APPEAL NUMBER 94971
FILED SEPTEMBER 8, 1994

This appeal arises pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act). A contested case hearing (CCH) was held on March 17, 1994, and June 8, 1994, in (City), Texas, with (hearing officer 1) presiding as hearing officer. The issues at the CCH were maximum medical improvement (MMI), impairment rating (IR) and disability. The decision found that the appellant (claimant herein) attained MMI on June 25, 1992, with an 11% IR based upon the opinion of the second designated doctor selected by the Texas Workers' Compensation Commission (Commission). The claimant appeals contending that the findings of the hearing officer regarding MMI and IR are against the great weight of the evidence, that the rating of the designated doctor was invalid and that great weight of the other medical evidence was contrary to the opinion of the designated doctor. The claimant also contests the decision of the hearing officer because the "decision is not signed by the Hearing Officer who heard the case and there is no indication that the Hearing Officer who heard the case issued the Decision" and that the decision therefore is not in compliance with Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 142.16(a) (Rule 142.16(a)). The respondent (carrier herein) replies that the decision of the hearing officer was supported by sufficient evidence, that the presumptive weight given to the report of the designated doctor is not overcome by the other medical evidence, but in fact much of the other medical evidence supports the opinion of the designated doctor, and that the rating of the designated doctor is valid. The carrier also states that even though the hearing officer who heard the case did not appear to sign the decision, it was signed on her behalf.

DECISION

We reverse and remand.

Prior to reviewing the merits of the decision and order of the hearing officer, we must determine that this is indeed the decision and order of the hearing officer. The record clearly shows that the hearing officer presided over both sessions of the CCH. The decision of the hearing officer is signed "(hearing officer 2) for (hearing officer 1)." There is nothing else in the record other than this recital to indicate that the decision is that of the hearing officer who heard the case. The claimant has clearly raised the issue on appeal as to whether this decision is that of the hearing officer.

Section 410.168(a) provides in relevant part, "The hearing officer shall issue a written decision. . . ." Rule 142.16(a) provides as follows:

After the record closes, the hearing officer shall issue a decision on benefits. The decision shall:

(1)be in writing;

(2)include findings of fact and conclusions of law; a determination of whether benefits are due; and, if so, an award of benefits due; and

(3)be signed by the hearing officer.

It would appear that the language of both the statute and the rule, by referring to the hearing officer rather than a hearing officer, contemplates that the hearing officer who heard the case sign the decision. This view is further supported by the fact that pursuant to Section 410.165 the hearing officer is sole judge of the weight and credibility to be given the evidence. It is difficult to comprehend that a hearing officer or other person who did not hear the evidence, particularly the testimony, could make these determinations. In fact this was the rationale of Storrie v. Shaw, 96 Tex. 618, 75 S.W. 20 (1903), in which the Texas Supreme Court held that a judge who had not heard the case could not file findings of fact and conclusions of law because it would be impossible for a judge who had not heard the testimony to determine the impression the conflicting evidence had made upon the mind of one who heard it, and, therefore, the judge who tried the case should make the findings of fact. This rationale has been followed in later decisions of the Texas courts. *See* W.C. Banks, Inc. v. Team, Inc., 783 S.W.2d 783 (Tex. App.-Houston [1st Dist.] 1990, no writ); Bexar County Ice Cream Co., Inc. v. Swensen's Ice Cream Co., 859 S.W.2d 402 (Tex. App.-San Antonio 1993, no writ).

Nor is this inconsistent with our prior decisions. In Texas Workers' Compensation Commission Appeal No. 93683, decided September 24, 1993, a successor hearing officer was appointed when the original hearing officer left the Commission's employment. In Appeal No. 93683 we noted that the successor hearing officer reviewed the evidence, listened to the tapes and prepared the decision and order, and none of the parties challenged this procedure. We stated that since the issue was not raised on appeal we would not address it. Also in two unpublished decisions we affirmed decisions and orders signed by one hearing officer when another hearing officer heard the CCH where the hearing officer who heard the case had left the employment of the Commission prior to signing the decision, but we were able to ascertain that the decision and order had been completed, but not signed, by the hearing officer who heard the case prior to leaving the Commission.

Clearly, the best procedure is for the hearing officer who heard the case to sign the decision and order. Then there is no question that the person who heard the evidence and observed the demeanor of the witnesses was the person who weighed the evidence. Exigent circumstances may prevent the best procedure from always being followed. Although in this electronic age of instantaneous written communications, this should be less of a problem than in past times. However, when such exigent circumstances dictate that someone else sign for the hearing officer, we require evidence that such was done with the authority of the hearing officer so that we and the parties can know that the findings, conclusions and decision are those of the hearing officer, and not of some other

person. This is what is lacking in the present case and is why we must remand case. We reverse the decision and order in this case so that either the hearing officer can sign her decision or that we may be provided with proof that this is her decision.

Pending resolution of the remand, a final decision has not been made in this case. However, since reversal and remand necessitate the issuance of a new decision and order by the hearing officer, a party who wishes to appeal from such new decision must file a request for review not later than 15 days after the date on which such new decision is received from the Texas Workers' Compensation Commission's division of hearings, pursuant to Section 410.202. *See* Texas Workers' Compensation Commission Appeal No. 92642, decided January 20, 1993.

Gary L. Kilgore
Appeals Judge

CONCUR:

Susan M. Kelley
Appeals Judge

Philip F. O'Neill
Appeals Judge