APPEAL NO. 94051

This appeal arises under the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq*. (1989 Act). At a contested case hearing held in (city), Texas, on December 1, 1993, the hearing officer, (hearing officer), concluded, based on several factual findings, that there had been insufficient contact by the Texas Workers' Compensation Commission (Commission) with the respondent (claimant) concerning the status of a doctor as a designated doctor agreed upon by claimant and the appellant (carrier); that the determination of claimant's impairment rating (IR) by that doctor was thus not required to be adopted by the Commission pursuant to Section 408.125(d); and that since there has not yet been a designated doctor in claimant's case, the issue of her IR was not yet ripe for the hearing officer's determination. The carrier appeals from these conclusions, as well as the factual findings upon which they rest. The carrier contends that the requirements of Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 130.6 (Rule 130.6) concerning agreement of the parties on a designated doctor were met by the carrier and the Commission, that the usual rules of contract law do not apply to agreements on a designated doctor, and that the claimant is presumed to know the rules of contract law. The carrier also urges that by imposing on the Commission a requirement for communication with the claimant concerning the significance of agreeing to a designated doctor which exceeded the requirements of Rule 130.6, the hearing officer misread the law and is thus not entitled to the usual deference in his factual determinations. The response of the claimant urges the sufficiency of the evidence to support the challenged findings and conclusions.

DECISION

Being erroneous as a matter of law, the decision of the hearing officer that (Dr. B) was not an agreed designated doctor and that the issue of IR is not ripe for decision is reversed and a new decision is rendered that Dr. B. was an agreed designated doctor and that claimant's IR is 12%.

The parties stipulated that the claimant, a nurse employed by a hospital, was injured in the course and scope of her employment on (date of injury). According to medical records, claimant was aligning a baby in a bed with an X-ray machine when she jerked up and felt a "pull" in her left shoulder. The next day she awoke with a "crick" in her neck and pain in her left forearm. Following a variety of conservative treatment modalities, claimant underwent neck spine surgery. Claimant represented through counsel that she reached statutory maximum medical improvement (MMI) on April 20, 1993. In evidence was a Report of Medical Evaluation (TWCC-69) from (Dr. S), apparently claimant's treating doctor, certifying that she reached MMI (statutory) on April 20, 1993, with an IR of 21%. Dr. S's TWCC-69 referred to and obviously adopted the 21% IR from the TWCC-69 and accompanying narrative report of (Dr. W), to whom Dr. S had referred claimant for an IR evaluation. Dr. W's TWCC-69 and accompanying narrative report stated that claimant's work-related injury had required a C6-7 hemilaminectomy with discectomy and root decompression in September 1992, and that claimant reached MMI on April 20, 1993, with an IR of 21% consisting of nine percent for a cervical lesion, nine percent for cervical range

of motion (ROM), and three percent for cervical pain. The record did not appear to indicate that the claimant was examined by a doctor at the request of the carrier.

According to claimant's testimony and the documentary evidence, claimant was examined by Dr. B on August 4, 1993, and he assigned an IR of 12%. Dr. B's TWCC-69 dated "8/9/93" stated that claimant reached MMI on April 20, 1993, with a 12% IR consisting of nine percent for a surgically treated cervical lesion, one percent for decreased cervical ROM, and two percent for loss of sensation in claimant's left thumb, index and middle fingers.

The pertinent factual findings and legal conclusions, including those challenged by the carrier, are as follows:

FINDINGS OF FACT

8.CLAIMANT and CARRIER agreed CLAIMANT would see [Dr. B].

9.CLAIMANT did not receive the Notice of Dispute of [MMI] or Assigned [IR] which informs a claimant of the need to contact the [Commission] regarding any agreement to a designated doctor.

10.CLAIMANT was not contacted by the [Commission] regarding the significance of an agreement to a designated doctor.

11.[Dr. B] was not an agreed designated doctor.

12.There has not been a designated doctor on this claim file.

CONCLUSIONS OF LAW

2.Insufficient Commission contact occurred with CLAIMANT for [Dr. B] to be an agreed designated doctor. His determination of CLAIMANT'S [IR] is not required to be adopted by the [Commission].

3.There has not been a designated doctor on this claim so the issue of impairment rating is not ripe for determination at this time.

