APPEAL NO. 94317

This appeal arises under the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act). On February 1, 1994, a contested case hearing was held in (city), Texas, with (hearing officer) presiding, to determine the single issue of whether (Dr. R) was an agreed designated doctor on the claim of the claimant CC, who is the appellant, and who injured her shoulder and neck on (date of injury), in the course and scope of her employment as assistant manager for (employer).

The hearing officer determined that Dr. R was not a mutually agreed upon designated doctor. He nevertheless held that Dr. R was a designated doctor, and based this upon the fact that claimant, several weeks after Dr. R's examination, entered into a benefit review conference (BRC) agreement in which Dr. R was referred to as a designated doctor. He held that Dr. R's report was entitled to presumptive weight.

The claimant appeals this ruling, arguing that it is conflicting for the hearing officer to hold that Dr. R was not an agreed designated doctor and then determine that he is still a designated doctor. She argues that she was not adequately assisted by the ombudsman to prepare for the BRC where the agreement in question was forged. She further argues that the agreement should be set aside because Dr. R was not a properly agreed doctor. The carrier cross-appeals that the hearing officer was in error when he found that Dr. R was not a mutually agreed to designated doctor.

DECISION

The findings and conclusions of the hearing officer that Dr. R was not a mutually agreed upon designated doctor are affirmed. The decision of the hearing officer that Dr. R was nevertheless a designated doctor, based upon the BRC agreement entered into after his examination, is reversed, and a new decision rendered that Dr. R was not a designated doctor because he was neither mutually agreed to resolve the issue of impairment, nor appointed by the Texas Workers' Compensation Commission (Commission) for this purpose, and as a matter of law was not a "designated doctor" as defined by Section 401.011(15).

Claimant's treating doctor, (Dr. D), certified that claimant reached maximum medical improvement (MMI) on July 30, 1992, with a 21% impairment rating. The carrier disputed the impairment rating in a letter by adjuster (Mr. B) to the Commission dated August 28, 1992. A copy was mailed to claimant. This letter first indicated a dispute to the impairment rating, and stated that the notice was being filed "per Rule 130.5." The letter then said:

> By copy of this letter to [claimant] we are advising her of this dispute and ask that she contact us to see if an agreement can be reached for her to be seen by a specialist to render a second opinion.

The letter nowhere uses the all important term "designated doctor." When Mr. B was asked what he meant by the term "second opinion," he answered "[a] second opinion

can be referred to many different things. The designated doctor in my opinion would be--is also a second opinion. It's another opinion by a doctor." This testimony corroborates claimant's testimony that it was her impression after getting this letter that the carrier desired to have her treated by another doctor; this coincided with her dissatisfaction with her treating doctor's treatment in that she would only be afforded temporary relief. She stated that when she spoke with Mr. B, the gist of the conversation was that she would be treated by the second doctor; she did not recall that Mr. B used the term designated doctor, nor did she understand that a binding opinion would result as opposed to treatment.

Claimant stated that she attended the first appointment with Dr. R in late September (according to Mr. B, the first appointment with Dr. R was September 22, 1992). Claimant said that her records had not been sent to Dr. R, so she used the appointment to consult with him about injuries from an automobile accident (unrelated to the compensable injury) and paid him from her own pocket for this. Claimant said she scheduled a second appointment for the first week of October.

On September 21, 1992, the Commission mailed a letter to the claimant informing her of the dispute to the impairment rating, and stating that claimant would have 10 days to agree with the carrier on a designated doctor or one would be appointed.

Mr. B stated that claimant was to schedule the appointment with Dr. R. Mr. B stated that claimant called him on September 23rd to say that she did not have the examination because her records weren't there. A note in the commission contact log indicated that the disability determination officer spoke with Mr. B about a concern that Dr. R was a hand specialist (the note is not clear on who raised this concern). He stated that in this conversation he discussed the fact that Dr. R would be a designated doctor. However, when specifically asked if he discussed the significance of an agreed upon designated doctor and the ramifications of it, he said: "I discussed some of it with her. I don't know how in detail I got with her. The letter I sent to follow up my conversation seemed . . . pretty good detail on that." He was asked again if he specifically told her that all parties had to accept Dr. R's findings. He replied: "In my letter, I did. As far as our conversation, I'm not sure."

The letter to which Mr. B referred was his letter to claimant dated September 24, 1992, purporting to confirm "our previous phone conversation in which we agreed that you would see [Dr. R] as a designated doctor to determine your correct impairment rating." This letter states Mr. B's understanding that the claimant "rescheduled your appointment for October 6, 1992." It further states:

> It is understood that [Dr. R] is an agreed upon designated doctor and his findings will be binding as long as they are within the guidelines of the Workers' Compensation Act.

A copy of the letter is shown as mailed to the Commission's field office in (city). The letter in evidence contains the date stamp of the field office, with the month clearly reading "Nov," and the date is either the 13th, 16th or 18th. The year is not indicated.
The adjuster wrote another letter that day to Dr. R, and no copies are shown to either the claimant or Commission. The letter nowhere advises Dr. R that he will be the "designated doctor." It states only that the reason for the appointment is to determine claimant's "permanent partial impairment, if any" and shares the carrier's position that claimant was involved in an auto accident "reinjuring her neck. . . . I ask you to separate the two injuries when determining this impairment." The letter closes by conveying appreciation for "your help" and tells Dr. R to "feel free to contact me" with any questions or for further discussion. (During the contested case hearing, the ombudsman raised the point that this letter could be viewed as a unilateral contact with the designated doctor of the nature repeatedly criticized by the Appeals Panel, but objections to the relevance of such questions were sustained.)

