APPEAL NO. 94110

This appeal arises under the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq*. (1989 Act). A contested case hearing (CCH) was held in (city), Texas, on January 10, 1994, with (hearing officer) presiding, to determine the following disputed issues: 1. what is the correct impairment rating (IR); and 2. is (Dr. S) an agreed designated doctor. After the parties presented their evidence and argued their respective positions, the hearing officer closed the hearing. According to the records of the Texas Workers' Compensation Commission (Commission), the hearing officer wrote the parties on January 12 (sic), 1994, and enclosed an order she signed on January 13, 1994, entitled "Order Cancelling Benefit Contested Case Hearing" (the Order). The Order stated that the hearing officer found that "Dr. S was not an agreed designated doctor because [respondent] Claimant WR [claimant] did not enter into an agreement knowing the consequences relating to an `agreed upon' designated doctor and because proper Commission procedures were not followed with regard to the alleged agreement." The Order then stated that the CCH "be and is hereby cancelled and remanded to a Disability Determination Officer [DDO] for appointment of a designated doctor." The appellant (carrier) timely filed a Request for Review contending first that the Order did not comply with the requirements of Section 410.168 and requesting that the hearing officer issue a written decision in compliance with that statute. In the alternative, the carrier requests the Appeals Panel to reverse the finding that Dr. S was not a mutually agreed designated doctor. No response to the carrier's Request for Review was filed by the claimant.

DECISION

Finding that the Order of the hearing officer constituted a decision pursuant to Section 410.168, and that the hearing officer's findings are sufficiently supported by the evidence, we affirm the hearing officer's determination that Dr. S was not a mutually agreed designated doctor.

Before discussing the merits of the hearing officer's determination that Dr. S was not a mutually agreed designated doctor, we first address the threshold issue of our jurisdiction to entertain carrier's Request for Review. Section 410.151(a) provides that "a party to a claim for which a benefit review conference is held . . . is entitled to a contested case hearing;" Section 410.152(a) provides that a hearing officer "shall conduct a [CCH];" and Section 410.168(a) provides that "[t]he hearing officer shall issue a written decision" to include factual findings, legal conclusions, and a determination of whether benefits are due. While Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE §§ 142.2(13) and (14) (Rules 142.2 (13) and (14)) authorize hearing officers to "recess, postpone, or dismiss" hearings, and to "take any other action as authorized by law, or as may facilitate the orderly conduct and disposition of the hearing," we find no authority in the 1989 Act or in the Commission's rules for a hearing officer to "cancel," as such, a hearing that has already been held. *See* Texas Workers' Compensation Commission Appeal No. 94106, decided March 7, 1994.

Rule 142.16(a) provides that after the record closes, as indeed it did in this case, "the hearing officer shall issue a decision on benefits." Section 410.202(a) provides that "[t]o

appeal the decision of a hearing officer, a party shall file a written request for appeal with the appeals panel not later than the 15th day after the date on which the decision of the hearing officer is received. . . ." (Emphasis added.) Rule 143.3(a) provides that a party to a CCH "who is dissatisfied with the decision of the hearing officer may request the appeals panel to review that decision." (Emphasis added.) While the term "decision" is not defined in the 1989 Act or in the Commission's rules, Section 410.168(a) provides that the hearing officer "shall issue a written decision that includes: (1) findings of fact and conclusions of law; (2) a determination of whether benefits are due; and (3) an award of benefits due." In our view, the Order in this case met the requirements of Section 410.168(a) since it determined that Dr. S was not an agreed designated doctor based on two express, factual findings, namely, that claimant did not enter into the agreement knowing the consequences of agreeing to a designated doctor and because proper Texas Workers' Compensation Commission (Commission) procedures were not followed. Those factual findings imply the legal conclusion that Dr. S was not an agreed designated doctor. The net effect of such findings and conclusion is a determination that impairment income benefits (IIBS) are not due claimant because there has not yet been a determination of his correct IR. Thus, we disregard the Order to the extent it purported to "cancel" the CCH (*see* Texas Workers' Compensation Commission Appeal No. 94106, *supra*, and Texas Workers' Compensation Commission Appeal No. 94109, decided March 8, 1994) and we consider the Order to be an appealable decision and not an interlocutory order. The Appeals Panel has previously held that interlocutory orders of hearing officers are not appealable. *See e.g.* Texas Workers' Compensation Commission Order No. 92001, decided February 4, 1992.

