APPEAL NO. 94154

This appeal arises under the Texas Workers' Compensation Act of 1989 (1989 Act), TEX. LAB. CODE ANN. § 401.001 *et seq*. On January 14, 1994, a contested case hearing was held in (city), Texas, with (hearing officer) presiding. She determined that (Dr. J) was an agreed designated doctor. Appellant (carrier) asserts that Dr. J had been named in an order for Required Medical Examination in April 1993, and at that time had no dispute with the claimant; it adds that a doctor who conducts an examination under such an order cannot be a designated doctor. Carrier then asks that a designated doctor be appointed. The appellate file contained no reply by claimant.

DECISION

We affirm.

Claimant worked for (employer). He testified at the hearing through Spanish-English translation provided by the ombudsman. The parties stipulated that claimant was injured compensably on (date of injury). (The report of Dr. J indicates that claimant fell from a ladder, hurting his left knee and low back.) Claimant was treated by (Dr. K) who found he reached maximum medical improvement (MMI) in November 1992, with no impairment when claimant missed an appointment after not having seen Dr. K for several months while on physical therapy. Claimant then saw (Dr. JE), a doctor suggested by the carrier. Dr. JE stated that claimant reached MMI on August 18, 1993, with no impairment. Claimant then asked the Texas Workers' Compensation Commission (Commission) on September 9, 1993, to allow him to see (Dr. A).

Prior to the issuance of a Medical Evaluation Report by Dr. JE, claimant was told to see Dr. J in April 1993 under a Medical Examination Order (MEO). The evidence indicates that claimant did not attend the appointment set for this purpose. When claimant came to the (city) Field Office of the Commission on September 22, 1993, an entry was made in Commission records (the hearing officer took official notice of all Commission computer entries) that claimant disputed Dr. JE's MMI date and zero percent impairment. The entry then states that (BL), an adjuster for carrier was called, and "carrier and clmt. mutually agreed on a [Dr. J] to resolve the dispute. Carrier will make appt. for clmt. and sent (sic) him notification thru mail."

Dr. J evaluated claimant on October 4, 1993, and found MMI on that date with 16% impairment. At the hearing BL testified that she had not gotten a copy of claimant's request to change his treating doctor to Dr. A; she considered that she and claimant had agreed that Dr. J would be claimant's new treating doctor, and her letter of September 23, 1993, to claimant to see Dr. J indicated that claimant could see Dr. J. Carrier's letter to claimant dated September 23, 1993, stated, "[a]n appointment has been made for you to see [Dr. J], a doctor you and I previously agreed on." The letter then gave the date, time, and place of the appointment on October 4, 1993. The letter never used the words "designated," "treating," or "medical examination order." The only issue at the hearing was whether Dr. J was an agreed designated doctor.

Carrier's appeal refers to the appointment with Dr. J in October as an "appointment with the previously approved independent medical examination physician, [Dr. J], for claimant to receive an evaluation, and continue treatment if needed." Carrier points out that at the time of the order for a medical examination (April 1993) it had no dispute with the claimant. Carrier takes the position that Dr. J was seen under the April 1993 order and therefore cannot be considered as a designated doctor under separate sections of the 1989 Act.

The Commission computer records further indicate, after the entry of September 22, 1993, that on November 2, 1993, a discussion was held with the carrier's adjuster, who said that Dr. J was an MEO doctor. The entry refers to "T" having the claimant in his office in September when the "carrier and clmt, agreed to [Dr. J]." Reference is made to carrier disputing the "MEO drs. assessment." The next entry reads, "T states that this was a Des Dr. Carrier did send the clmt. the agreed letter with the date time and place." (The record indicates that "T" is a Commission employee.)

Claimant's testimony indicated that he did not really know what a designated doctor was. He did make it clear that in his conversation in September with the carrier, BL stated that it would pay based on what Dr. J said; claimant indicated he agreed with that because he was interested in receiving his checks.

The hearing officer is the sole judge of the weight and credibility of the evidence. *See* Section 410.165. She could interpret the carrier's letter to claimant of September 23, 1993, as providing appointment information with a doctor upon whom the parties had agreed for claimant to see. She could note that there was no reference to an MEO as had been specified in the April 23, 1993, letter from carrier to claimant telling claimant to go to an appointment in May 1993, and pointing out the possibility of a fine for failure to attend that examination. She could infer that since the September letter did not even make reference to the April letter, much less the Commission order that the April letter cited, but did refer to an agreement, the appointment with Dr. J was not pursuant to the MEO. The contrast in these two letters, together with the Commission computer entries, provide sufficient evidence for the hearing officer to conclude that the parties agreed to have Dr. J resolve the dispute raised by claimant as to a prior indication of MMI and impairment rating.

Affirming both the hearing officer's finding of fact, that the parties agreed in September 1993 for claimant to be examined by Dr. J to resolve the dispute, and conclusion of law, that Dr. J was an agreed designated doctor, is consistent with Texas Workers' Compensation Commission Appeal No. 92511, decided November 12, 1992, which provided that an agreement to a designated doctor "need not be a signed contract," but should be memorialized in a letter thereafter. It emphasized the hearing officer's power as fact finder by pointing out that when the Commission is not included in the venture, a risk is run that the hearing officer will not give effect to the agreement. Texas Workers' Compensation Commission Appeal No. 93425, decided July 14, 1993, provides an example of a question in this area that was not governed by whether Tex. W. C. Comm'n, TEX. ADMIN. CODE § 130.6 (Rule 130.6) was followed, but by whether it was shown that the

doctor in question was agreed upon to be the designated doctor. Compare the case under review to Texas Workers' Compensation Commission Appeal No. 92233, decided July 16, 1992, in which an employee of the Commission (hearing officer) appointed a doctor under the section of the 1989 Act, Article 8308-4.16, which applied to an MEO at that time, but then gave the resulting report presumptive weight calling it a designated doctor's opinion; giving presumptive weight to a doctor acting under an appointment as a medical examination doctor was found to be error by the Appeals Panel.

Finding that the decision and order of the hearing officer are not against the great weight and preponderance of the evidence, we affirm. *See* In re King's Estate, 150 Tex. 662, 244 S.W.2d 660 (1951).

Joe Sebesta
Appeals Judge

CONCUR:

Thomas A. Knapp
Appeals Judge

Alan C. Ernst
Appeals Judge