Claimant stated she did not receive this letter prior to her October 6th appointment with Dr. R. The evidence is clear that the Commission never contacted the claimant to confirm the purported agreement. On October 8th, according to Commission logs, the claimant contacted the Commission to complain that she disagreed with Dr. R's examination, and raised the point on that date that Mr. B had never used the term designated doctor, and that she went to Dr. R for a second opinion. A further note from the log somewhat cryptically states: "She will wait and see what Dr. R has to say, if does not agree w/this will go designated dr."

The TWCC-69 from Dr. R is date stamped by the (city) field office as received November 16, 1992. The opening sentence of the narrative attached to Dr. R's report states: "This is an IME." Dr. R certified that claimant reached MMI effective October 6, 1992, with a zero percent impairment.

A benefit review conference was requested by telephone on October 22nd; the disability determination officer's transcription of the issues to be determined lists: did claimant and carrier agree upon a designated doctor, did carrier follow proper procedures for agreement, and does carrier owe impairment income benefits (IIBS). The first two issues are indicated on the form not to have been resolved by October 23, 1992. No BRC report is in evidence. The only document represented to have followed from the BRC is a benefit review conference agreement form dated and signed November 20, 1992. This cites the disputed issue as: "Whether the claimant has a right to a 2nd treating doctor?" The recited "resolution" is twofold: "1. The insurance company and [claimant] agree to [Dr. O] as [claimant]'s second treating doctor; 2. The claimant preserves the right to at another benefit review conference dispute the impairment rating of the designated doctor [Dr. R] of 0%."

Claimant stated that the ombudsman did not prepare with her beforehand for the conference. She said that although she continued to dispute that Dr. R was a designated doctor, the attorney for the carrier simply announced at the BRC that it had "already been

established" that Dr. R was a designated doctor. She stated that she took from this that there was no use arguing. Claimant said she did not realize she had a right not to sign the agreement, and did not recall being advised by the benefit review officer (BRO) or the ombudsman that it would be binding.

"Designated doctor" is defined in Section 401.011(15) as "a doctor appointed by mutual agreement of the parties or by the commission *to recommend* a resolution of a dispute as to the medical condition of an injured employee." (Emphasis added.) A doctor becomes a "designated doctor" only through mutual agreement or commission appointment. *See also* Texas. W.C. Comm'n, 28 TEX. ADMIN. CODE § 130.6 (Rule 130.6). In this case, there was no Commission appointment. Therefore, the question for the hearing officer to determine was whether Dr. R was appointed by mutual agreement. He decided Dr. R was not. The evidence more than sufficiently supports this finding and conclusion.

Mr. B conceded that his use of the term "second opinion" has many meanings; it does not, in our view, accurately apply to an agreed designated doctor, whose opinion is not merely a "second" one, but the opinion on impairment. Thus, it is misleading to solicit agreement to a designated doctor by representing that only a "second opinion" will be involved. Subsequent references in correspondence or conversations to desire to agree on a doctor to resolve impairment does not cure ambiguity, because the agreement provisions also apply to appointment of a doctor under Section 408.004. The use of the term "second opinion" is something a trier of fact may consider as evidence that there was no agreed designated doctor. *See* Texas Workers' Compensation Commission Appeal No. 93425, decided July 14, 1993.

It is hard to fathom why a party who seeks a binding agreement on a designated doctor, most especially with an unrepresented claimant, would not directly use that term, and fully explain the ramifications to the other party, from day one of a dispute. We note that one of the strongest pieces of evidence against the existence of an agreement for a designated doctor is the failure of the carrier to inform Dr. R himself that he was a designated, as opposed to a carrier "IME," doctor. Given the special status of a designated doctor in the 1989 Act as the impartial doctor, such an omission is without justification.

In short, the risk of the conduct evident here is that there will be no meeting of the minds on the status of the designated doctor prior to his examination. The hearing officer's assessment that the evidence preponderated against an agreement is affirmed.

Having properly rejected a finding that Dr. R was an agreed designated doctor, and there being no Commission appointment of him as such, the hearing officer erred by effectively allowing a third method by which Dr. R became a designated doctor. The determination of this case is clearly guided by the statutes and our decisions holding that the status of a doctor as a designated doctor must be established prior to his examination. Texas Workers' Compensation Commission Appeal No. 92511, decided November 12, 1992. We have also held that this precludes a retrospective agreement on the doctor's status as "designated" through a BRC agreement, Texas Workers' Compensation

Commission Appeal No. 94072, decided March 3, 1994; we noted in that decision that this in no way compromised the ability of the parties to enter into an agreement or settlement that expressly states that MMI had been reached or adopts one of the impairment ratings. Even if the BRC agreement in this case had expressly agreed that Dr. R was a designated doctor (which in our opinion it does not), it would have been an abuse of discretion for the hearing officer not to set it aside. *See* Appeal No. 94072, cited above. We observe that the only "agreement" here is a passive reference to Dr. R as a designated doctor in the course of a purported resolution of the primary, stated issue of whether claimant would be allowed to change to a second treating doctor.

For these reasons, we reverse those findings and conclusions which determine that Dr. R was a designated doctor, holding as a matter of law that since he was determined by the hearing officer not to be a mutually agreed designated doctor, and he was not appointed by the Commission, he is not a "designated doctor" as defined by the 1989 Act. As the only issue before the hearing officer involved the status of Dr. R, and there were no issues relating to impairment rating or MMI, there is no reason to remand the case, although the parties are free to resolve any dispute relating to Dr. D's 21% impairment rating through the BRC and hearing system.

Susan M. Kelley
Appeals Judge

CONCUR:

Robert W. Potts
Appeals Judge

Gary L. Kilgore
Appeals Judge