APPEAL NO. 042042-s
FILED OCTOBER 14, 2004

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 July 21, 2004. The CCH record was closed on August 3, 2004. The hearing officer resolved the disputed issue by deciding that the respondent's (claimant) impairment rating (IR) is 20% as reported in an amended report by the designated doctor chosen by the Texas Workers' Compensation Commission (Commission). The appellant (self-insured) appeals, contending that the hearing officer erred in considering the letters of clarification and the designated doctor's amended report because the claimant was not present at the CCH to offer those documents into evidence; that the evidence presented at the CCH is insufficient to support the hearing officer's decision; and that the evidence supports the 5% IR initially reported by the designated doctor. No response was received from the claimant.

DECISION

Affirmed.

It is undisputed that the claimant sustained a compensable lower back injury on _____, and that she reached maximum medical improvement (MMI) on May 23, 2003.

The claimant did not appear at the CCH. The hearing officer sent a 10-day letter to the claimant. The claimant did not respond to the 10-day letter. The hearing officer closed the record and issued his decision.

The self-insured was represented at the CCH by its attorney. The ombudsman was also present at the CCH. The benefit review conference report reflects that the benefit review officer recommended that the claimant's IR is 20% as certified by the designated doctor. The self-insured objected to the presence of the ombudsman in the absence of the claimant. The hearing officer overruled that objection. It was clear upon questioning of the self-insured by the hearing officer, that the self-insured did not intend to offer into evidence any document from the designated doctor other than the designated doctor's initial report of a 5% IR. An operative report offered into evidence by the self-insured reflects that the claimant underwent a multilevel fusion from L4 to the sacrum in December 2002, which was before the undisputed date of MMI.

The hearing officer noted that he needed the exhibits relating to the 20% IR to make his decision and that it appeared that it was the self-insured who was contesting the 20% IR. The hearing officer said he would allow the ombudsman to remain at the CCH for the purpose of giving him the exhibits related to the IR issue. The self-insured objected to any exhibits being admitted on behalf of the absent claimant. The hearing officer overruled that objection. The hearing officer admitted into evidence two letters of

clarification from the Commission to the designated doctor and the designated doctor's responses, which included the amended IR report assigning a 20% IR. The designated doctor's amended IR report referenced Commission Advisory 2003-10, signed July 22, 2003. *See* Texas Workers' Compensation Commission Appeal No. 032399-s, decided November 3, 2003, regarding the referenced Commission Advisory. The hearing officer notes in his decision that he took official notice of the Commission's letters of clarification, the designated doctor's responses, and Commission Advisory 2003-10. What he actually did at the CCH was request the ombudsman to provide him with the exhibits relating to the issue, which exhibits were the letters of clarification to the designated doctor and the designated doctor's responses.

The hearing officer found that the designated doctor assigned the claimant a 20% IR and that the IR assigned by the designated doctor is not contrary to the great weight of the other medical evidence. The hearing officer concluded that the claimant's IR is 20%. The self-insured appeals, contending that the hearing officer should have made his decision based on the designated doctor's report of a 5% IR and that the hearing officer committed reversible error "by presenting evidence on behalf of an absent claimant, and allowing the Ombudsman to present evidence and argument on the Claimant's behalf."

The self-insured cites several Appeals Panel decisions in support of its contention. In Texas Workers' Compensation Commission Appeal No. 011162, decided July 2, 2001, the claimant did not appear at the CCH, lost on the issues of compensable injury and disability, and contended on appeal that the ombudsman should have presented his evidence at the CCH despite the claimant's absence. The Appeals Panel affirmed the hearing officer's decision, noting that the ombudsman assists, but does not represent, the claimant, and therefore cannot present evidence in the absence of the claimant. In Texas Workers' Compensation Commission Appeal No. 030716, decided April 29, 2003, the hearing officer determined that the claimant did not sustain a compensable injury and did not have disability, and the claimant complained on appeal about the assistance received from the ombudsman. The Appeals Panel noted in that decision that an ombudsman is available to assist a claimant, not to be the claimant's representative, and that a claimant is still responsible for the presentation of his or her case and for insuring that the evidence is presented to the hearing officer. Similarly, in Texas Workers' Compensation Commission Appeal No. 931006, decided December 17, 1993, which was an injury, notice, and disability case, the Appeals Panel noted that the ombudsman assists, but does not represent, the claimant. In Texas Workers' Compensation Commission Appeal No. 971047, decided July 16, 1997, the claimant did not appear at the CCH on the issues of compensable injury and disability, the hearing officer on his own motion admitted certain documents into evidence after asking the ombudsman if she had any medical records or documents, and the hearing officer decided the issues in favor of the claimant. The Appeals Panel remanded that case back to the hearing officer, noting that the hearing officer should require the claimant to prove his or her case rather than soliciting evidence on his own motion to establish the claimant's case. In Texas Workers' Compensation Commission Appeal No. 992056, decided November 1, 1999, an extent of injury case, the Appeals Panel noted that

