APPEAL NO. 93992

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., Article 8308-1.01 *et seq.*). This case is before us again following our remand in Texas Workers' Compensation Commission Appeal No. 93556, decided August 18, 1993. The remand was predicated on our holding that the evidence in the record did not establish that (Dr. AR), whose opinion the hearing officer had given presumptive weight on the issues of maximum medical improvement (MMI) and impairment, was a proper Texas Workers' Compensation Commission (Commission)-selected designated doctor if prior to his appointment the parties had agreed to a designated doctor, to which agreement the appellant (claimant herein) had testified at the original contested case hearing (CCH). We remanded the case for further development of the evidence concerning an agreement between the parties as to a designated doctor since this "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." This in turn should have allowed proper resolution of the original issues in the case as to when the claimant attained MMI and what, if any, permanent impairment she may have.

On September 27, 1993, a CCH on remand was held in (city), Texas, with (Hearing officer) presiding as hearing officer. At the hearing the claimant testified concerning her agreement with the respondent (carrier herein) on a designated doctor and presented documents confirming that agreement. The carrier agreed that it entered into an agreement that (Dr. K) be the designated doctor, but stated that Dr. K refused to act as the designated doctor. The claimant testified that she had not been told that Dr. K would not act as designated doctor, or given an opportunity to agree to another designated doctor before the Commission, at the request of the carrier, selected Dr. AR as the designated doctor. The carrier presented evidence that Dr. K refused to act as designated doctor in this case. The carrier argued that since Dr. K had been the only doctor upon which the claimant and the carrier had been able to agree to be the designated doctor, the only thing which could be done once Dr. K refused to be the designated doctor was for the Commission to choose a designated doctor, which is what it requested and what was done.

The hearing officer found that the claimant and the carrier agreed upon Dr. K as designated doctor, but Dr. K refused to participate, as another doctor in his office had previously seen the claimant. Dr. AR was appointed by the Commission to act as designated doctor. The hearing officer found MMI and impairment based upon the opinion of Dr. AR, finding the claimant reached MMI on July 6, 1992, with four percent impairment. The claimant appeals alleging, among other things, she was denied her rights under 28 TEX. ADMIN. CODE § 130.6 (Rule 130.6) to have an opportunity to agree to a designated doctor. The carrier argues that it entered into an agreement for Dr. K to be the designated doctor and, through no fault of its own, Dr. K refused to be designated doctor. The carrier argues that the claimant has no right under the statute or the rules to have an opportunity to enter into a second agreement for a designated doctor. The carrier requests that we affirm the decision of the hearing officer.

DECISION

We reverse the decision of the hearing officer and render a new decision that MMI and impairment cannot yet be determined as there as been no properly selected designated doctor.

The essential facts of this case are detailed in our opinion in Appeal No. 93556, *supra*. To briefly summarize them we note that it was undisputed that the claimant suffered a compensable injury on (date of injury), when she fell while crawling under a desk to retrieve an item. The claimant was initially seen for her injury at the Humana Hospital and later (Dr. G) became her treating doctor.

The carrier requested an examination by a (Dr. N), who examined the claimant on May 7, 1992, and who later certified, without subsequent examination, that the claimant reached MMI in July 6, 1992, with zero physical impairment on a Report of Medical Evaluation (TWCC-69). 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 after receiving Dr. N's TWCC-69, she checked with the Commission and was told that she needed to agree with the carrier on a designated doctor. To mediate an agreement with carrier, the claimant testified that she enlisted the good offices of State Senator BS. The claimant and the carrier each provided Senator S' office with a list of three doctors with whom they would agree to be the designated doctor. The claimant testified that she agreed to Dr. K, who was one of the doctors on the carrier's list.

The claimant testified that the carrier told her that it would arrange an appointment with 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 called Dr. K's office on November 2, 1992, to confirm her appointment for the next day and was told she had no appointment. The claimant testified that she then 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 next received a notice from the Commission that Dr. AR had been selected by the Commission as a designated doctor and she was to be examined by him. Dr. AR examined the claimant on December 30, 1992, and certified on a TWCC-69 that the claimant reached MMI on July 6, 1992, with a four percent impairment rating.

The claimant introduced into evidence 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, her treating doctor. 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, with a 22% impairment rating. The claimant attaches to her request for review, but not admitted into evidence at either hearing, a TWCC-69 from a (Dr. R) certifying she attained MMI on February 26, 1993, with a 22% impairment rating and a TWCC-69 from Dr. G certifying she attained MMI on September 15, 1993, with a 36% impairment.

