APPEAL NO. 94187

This appeal is considered in accordance with the Texas Workers' Compensation Act (1989 Act), TEX. LAB. CODE ANN. § 401.001 *et seq.* On December 23, 1993, a contested case hearing was held in (city), Texas, with (hearing officer) presiding. The issues considered were whether the respondent, OB, who is the claimant herein, had entered into an agreement that (Dr. S) was an agreed designated doctor. The second issue was the correct impairment rating to be assigned to claimant.

The hearing officer determined that Dr. S was not an agreed designated doctor, and then found that claimant had a 32% impairment from his injury, based upon the report of a designated doctor, (Dr. T), appointed by the Texas Workers' Compensation Commission (Commission).

The carrier has appealed, arguing that it complied with applicable rules of the Commission in reaching an agreement for a designated doctor, and that the hearing officer erred in holding that Dr. S was not so agreed. The carrier further argues that the designated doctor did not properly use the Guides to the Evaluation of Permanent Impairment, third edition, second printing, published by the American Medical Association (Guides), and that a 22% rating (included in the overall 32%) for loss of range of motion is "so high that, on its face, is subject to attack." No response was filed by the claimant.

DECISION

We affirm the hearing officer's decision and order.

The claimant injured his neck on (date of injury), while employed by (employer). He eventually had surgery for a herniated cervical disc at the C4-5 level. Claimant's treating doctor, (Dr. P), certified he had reached maximum medical improvement (MMI) on March 23, 1993, with a 35% impairment. A referral doctor, (Dr. ST), certified that claimant reached MMI on March 31, 1993, with a 35% impairment.

Claimant said he contacted the adjuster, (Mr. R), sometime in May 1993 about receiving an advance of benefits. In that conversation, he said that Mr. R asked if he would be willing to be examined by a doctor for the carrier, and suggested two doctors located in (city). Claimant said he agreed that he would, and he assumed that the purpose was to determine if Dr. P was treating him correctly. He stated that Mr. R called back later and said he had set up an appointment with Dr. S, and told him when it would be. Claimant said that the binding effect of Dr. S's opinion was not at all discussed, or he wouldn't have agreed to see him. He stated that he did not select Dr. S because he wouldn't have known about the doctor to select between him over the other doctor carrier proposed.

The record contains a letter to claimant from Mr. R, dated May 13, 1993. The most pertinent paragraph of the letter as it bears on the issues is:

As we discussed on the telephone, [Dr. S] is a mutually agreed upon doctor to conduct an impairment evaluation. [Dr. S]'s rating will be binding on both of us.

The letter does not use the term "designated doctor," and a copy to the (city) field office of the Commission is shown at the bottom. On May 17, 1993, a letter was sent to Dr. S by Mr. R confirming the appointment, and posing several questions relating to claimant, most of which have to do with his ability to work. Dr. S is asked when he feels claimant "will reach" MMI, and whether he will have "permanent disability." The letter does not indicate that Dr. S is a designated doctor, nor does it refer specifically to an impairment rating, or any dispute.

On May 19, 1993, the carrier completed a TWCC-21 notice of dispute form, which indicates that it disputes Dr. P's rating, and that the parties have agreed upon Dr. S to resolve the dispute. Again, the term "designated doctor" is not used in reference to Dr. S.

Dr. S filed a report, indicating that he examined claimant pursuant to an "independent medical evaluation." Dr. S states that the patient was referred by the insurance company. Dr. S certified that claimant reached MMI (no date was given) and had a 21% impairment.

Claimant said he disputed this, and thereafter the Commission appointed (Dr. T) as designated doctor. Dr. T examined him for about an hour, used an inclinometer, and certified MMI on September 2, 1993 (the day of his examination) with a 32% impairment rating. Claimant said he did not observe Dr. T reading his medical records while he was there.

An affidavit by Mr. R, the adjuster, dated December 16, 1993, contends that claimant selected Dr. S from a choice of two names given to him, and that he and claimant fully discussed that Dr. S was a mutually agreed "designated doctor" whose impairment rating would be binding. (This is the only communication by Mr. R or the carrier which uses the term "designated doctor.") Mr. R was not present at the contested case hearing and did not testify.

No medical opinion or evidence was offered as to whether Dr. T's use of the Guides was incorrect.

It is important to point out that the 1989 Act calls for two types of "agreed" doctors. The statute allowing a carrier to request a medical examination states that it must first seek agreement from the claimant for such an examination, before obtaining an order from the Commission. Section 408.004. The results of this examination are not stated in the statute to be binding.

On the other hand, if there is a dispute over an impairment rating, the parties may agree to a "designated doctor" whose report must be accepted by the Commission. Section 408.125(d). Texas Workers' Compensation Comm'n, 28 TEX. ADMIN. CODE § 130.6 (Rule 130.6) sets out the procedures to be followed to validate such an agreement.

