APPEAL NO. 950435

Pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq*. (1989 Act), a contested case hearing (CCH) was held in (city), Texas, on February 15, 1995, (hearing officer) presiding as hearing officer. She determined that respondent's (carrier) action in unilaterally contacting the Texas Workers' Compensation Commission (Commission)-selected designated doctor and forwarding to him a critique of his report did not so compromise the impartially of the designated doctor as to overcome the presumptive weight to be given his amended or changed impairment rating (IR). Accordingly, she found the appellant's (claimant) IR to be 13% as contained in the designated doctor's amended report and that it was not contrary to the great weight of the other medical evidence. The claimant appeals urging in essence that the unilateral contact rendered the amended certification of IR tainted and invalid and asks that we reverse and render a new decision that the first rating of 21% be accepted or, alternatively, return the case for the appointment of a new designated doctor. The carrier urges that there was no prejudice from the unilateral contact and thus no basis for any corrective action and argues that in any event, the claimant is estopped from complaining at this time since he agreed to go back to the designated doctor for reexamination and assessment of range of motion (ROM).

DECISION

Finding impermissible unilateral contact with the Commission-selected designated doctor resulting in the likely perception of improper influence and potential tainting of the impartiality of the designated doctor, we reverse and remand for the appointment of and evaluation by a second designated doctor.

The only issue at the CCH, following a stipulation as to the maximum medical improvement (MMI) date, was the correct IR. The focal point of the claimant's case was primarily the matter of the unilateral contact by the carrier with the designated doctor. The claimant sustained a compensable back injury and his treating doctor certified an IR of 34%. The carrier disputed this rating and a Commission-selected designated doctor, (Dr. O), was appointed who certified an IR of 21% on November 11, 1993. Subsequently, the carrier sent Dr. O's report for a "peer" review (there is no evidence that any physician reviewed Dr. O's report). A three page report on "Impairment Rating Facts" letterhead dated November 29, 1993, and signed by (Mr. A) (no degree or specialty indicated) criticized many aspects of Dr. O's report. This report was sent to the carrier's agent who, in a letter dated December 12, 1993, sent the report to Dr. O and requested that Dr. O forward a written response at his earliest convenience as a benefit review conference (BRC) had been requested by the agent. Neither this correspondence nor the report of Mr. A was sent to or made known to the Commission or the claimant. Dr. O responded to the agent in a letter dated January 21, 1994, indicating agreement with some errors in his original report and recommending a repeat of some ROM testing. At a subsequent BRC, and with the letter from Dr. O, the claimant and carrier apparently agreed that the claimant would be retested by Dr. O. It was a matter of controversy whether the claimant was aware of the report of Mr. A at the time of

the BRC or of the unilateral contact. The claimant's representative argues there was no evidence of such awareness, the carrier countering that it was "clear" everyone did know. We do not find such clear evidence of this from our review of the record and observe that an affidavit from the carrier representative at the BRC cited by the carrier to support its position is, in our view, nothing more than neutral on the matter. It is certainly not convincing evidence that the parties were aware of more that the fact that when the report was pointed out to Dr. O, "he agreed that a re-testing of [claimant] was warranted." At the conference, the claimant agreed to retesting by Dr. O. A subsequent report by Dr. O adhered to his revised or amended rating of 13%. This was accepted by the hearing officer.

We have repeatedly cautioned against the unilateral contact of the designated doctor by either party. Texas Workers' Compensation Commission Appeal No. 92595, decided December 21, 1992; Texas Workers' Compensation Commission Appeal No. 93455, decided July 22, 1993. As this case suggests, so much for our exhortations. This case tends to shows, at best, negligence, and, at worst, a blatant disregard for prior decisions of the Appeals Panel and what has now become official policy of the Texas Workers' Compensation Commission. We assume prejudice, or at the very least some resulting unacceptable adverse perceptions of the fairness and unbiased nature of the designated doctor program, from such egregious conduct as we see here. Our early concerns for unilateral contact with designated doctors, who are a cornerstone of the medical dispute resolution apparatus under the 1989 Act (Appeal No. 92595, *supra*; Texas Workers' Compensation Commission Appeal No. 93272, decided May 24, 1993), led to an official Texas Workers' Compensation Commission Advisory being promulgated. Texas Workers' Compensation Commission Advisory 94-02, dated March 14, 1994, specifies that parties to a specific case should only communicate with a designated doctor through appropriate Commission officials. We recognize that this Advisory was not promulgated until after the unilateral contact in this case but there were numerous earlier Appeals Panel decisions on the matter. In Texas Workers' Compensation Commission Appeal No. 93613, decided August 24, 1993, we stated "[w]e could envision a situation where a unilateral communication so compromises the appearance of impartiality of the designated doctor as to require as a matter of law to hold that his opinion must be disregarded." And, in Texas Workers' Compensation Commission Appeal No. 94237, decided March 31, 1994, the unilateral contact with the designated doctor led to our reversal and remand, while in other situations we have concluded that an innocuous unilateral contact would not require corrective action. Texas Workers' Compensation Commission Appeal No. 93762, decided October 1, 1993. Here, we conclude the chance of improper influence or the perception thereof, under the particular circumstances, was too great to ignore. Also, we do not find an evidentiary basis in the record for the application of waiver or estoppel. Further, we find the situation here to be clearly distinguishable from those cited by the carrier which involved the providing of prior medical records to the designated doctor as a part of his examination and assessment of MMI and an IR. This latter aspect is also addressed in the Commission's Advisory.

For the foregoing reasons, the decision is reversed and the case remanded for the appointment of a new designated doctor. 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.

Stark O. Sanders, Jr.
Chief Appeals Judge

CONCUR:

Susan M. Kelley
Appeals Judge

Philip F. O'Neill
Appeals Judge