At the CCH on remand, the carrier introduced into evidence an affidavit from Dr. K's office manager stating that she received several telephone calls from the carrier in November and December 1992 inquiring into setting up an appointment for the claimant to see Dr. K. The affidavit went on to state that Dr. K would not see the claimant because she had been previously seen by (Dr. NL) in Dr. K's office and there was an office policy that Dr. K and Dr. NL did not see a patient who had been previously examined or treated by the other. The carrier also introduced a TWCC-45 dated November 5, 1992, it filed with the Commission and which stated:

> We had IME, [Dr. N], give TWCC-69 with 0% disability. Sent this report to [Dr. G]. He said she was not at MMI, but had no diagnostic findings. We were asked by [Ms. V] with TWCC to agree upon a designated doctor in August. We agreed to [Dr. K]. Claimant either was not able to get appointment or has rescheduled since. We seem to being having a problem getting this done. Please designate doctor to determine if MMI has been reached.

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. Texas Workers' Compensation Commission Appeal No. 93099, decided March 25, 1993. We decline to retreat from this rule. Nor do we find any merit in the argument of the carrier that if a doctor is agreed upon under Rule 130.6, but will not or cannot see the claimant, that the claimant, having once been given the opportunity to agree to a designated doctor, is not entitled to another opportunity to agree to a designated doctor. This is simply a distinction without a difference.

The hearing officer's analysis on remand is also fatally flawed. The hearing officer apparently believes that since Dr. K was the only doctor upon which the carrier and the claimant could agree, they would not be able to agree on another doctor, so Rule 130.6 was satisfied. First, there is no evidence that Dr. K was the only doctor upon which the parties *could* agree; the evidence is that he was the only doctor upon which they *did* agree. Once this agreement had been reached, they never again attempted to agree because until Dr. K refused to see the claimant there was no need, and afterwards, there was no opportunity presented them. While the carrier implies that the carrier would not have agreed to another doctor, this implication is raised in argument of counsel (which we, at least, have difficulty transmuting into evidence) and which even counsel does not state directly, and probably with good reason. The *evidence* in the case shows that with the mediation from Senator S' office, the parties had no real difficulty agreeing to Dr. K. A reasonable inference from this evidence is that given an opportunity the parties may have had no difficulty agreeing to another doctor. We believe that the only proper remedy under these facts is to declare invalid the appointment of Dr. AR as the designated doctor and disregard his opinion. To attempt to render a decision based upon the findings of any other doctor would be difficult and unfair. It would be difficult because of the paucity of opinions we might use. Dr. N

appears to have announced retroactively a prospective MMI date--a practice we have previously disapproved. *See* Texas Workers' Compensation Commission Appeal No. 93763, decided October 8, 1993. The opinions of Dr. G and Dr. R were not put into evidence and we will not consider them. *See* Texas Workers' Compensation Commission Appeal No. 91132, decided February 14, 1992. The opinion of the South Texas Work Assessment and Rehabilitation Center appears to that of a physical therapist only. This leaves Dr. AV's certification of MMI on February 26, 1993, with a 22% impairment rating as the only valid assessment. We believe that, under the facts of this case, to render a decision based on this assessment would be unfair to the carrier by not giving it an opportunity to have the claimant examined by a designated doctor through no fault of its own.

We therefore render a decision that the issues of MMI and impairment have not been properly determined. It is apparent that future dispute resolution process may be necessary for a valid determination of these issues. *See* Texas Workers' Compensation Commission Appeal No. 93323, decided June 9, 1993.

Gary L. Kilgore
Appeals Judge

CONCUR:

Stark O. Sanders, Jr.
Chief Appeals Judge

DISSENTING OPINION:

Rule 130.6(b) imposes a particular duty upon the Commission after receiving notification of a dispute. The Commission did what the rule told it to do. Later when it developed that the agreed designated doctor would not function as such, another doctor was then appointed. I see no provision in the rule requiring otherwise. While Appeal No. 93099, *supra*, correctly stated that this Commission had a duty under Rule 130.6(b), it also made clear that the Commission in that case did not give the parties "an opportunity" and "any opportunity" to act. That opinion also cited the purpose of the 1989 Act to provide speedy, equitable relief to an employee. I'm not sure speedy, equitable relief will result from the Commission waiting at least 10 days for subsequent attempts to reach agreement as to a designated doctor. While it is clear that a time for agreement should be given after notification of a dispute, the rule is not so clear as to compel this body to act to reverse the decision of the hearing officer after an opportunity was provided.

Joe Sebesta
Appeals Judge