The following excerpt from the hearing officer's discussion makes clear that he regarded the decision as to whether Dr. B was a mutually agreed upon designated doctor as turning on the extent of the Commission's communication or lack thereof with the claimant:

The Commission mailed at least two and possibly three documents to CLAIMANT. The two documents CLAIMANT definitely received related to identifying a dispute and notifying CLAIMANT of an appointment with [Dr. B]. The two letters informed CLAIMANT she could call the Commission if she had any questions. These documents do not point out the significance of an agreed designated doctor (see CLAIMANT's exhibits 4 and 8). CLAIMANT's exhibit 6, the third document she should have received, is signed only by the adjuster. When asked by the Hearing Officer if she had ever seen this document, she stated she had received many documents and could not remember. It is important that the one document which informs CLAIMANT she shall call the Commission for an explanation of the importance of the agreement for a designated doctor may not have been received by CLAIMANT. It is also important to note the adjuster completed the document showing no agreement was reached which may have prevented this document from being mailed to CLAIMANT. CLAIMANT testified no one from the Commission called her to explain the agreement and she had no questions since she did not understand the significance of the designated doctor. With no evidence CLAIMANT received notification of her rights relating to an agreed designated doctor and no phone contact between the Commission and CLAIMANT to verify the agreement and inform her of the importance of the agreement, I find insufficient Commission contact occurred to validate the agreement.

Section 408.125 provides that if an IR is disputed, the Commission shall direct the employee to be examined by a designated doctor "chosen by mutual agreement of the parties;" that if the parties are unable to agree on a designated doctor, the Commission shall direct the employee to be examined by a designated doctor chosen by the Commission; that if the designated doctor is chosen by the Commission the report of that doctor will have presumptive weight but that if the designated doctor is chosen by the parties the Commission "shall adopt" the IR made by that doctor. Thus, when the parties mutually agree on a designated doctor, they agree to be bound by that doctor's IR.

To implement this statutory provision, the Commission adopted Rule 130.6. Rules 130.6(a)-(c) provide, in part, that if the Commission receives a notice from either the employee or the carrier that disputes MMI or an IR, the Commission shall notify those parties that a designated doctor will be directed to examine the employee; that after such notification, the Commission will allow the parties ten days to agree on a designated doctor; that the Commission will "inform" an unrepresented employee that an Ombudsman is available to explain the content of the agreement for a designated doctor; and that if the parties agree on a designated doctor the carrier shall within ten days send a confirmation letter to the employee containing, among other things, the designated doctor's name, business address, telephone number, and time and date of the examination. Rule 130.6(d) provides that the Commission "shall contact the worker to confirm the agreement." Rule

130.6(d) goes on to provide that if the Commission is not notified by the end of the 10th day that an agreement has been reached, the Commission shall issue an order directing the employee's examination by a designated doctor chosen by the Commission.

We find as a matter of law that the requirements of Rule 130.6 were satisfied, and that the hearing officer erred in requiring more "contact" by the Commission with the claimant than is required by the Rule.

The Commission's letter to claimant of June 29, 1993 (claimant exhibit 4), which claimant said she received, met the requirement of Rule 130.6(a) that the Commission, upon receipt of notice of a dispute of either MMI or an assigned IR, notify the employee and the carrier that a designated doctor will be directed to examine the employee. This letter advised claimant that the Commission had been notified that claimant and the carrier "are in dispute over [MMI] and/or [IR]," and said that "[s]ince you have not been able to resolve this dispute by mutual agreement, a designated doctor must be used to resolve the dispute." This letter also recognized that part of Rule 130.6(b) which provides that after providing such notice, the Commission shall allow the employee and carrier ten days to agree on a designated doctor in that it went on to advise that the parties had ten days under Rule 130.6 to agree to a designated doctor after which time the Commission would select a designated doctor and schedule an examination. The letter concluded by inviting claimant to call the Commission's local field office if she had any questions. Claimant testified she had no questions after receiving the letter and that she thought she understood it at the time but now knows she did not. She also acknowledged that while the carrier always communicated to her in writing about seeing various doctors, this was the first time she received a letter from the Commission about seeing another doctor.

The carrier's letter to claimant of June 30, 1993 (claimant exhibit 5), signed by (Ms. B), one of carrier's adjusters on claimant's claim, satisfied Rule 130.6(c) requiring the carrier, within ten days, to send a confirmation letter to the employee if the employee and carrier agree on a designated doctor. This letter, which claimant said she received, contained all the information stated in Rule 130.6(c) (1) through (4) except for claimant's social security number. The letter confirmed the telephone conversation between Ms. B and claimant of that date "in which we agreed on a designated doctor for your examregarding your [IR]." It went on to state that by a copy of the letter carrier was also notifying the Commission "of our agreement." It also stated the time and date of claimant's appointment with Dr. B, said all medical records in carrier's file would be sent to Dr. B for his review, and invited claimant to call if she had any questions. Claimant testified that the carrier always followed up on telephone conversations regarding her seeing doctors with a letter.

