APPEAL NO. 011128
FILED JUNE 25, 2001

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 30, 2001. The hearing officer resolved the disputed issue by determining that the respondent/cross-appellant (claimant) had an impairment rating (IR) of 17%. The hearing officer further determined that all IRs issued prior to October 6, 1999, were invalid because they were issued prior to the date of maximum medical improvement (MMI). The appellant/cross-respondent (carrier) appeals (some arguments are in the alternative) and seeks reversal on grounds that an IR is not necessarily invalid because it is issued prior to statutory MMI; that the October 9, 1999, IR of 12%, issued by Dr. F, the designated doctor, is valid; that the initial IR of the designated doctor of 6% (done on May 18, 1998), is entitled to presumptive weight; and that the hearing officer's holding that the IR is 17% is erroneous because it is based on clarification letters sent to and received from the designated doctor after the CCH closed, and without notice to the parties. The claimant responds and requests that the hearing officer's decision and order be affirmed, except the finding that surgery was not under active consideration at the time of statutory MMI, and the IR of 17%. The claimant believes the IR should properly be 21%. The claimant does not find the ex parte contact between the hearing officer and the designated doctor objectionable.

DECISION

Reversed and remanded.

The chronology of this case is very convoluted. The hearing officer had plausible reasons for rejecting each of the several MMI dates and IRs which had been assigned. His resolution of the case was improper, however, and we must send the case back to be correctly resolved.

We agree with the carrier that the hearing officer erred in not offering the parties an opportunity to respond to the additional evidence from the designated doctor before writing his decision. The hearing officer did not hold the CCH open for further development of the evidence, or even advise the parties that he intended to contact the designated doctor for clarification. The hearing officer apparently contacted the designated doctor and asked that he revisit his January 8, 2001, certification of IR, and state what the claimant's IR would have been without consideration of the claimant's surgery on June 27, 2000. The designated doctor responded, and the hearing officer considered and relied on that response in making his determinations in this case. The hearing officer's letter and the designated doctor's response were added as attachments to the CCH record as Hearing Officer's Exhibit Nos. 2 and 3. The hearing officer signed his decision on May 3, 2001. It was not until after receiving his decision that the parties even became aware that the hearing officer had contacted the designated doctor. The hearing officer thus made his

determinations without having previously allowed the parties to comment on or object to the new evidence presented by the designated doctor.

The hearing officer's actions in this regard violated due process. We have previously held that it is reversible error to solicit a response from a designated doctor and write an opinion based thereon without having afforded the parties the opportunity to comment on the additional evidence. Texas Workers' Compensation Commission Appeal No. 93323, decided June 9, 1993.

Therefore, we reverse and remand to the hearing officer to reopen the evidence and allow the parties a time certain to respond and comment on the new evidence from the designated doctor. The hearing officer may choose to reconvene the CCH with the parties present. We will not consider the points of error raised about the designated doctor's report at this time, pending the outcome of the remand and any subsequent appeal thereof.

For the reasons cited above, the hearing officer's decision and order is reversed and remanded.

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.

Michael B. McShane
Appeals Judge

CONCUR:

Judy L. S. Barnes
Appeals Judge

Robert W. Potts
Appeals Judge