The claimant testified that on (date of injury), he was employed by (employer). (employer) and that while struggling with a thief at his workplace, he hyperextended his right knee tearing ligaments and cartilage and fell breaking his left wrist. After seeking immediate hospital treatment, claimant was treated by (Dr. EO) who set his wrist and later operated on his injured knee. Dr. EO's records indicated he operated on claimant's knee on November 6, 1992, and that claimant had a torn medial meniscus, a torn lateral meniscus, and a torn cruciate ligament. Claimant said he has since returned to work. He also testified that Dr. EO assigned him an IR, which was 25% according to the documentary evidence, and that the carrier disputed this IR. A Report of Medical Evaluation (TWCC-69) signed by Dr. EO on February 14, 1993, certified that claimant reached maximum medical improvement (MMI) on January 29, 1993, with an IR of 25%. According to Dr. EO's accompanying narrative report of February 14th, the 25% IR was assigned for the above mentioned disorders of claimant's right knee as well as for its abnormal range of motion (ROM) and for persistent weakness of the quadriceps muscle. An impairment rating was also included for abnormal ROM in claimant's left wrist.

Claimant testified that carrier's adjuster, (Ms. F), called and explained to him that he had two options, namely, to go to Dr. S or to a medical clinic, and that she further explained that the purpose was to see a mutually agreed designated doctor. Claimant said the term "agreed designated doctor" was used; that he understood the term to mean the doctor the carrier offered him; that he did not believe that Dr. S's opinion would be binding; that he thought Dr. S was an insurance company doctor because Dr. S favored insurance

companies; that he assumed the doctors' names provided by Ms. F were insurance company doctors because it was she who provided their names; and that he selected Dr. S from the two specific names offered by Ms. F.

Ms. F testified that she was the adjuster on claimant's claim and that the carrier disputed Dr. EO's 25% IR and assessed an IR of 10%. She said she called claimant, advised him of the dispute, and told him that carrier wanted to try to agree on a mutual designated doctor "to get a second opinion." Ms. F stated that she then asked claimant if he had any orthopedist he would like to see, that he stated he knew of no orthopedists in the area, and that he asked if she knew of any. She said she then gave him the names of Dr. S and of (Dr. O) clinic, and thought she gave him a third name as well. Claimant testified only to being given the names of Dr. S and a clinic. Ms. F also stated that she explained to claimant that the doctor would be a designated doctor whose opinion would be binding--an opinion "we would both have to live with"--and that claimant responded that he wanted to discuss the matter with Dr. EO. Claimant said he consulted with Dr. EO over the choice and that Dr. EO suggested he see Dr. S. Claimant also said that Dr. EO "implied," without directly stating, that Dr. S would favor the carrier and probably give him a low rating. Claimant said he talked it over with his wife and decided to be examined by Dr. S figuring that if Dr. S's rating were insufficient he would appeal it and attempt to reach some agreement with the carrier on his IR. Ms. F testified that claimant later called her saying he agreed to see Dr. S.

Claimant further testified that he could not recall receiving any communication from the Commission about seeing Dr. S as a mutually agreed designated doctor, that no one mentioned his seeing a Commission ombudsman about the matter, and that he had no contact with the Commission about the matter until after he received the Dr. S's IR. Neither party contended that Dr. S was a designated doctor selected by the Commission.

Claimant said that after receiving the 14% IR from Dr. S, he discussed the rating with Dr. EO who disagreed with it and asked if Dr. S had measured his knee. Claimant said that while Dr. S did bend his knee, and that he also bent claimant's wrist, Dr. S did not measure the knee range of motion (ROM) with any instrument. Claimant said he next called the Commission to find out what his rights were. He said he was told he could appeal Dr. S's IR so he sent the Commission a letter disputing Dr. S's IR believing that he and the carrier could reach some agreement on it but that he later came to realize he was mistaken. In evidence was an August 19, 1993, letter from claimant to the Commission requesting a benefit review conference and stating that he was disputing Dr. S's 14% rating and that "he was a mutually agreed upon doctor." Claimant said he wanted the Commission to select a designated doctor to give him a "fair" IR for his knee.

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 10 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 view the evidence as sufficient to support the hearing officer's determination that Dr. S was not a mutually agreed designated doctor. An April 2, 1993, letter from the carrier to the Commission, which reflected that a copy was sent to claimant, stated that the carrier disputed the 25% IR, that the carrier reasonably assessed the correct IR at 10%, and that carrier and claimant agreed on Dr. S as the designated doctor to assess impairment. Carrier's letter of April 5, 1993, to Dr. S confirmed claimant's appointment for April 19th, stated that the purpose of the evaluation was to resolve a dispute only over claimant's IR of the left wrist and right knee, and enclosed medical reports and a TWCC-69. This letter did not reflect that a copy was sent to claimant. Also in evidence was a carrier letter of April 5th to claimant stating it served "as a reminder of the mutually-agreeable, designated doctor's appointment, . . ." and specifying the date, time and location. Unlike the April 5th letter to Dr. S, this letter did not include the reference to Dr. S's resolving a dispute over claimant's IR. Dr. S's TWCC-69, signed on April 26, 1993, stated that claimant reached MMI on April 19, 1993, with an IR of 14% for his right knee and left wrist.