The way to avoid the very dispute in this case--whether the parties agreed upon a designated doctor--was clearly set forth in Texas Workers' Compensation Commission Appeal No. 92511, decided November 12, 1992:

> While an agreement on a designated doctor need not be a signed contract, Rule 130.6(c) plainly requires that any verbal agreement be memorialized in a written letter of confirmation. Moreover, the Commission's confirmation of the agreement is envisioned. Rule 130.6(d). While we can understand that there could be a situation where a clear agreement for a designated doctor is documented but the Commission is inadvertently left "out of the loop", *we would point out that parties who do not seek confirmation could run the risk that the trier of fact will not give effect to an agreement*. Such extra safeguards were apparently deemed necessary by the Commission, because an agreed designated doctor's report will . . . conclusively bind the parties to the impairment rating. . . . In our opinion, Rule 130.6 sets forth the two ways in which a designated doctor indisputably is "appointed." [Emphasis added.]

In the case at hand, the letter of confirmation does not anywhere use the all important term "designated doctor." The Commission did not contact claimant to confirm the alleged agreement. Although the carrier characterized the dispute as a "swearing match" between the claimant and the adjuster, the adjuster did not appear at the hearing to testify about any underlying verbal agreements. The claimant testified live and disputed the adjuster's affidavit. The hearing officer was therefore faced with weighing conflicting accounts of what occurred. By not following the procedures set forth in Rule 130.6 (and it did not, despite its arguments to the contrary), the carrier ran the very risk that is articulated in Appeal No. 92511. *See also* Texas Workers' Compensation Commission Appeal No. 93247, decided May 5, 1993, which discusses the history of Appeals Panel decisions on agreed designated doctors.

The facts here indicate that there was no impairment rating dispute filed with the Commission at the time the parties discussed the examination by Dr. S. The letter confirming the examination, although it does indicate that the impairment rating will be binding, does not use the critical term "designated doctor." Indeed, given the certainty expressed in the adjuster's affidavit that this was discussed, the May 1993 letter seems needlessly reticent in identifying Dr. S's role, as do other documents written contemporaneously with that examination. Dr. S does not describe himself as a designated doctor in his narrative report, nor did the May 17, 1993, letter to him from Mr. R describe him as such. A designated doctor is more than just a "mutually agreed doctor" and should be forthrightly identified as such in communications which purport to reflect an agreement on a designated doctor.

On its face, the May 13, 1993, reference to the binding effect of Dr. S's rating could be nothing more than an incorrect statement of the effect of an examination performed in accordance with Section 408.004. Thus, while the letter indicates that it was copied to the Commission, omission of the term "designated doctor" (coupled with the fact that a dispute

was not filed by the carrier until after this letter was written) would not ensure that the Commission confirmation procedure set out under Rule 130.6 would be invoked.

As it stands, the correspondence generated around the time of Dr. S's examination essentially corroborates claimant's testimony that Dr. S was not described in his conversation with the adjuster as a "designated doctor" whose opinion would be conclusive.

The hearing officer is the sole judge of the relevance, the materiality, weight, and credibility of the evidence presented at the hearing. Section 410.165(a). It was for the hearing officer, as trier of fact, to resolve the inconsistencies and conflicts in the evidence. Garza v. Commercial Insurance Company of Newark, N.J., 508 S.W.2d 701, 702 (Tex. Civ. App.- Amarillo 1974, no writ). The trier of fact may believe all, part, or none of the testimony of any witness. Taylor v. Lewis, 553 S.W.2d 153, 161 (Tex. Civ. App.-Amarillo 1977, writ ref'd n.r.e.). The decision of the hearing officer will be set aside only if the evidence supporting the hearing officer's determination is so weak or against the overwhelming weight of the evidence as to be clearly wrong or manifestly unjust. Atlantic Mutual Insurance Co. v. Middleman, 661 S.W.2d 182 (Tex. App.-San Antonio 1983, writ ref'd n.r.e.).

The hearing officer properly gave presumptive weight to the designated doctor's report. The arguments interposed by the carrier both in closing at the hearing and on appeal here do not amount to a great weight of medical evidence against the designated doctor's report. The fact that some portions of Dr. T's report refer to a "disability" rating does not undermine his assessment of "impairment" on the TWCC-69 form. Moreover, at least two other doctors have determined that claimant has an impairment in the general range found by Dr. T. We find no basis in this record upon which the fact finder would be permitted to determine that Dr. T's impairment rating for range of motion was inherently too high.

For the reasons stated above, the decision and order of the hearing officer are afffirmed.

Susan M. Kelley
Appeals Judge

CONCUR:

Stark O. Sanders, Jr.
Chief Appeals Judge

Philip F. O'Neill
Appeals Judge