APPEAL NO. 94253

This appeal is brought pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act). A contested case hearing was held on January 28, 1994, in (city), Texas, with (hearing officer) presiding as hearing officer. The only issue at the hearing was, What is the appellant's (claimant) impairment rating. The hearing officer found that in accordance with the report of the Texas Workers' Compensation Commission (Commission)-selected designated doctor, the claimant's correct impairment rating (IR) was 13%. The claimant appeals urging that the great weight of the other medical evidence is contrary to the report of the designated doctor and that the hearing officer improperly refused to consider as an issue whether the carrier disputed within 90 days the claimant's first assigned impairment rating. The respondent (carrier) replies that the decision of the hearing officer is supported by sufficient evidence and is correct as a matter of law.

DECISION

Finding no legal error and finding sufficient evidence to support the decision and order of the hearing officer, we affirm.

It is undisputed that the claimant sustained a compensable back injury in the course and scope of his employment on (date of injury), which resulted in L4, L5 disc herniation and nerve compression. Surgery was performed on October 22, 1991, by a Dr G.. The claimant testified that his treating doctor was (Dr. E), an orthopedist. On November 16, 1992, the claimant was examined by (Dr. H), a neurosurgeon. Dr. H provided a Report of Medical Evaluation (TWCC-69) in which he certified November 5, 1992, as the date of maximum medical improvement (MMI) and assigned a 20% IR. Dr. H did not list the specific elements that comprised the 20% IR. According to an accompanying report, the claimant's range of motion was apparently normal, there was no indication of a recurrent herniated disc, but there was "marked narrowing . . . at L4-5 with moderate bulging."

On April 26, 1993, Dr. E completed a TWCC-69 in which he certified MMI for the same date and assigned a 46% IR. Although the TWCC-69 references an "attached dictation," it did not accompany the report and was not introduced into evidence. Dr. E listed eight components of his rating, including a herniation, neurological changes, instability and a second operation. However, not all the listed body parts or systems rated were legible and Dr. E appears to have simply added the individual items to arrive at the 46%, rather than applying the combined values chart of the Guides to the Evaluation of Permanent Impairment, third edition, second printing, dated February 1989, published by the American Medical Association (AMA Guides) which would have produced a 39% IR.

The parties agreed, and presented their respective positions as if, (Dr. T) was a Commission-selected designated doctor to determine IR only.[1] On July 9, 1993, Dr. T

[1]The letter of appointment is addressed to the (city) Impairment Center (Center) and expressly stated that the Center, not Dr. T, is the designated doctor. We have noted in the past that the 1989 Act does not contemplate this procedure, but do not address it on appeal because the parties have not raised the issue and have, at least by implication, agreed that Dr. T is a Commission-selected designated doctor. *See* Texas Workers' Compensation

completed a TWCC-69 in which he certified MMI as of that date and assigned a 13% IR. Of this 13%, eight percent was assigned for a specific disorder of the spine without herniation, four percent for loss of range of motion and one percent for decreased sensation in the lower left extremity. Other medical evidence in the record includes an opinion from two other doctors that further back surgery is not medically appropriate, and they do not assign an IR.

The claimant contends on appeal that the hearing officer improperly denied him the opportunity to raise and present evidence on the issue of whether the IR assigned by Dr. H on November 16, 1992, became final by virtue of Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 130.5(e) (Rule 130.5(e)) which provides that "[t]he first impairment rating assigned to an employee is considered final if the rating is not disputed within 90 days after the rating is assigned."

Section 410.151(b) provides, in pertinent part, that an issue not raised at a benefit review conference (BRC) may not be considered at a contested case hearing unless the parties consent or "the commission determines that good cause existed for not raising the issue" at the BRC. Rule 142.7(e) further specifies how issues may be considered at a contested case hearing as follows:

> (e)Additional disputes by permission of the hearing officer. A party may request the hearing officer to include in the statement of disputes one or more disputes not identified as unresolved in the benefit review officer's report. The hearing officer will allow the amendment only on a determination of good cause.
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> (2)An unrepresented claimant may request additional disputes to be included in the statement of disputes by contacting the commission in any manner no later than 15 days before the hearing.

The Appeals Panel has strictly applied Rule 142.7 unless there is a knowing waiver of its provisions by both parties. Texas Workers' Compensation Commission Appeal No. 93593, decided August 31, 1993.