There was no evidence that the unrepresented claimant was informed by the Commission of the IR dispute and necessity for a designated doctor, nor of the availability of a Commission ombudsman to explain the content of the agreement with carrier on a designated doctor, nor was there any evidence of the Commission's having contacted claimant to confirm the agreement. Indeed there was no documentary evidence of any communication by the Commission with the claimant concerning the IR dispute and the matter of the designated doctor. The carrier makes the point that it complied with its requirements under Rule 130.6 and should not suffer the consequences of the Commission's failure to comply.

The Appeals Panel has recognized that while an agreement on a designated doctor need not be a signed contract, "the Commission's confirmation of the agreement is

envisioned" by Rule 130.6, and has characterized the requirements of Rule 130.6 as "extra safeguards . . . 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. In Texas Workers' Compensation Commission Appeal No. 93247, decided May 5, 1993, where the hearing officer determined that a Dr. E was not an agreed designated doctor under Rule 130.6 and the carrier appealed, the Appeals Panel, in affirming, reviewed its decisions in Texas Workers' Compensation Commission Appeal No. 92312, decided August 19, 1992, and in Appeal No. 92511, *supra*, and stated:

> 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.

In Texas Workers' Compensation Commission Appeal No. 93514, decided August 5, 1993, the carrier's position was that carrier and claimant had agreed upon Dr. B as a designated doctor whereas the claimant maintained he did not agree to see Dr. B as a designated doctor and that the Commission failed to comply with Rule 130.6 by informing him of the availability of an ombudsman to explain the ramifications of such an agreement and further failed to confirm the purported agreement. The hearing officer determined that Dr. B was not a designated doctor. In affirming the hearing officer's decision, the Appeals Panel observed:

> As we pointed out in Appeal No. 92511, *supra*, the Commission deemed it necessary to provide safeguards in Rule 130.6 because the agreed designated doctor's assigned impairment rating will bind the parties to that rating. We think that when there is a dispute over whether a doctor was an agreed designated doctor, with the claimant asserting that there was no agreement, evidence of the Commission's confirmation of the agreement with the claimant would be both relevant and compelling evidence, because it provides evidence of the existence of the agreement from an impartial third party who has the duty and responsibility to administer and enforce the provisions of the Texas Workers' Compensation Act. By showing that the Commission did not confirm the purported agreement, the claimant demonstrated the weakness in the carrier's evidence, and the carrier was left with attempting to prove the agreement through other means. In other words, evidence pertaining to compliance or noncompliance with the Commission confirmation provision in Rule 130.6 is relevant to the issue of whether the parties agreed on a

> designated doctor in that compliance with that provision would tend to show that there was an agreement whereas noncompliance would tend to show that there was not an agreement. Of course, the parties' agreement to have a particular doctor serve as the designated doctor can be established despite a lack of evidence showing that the Commission confirmed the agreement with the claimant. *See* Texas Workers' Compensation Commission Appeal No. 92312, decided August 19, 1992, where we found that 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, despite the fact there was no direct evidence that the Commission confirmed the agreement as provided in Rule 130.6(d). *Compare* Texas Workers' Compensation Commission Appeal No. 93425, decided July 14, 1993.

See also Texas Workers' Compensation Commission Appeal No. 92608, decided December 30, 1992, where the Appeals Panel affirmed a decision that a Dr. H was not an agreed designated doctor and the evidence showed that Rule 130.6 was not followed. *And see* Texas Workers' Compensation Commission Appeal No. 93170, decided April 22, 1993. *Compare* Texas Workers' Compensation Commission Appeal No. 94051, decided February 23, 1994, where the hearing officer determined that a Dr. B was not an agreed designated doctor because the Commission had not sufficiently contacted the claimant to explain the significance of a designated doctor. Determining that the Commission had advised claimant of the availability of an ombudsman and had contacted claimant to confirm the agreement, the Appeals Panel in that case reversed and rendered a decision that Dr. B was an agreed designated doctor.

Whether the carrier and claimant reached a meeting of the minds respecting Dr. S as a designated doctor was a fact question for the hearing officer. Section 410.165(a) provides that the hearing officer is the sole judge of the relevance and materiality of the evidence as well as the weight and credibility it is to be given. We do not find the hearing officer's factual findings and her determination that Dr. S was not an agreed designated doctor to be against the great weight and preponderance of the evidence. The hearing officer could believe from the claimant's testimony, together with the lack of evidence of compliance with Rule 130.6, that claimant did not mutually agree to Dr. S as a designated doctor because he did not know what a designated doctor was. We do not substitute our judgment for that of the hearing officer where, as here, the challenged findings are supported by sufficient evidence. Texas Employers' Insurance Association v. Alcantara, 764 S.W.2d 865 (Tex. App.-Texarkana 1989, no writ). The challenged findings and conclusion are not so against the great weight and preponderance of the evidence as to be manifestly unjust. In re King's Estate, 244 S.W.2d 660 (Tex. 1951).

The decision of the hearing officer that Dr. S was not a mutually agreed designated doctor is affirmed.

Philip F. O'Neill
Appeals Judge

CONCUR:

Gary L. Kilgore
Appeals Judge

Alan C. Ernst
Appeals Judge