The Commission's letter to claimant of July 9, 1993 (claimant exhibit 8), which claimant said she received, satisfied that part of Rule 130.6(b) requiring that the Commission inform an unrepresented claimant that a Commission ombudsman is available to explain

the contents of the agreement for a designated doctor. The letter stated that the Commission had been notified that claimant and the carrier "have agreed for you to be examined by a designated doctor, [Dr. B]," and provided Dr. B's address, telephone number, and the date of the appointment. This letter went on to state: "If you are unrepresented and have any questions about the agreement, you may contact the Commission OMBUDSMAN at the number shown above or if calling long distance, 1-800-252-7031." In our view, this letter also satisfied the requirement of Rule 130.6(d) that the Commission "contact the worker to confirm the agreement."

The document which the hearing officer characterized as "the one document which informs the CLAIMANT she shall call the Commission for an explanation of the importance of the agreement for a designated doctor" was entitled "Notice of Dispute of [MMI] or Assigned [IR]." In his discussion, the hearing officer stated claimant "may not have" received it, whereas in Finding of Fact No. 9 he found that claimant "did not" receive it. Claimant testified she had received numerous documents and, variously, that she did not know whether she received it and did not remember. She also said that before the hearing she looked for it but volunteered she did not search thoroughly. In any event, this printed form was signed by Ms. B on "6-22-93" and did not indicate whose form it was or who authored it. From the context of the information checked on the form, however, it appears to notify the Commission that the carrier disputes claimant's IR. The signature block for the claimant was left blank. Below the signature blocks for the parties, the form states that the carrier shall notify claimant within 10 days from the date of the notice, that "[t]he claimant shall contact JA or CM at 806/765-2700, for an explanation of the importance of the agreement for a Designated Doctor." The record did not further identify these persons.

While finding that claimant and carrier did agree that claimant would see Dr. B, the hearing officer further found that Dr. B was not an agreed designated doctor, apparently because of his findings that the Notice of Dispute discussed above was not received by claimant and because claimant was not contacted by the Commission regarding the significance of an agreement to a designated doctor. As previously noted, however, the correspondence claimant said she received from the Commission and the carrier was confirmation from both entities that she had agreed to be examined by Dr. B as a designated doctor who would resolve the disputed issue of her IR, and invited her to call the Commission, its ombudsman, and the carrier if she had any questions.

Rule 130.6 does not require the Commission to advise a claimant of the significance of an agreement to a designated doctor. In Texas Workers' Compensation Commission Appeal No. 931158, decided January 28, 1994, where the Appeals Panel affirmed the hearing officer's determination that the claimant had agreed to a designated doctor, the following discussion is pertinent to this case:

In prior cases in which an issue was raised as to whether a designated doctor was agreed upon, this panel has examined the procedures followed to see whether they comported with those set forth in the rule. *See* Texas Workers' Compensation Commission Appeal No. 92312, decided August 19, 1992; Texas Workers' Compensation Commission Appeal No. 93912, decided November 22, 1993. This panel has characterized the rule's procedures as "extra safeguards" which "were apparently deemed necessary by the Commission, because an agreed designated doctor's report will, according to [Section 408.125], conclusively bind the parties to the impairment rating, and prevent the Commission from considering medical evidence to the contrary." Texas Workers' Compensation Commission Appeal No. 92511, decided November 12, 1992. Absence of a showing of compliance with the rule has resulted in determinations that a particular doctor was not a designated doctor. *See* Texas Workers' Compensation Commission Appeal No. 92608, decided December 30, 1992, (in which the Appeals Panel found error, among other things, for the Commission to fail to notify an unrepresented claimant that ombudsman assistance was available); Texas Workers' Compensation Commission Appeal No. 93425, decided July 14, 1993.

Our review of the record in this case shows that the basic elements of Rule 130.6 were complied with, most notably that the parties were given ten days in which to agree on a designated doctor and the claimant was informed of the availability of ombudsman assistance. (While the rule is not entirely clear as to when the latter notice must be given, we note that in this case such notice was given approximately two weeks before the date of the appointment with the designated doctor, which would have been sufficient time in which to contact an ombudsman.) We also observe that the rule does not require, and this panel has not previously held, that a claimant be informed that the Commission must adopt the findings of an agreed upon designated doctor. While such omission does not appear to be fatal, we cite with approval the procedures detailed in Texas Workers' Compensation Commission Appeal No. 931095, decided January 4, 1994, in which the letter from the Commission contained this information.

We find the hearing officer's Findings of Fact Nos. 10 - 12 and Conclusions of Law Nos. 2-3 erroneous as a matter of law for the reasons discussed above. Accordingly, we find that Dr. B was a designated doctor agreed to by the claimant and the carrier and, thus, the 12% IR he assigned to the claimant is adopted by the Commission pursuant to Section 408.125(d).

The decision and order of the hearing officer are reversed and a new decision and order are rendered that claimant's IR is 12%.

Philip F. O'Neill
Appeals Judge

CONCUR:

Stark O. Sanders, Jr.
Chief Appeals Judge

Robert W. Potts
Appeals Judge