examination doctor. In affirming the hearing officer's adoption of the designated doctor's impairment rating, we noted at least three letters in the record sent to the claimant's attorney which referred to the doctor in question as a designated doctor, and we stated that the evidence showed that the doctor's examination came after an apparent disagreement over an earlier doctor's assessment of MMI. That decision also stated:

> 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 Tex. W.C. Comm'n, 28 TEX. 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.

In this case, the hearing officer reasoned in his discussion that the evidence showed there was sufficient Commission contact with the claimant, noting that the designated doctor provisions had been explained at the first benefit review conference. The hearing officer also noted that the claimant spoke with the Commission ombudsman, who told him about the institute, and that claimant and Mr. GS discussed the institute prior to agreeing to Dr. S. From that testimony, the hearing officer stated, it was clear the claimant talked to the Commission prior to seeing Dr. S for the second time. We also note that carrier's written dispute of Dr. D's impairment rating and its letter to claimant setting up an appointment with Dr. S as a designated doctor were sent to both claimant and to the Commission. As this panel has previously 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." Texas Workers' Compensation Commission Appeal No. 92511, decided November 12, 1992. That decision also said that Rule 130.6 envisions Commission confirmation of such agreement, and that leaving the Commission "out of the

loop" following a clear and documented agreement for a designated doctor could entail a risk that the trier of fact would not give effect to such agreement. In this case, we agree with the hearing officer that there was sufficient evidence both of an agreement and of Commission contact. Our review of the record convinces us that the hearing officer's decision is not so against the great weight and preponderance of the evidence as to be clearly wrong or manifestly unjust. Atlantic Mutual Insurance Company v. Middleman, 661 S.W.2d 182 (Tex. App.-San Antonio 1983, writ ref'd n.r.e.).

The decision and order of the hearing officer are affirmed.

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Lynda H. Nesenholtz
Appeals Judge

CONCUR:

_____
Thomas A. Knapp
Appeals Judge

_____
Gary L. Kilgore
Appeals Judge