According to the claimant's own testimony and his appeal, he did not raise the Rule 130.5(e) 90 day issue at the BRC because he did not have the assistance of an ombudsman at the time and was either not aware it was a potential issue or was not aware he could raise it at the BRC. For the same reasons, he contends he did not contact the Commission no later than 15 days before the contested case hearing to request the issue be added as a disputed issue. He contends that he did not learn this was a potential issue until he spoke with an ombudsman. The carrier refused to consent to adding it as an issue at the hearing.

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Commission Appeal No. 93833, decided October 25, 1993.

It has been held that ignorance of the law does not excuse or constitute good cause for failure to comply with its terms, Texas Workers' Compensation Commission Appeal No. 92657, decided January 15, 1993, and that the party who seeks to come within the good cause exception to a provision of Rule 142.7(e) has the burden to prove that good cause exists in his or her particular case. Texas Workers' Compensation Commission Appeal No. 92538, decided November 25, 1992. We also note that an ombudsman functions purely in an assistance capacity and gives advice which can be followed or rejected by a claimant. Section 409.041. There is no indication that the claimant was deprived of timely help from an ombudsman. In any event, the timely availability of an ombudsman is not a precondition to the application of Section 410.151(b) or Rule 142.7(e) of the 1989 Act to a claimant. The potential issue of the finality of Dr. H's assigned IR under Rule 130.5(e) should have been known by the claimant at the time of the BRC on December 7, 1993. Under the circumstances of this case, we find no abuse of discretion in the hearing officer's refusal to consider for the first time without the consent of the carrier, an additional disputed issue of whether the claimant's first impairment rating became final by operation of Rule 130.5(e). *See* Texas Workers' Compensation Commission Appeal No. 93438, decided July 16, 1993.

The claimant also contends on appeal that the hearing officer erred in finding that the report of Dr. T, the designated doctor, as to the 13% IR was not contrary to the great weight of the other medical evidence. Section 408.125(e) provides in relevant part that the Commission shall base an IR on the report of the Commission-selected designated doctor "unless the great weight of the other medical evidence is to the contrary." We have frequently noted the important and unique position occupied by the designated doctor under the 1989 Act. *See* Texas Workers' Compensation Commission Appeal No. 92555, decided December 2, 1992. We have just as frequently stated that a "great weight" determination amounts to more than a mere balancing or preponderance of the medical evidence. Texas Workers' Compensation Commission Appeal No. 92412, decided September 28, 1992. The 1989 Act also provides that the hearing officer, as the fact finder, is the sole judge not only of the relevance and materiality of the evidence, but also of its weight and credibility. Section 410.165(a). This includes medical evidence.

In the case under appeal, the claimant offered into evidence the TWCC-69 of Dr. H. It did not specify any body part or system to which it assigned the 20% IR. The accompanying narrative does not lead one to conclude that the claimant suffered reduced range of motion or any herniation or nerve root irritation. One can only surmise that the 20% is based on a specific disorder of the lumbar spine, but no connection between this rating and the AMA Guides is offered. The only other evidence, other than that of Dr. T, which purports to assign an IR is the TWCC-69 of Dr. E. No attachment to this report was offered in to evidence. The TWCC-69 references no objective laboratory or clinical findings, tests performed or records reviewed. *See* Rule 130.1. It contains only unexplained ratings for specific body parts. On the other hand, the hearing officer evidently found the report of Dr. T to be comprehensive and reasoned. Dr. T provided a rationale for his IR, confirmed that he examined the claimant and noted the tests on which he based his ratings and the previous records of the claimant that he reviewed. Contrary to the suggestion of the claimant, we have recognized that a designated doctor may rely on the

tests and opinions of others in arriving at an IR provided the designated doctor actually examines the claimant and the final assignment of an IR is the product of the designated doctor's own professional judgment. *See* Texas Workers' Compensation Commission Appeal No. 93870, decided November 10, 1993. Having reviewed the evidence in this case, we are satisfied that the decision of the hearing officer that the claimant's correct IR was 13% is supported by sufficient evidence and is not so against the great weight and preponderance of the evidence as to be clearly erroneous and manifestly unjust which is our standard of review. In re King's Estate, 150 Tex. 662, 244 S.W.2d 660 (1951); Pool v. Ford Motor Co., 715 S.W.2d 629, 635 (Tex. 1986).

The decision and order of the hearing officer are affirmed.

Alan C. Ernst
Appeals Judge

CONCUR:

Susan M. Kelley
Appeals Judge

Philip F. O'Neill
Appeals Judge