Section 410.163(b) does not grant the hearing officer the right to become a "surrogate party at the CCH," and that it was improper for the hearing officer to shore up the claimant's case under the guise of ensuring a full development of the record, although given the other evidence in the record, reversible error was not found. In Texas Workers' Compensation Commission Appeal No. 92272, decided August 6, 1992, which involved an issue of compensable injury, the Appeals Panel noted that the hearing officer acts as an impartial judge of the facts and is not an advocate for any party.

What is important to note about the case under review is that the disputed issue involved the claimant's IR. Section 410.125(e) provides that if the designated doctor is chosen by the Commission, the report of the designated doctor shall have presumptive weight, and the Commission shall base the IR on that report unless the great weight of the other medical evidence is to the contrary. Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 130.6(i) (Rule 130.6(i)) provides in part that the designated doctor's response to a Commission request for clarification is considered to have presumptive weight as it is part of the doctor's opinion. Rule 142.2 regarding authority of the hearing officer provides in part that the hearing officer is authorized to request additional evidence. In Texas Workers' Compensation Commission Appeal No. 001643, decided August 30, 2000, the claimant did not appear at the CCH and the hearing officer issued his decision on the IR issue. On appeal, the Appeals Panel noted that there was no evidentiary support for the hearing officer's decision, and remanded for proper development and consideration of the evidence, including the MMI/IR certification of the designated doctor. In Texas Workers' Compensation Commission Appeal No. 960560, decided May 2, 1996, the Appeals Panel wrote that "because the carrier in this case was seeking to set aside the report of the designated doctor, it had the burden of proof." In Texas Workers' Compensation Commission Appeal No. 962592, decided February 6, 1997, the Appeals Panel stated "the designated doctor is the Commission's doctor and he exists primarily to aid in the resolution of the MMI and IR disputes" and that "the designated doctor was not intended to function as an expert for either party." In Texas Workers' Compensation Commission Appeal No. 92595, decided December 21, 1992, the Appeals Panel stated "if information is nevertheless missing or unclear by the time that the contested case hearing officer is asked to evaluate the designated doctor's report, it is appropriate for the hearing officer, in carrying out his or her responsibilities to fully develop the facts required, in accordance with Article 8308-6.34(b) [now Section 410.163(b)] to seek that additional information."

While we do not consider it proper for the ombudsman to offer exhibits into evidence or to make arguments on the merits when the claimant has not appeared at the CCH, because the ombudsman assists, but does not represent, a claimant, we nevertheless cannot conclude that the self-insured has shown reversible error in this case because it was the hearing officer who was seeking the additional designated doctor's reports, which the self-insured was not offering at the CCH. Rule 142.2(10) authorizes the hearing officer to request additional evidence. In addition, the amended designated doctor's report was in response to a request for clarification from the Commission and, as such, was entitled to presumptive weight under Rule 130.6(i). We think the hearing officer properly placed the burden of proof on the self-insured in this

case to overcome the presumptive weight afforded to the report of the designated doctor. The hearing officer believed it was necessary to have the reports and clarifications of the designated doctor in evidence to resolve the disputed IR issue. Since, as noted in Appeal No. 962592, *supra*, the designated doctor is the Commission's doctor, we believe the hearing officer acted appropriately in considering the amended designated doctor's report and not just the initial designated doctor's report, which is the only designated doctor report the self-insured wanted the hearing officer to consider despite its knowledge that the designated doctor had amended his report in response to a Commission request for clarification. We conclude that the hearing officer did not err in considering the amended designated doctor's report, which assigned the claimant a 20% IR, and that the hearing officer's decision is supported by sufficient evidence and is not so against the great weight and preponderance of the evidence as to be clearly wrong and unjust. Cain v. Bain, 709 S.W.2d 175 (Tex. 1986).

We affirm the hearing officer's decision and order.

The true corporate name of the insurance carrier is **(a self-insured governmental entity)** and the name and address of its registered agent for service of process is

**SF**
**(ADDRESS)**
**(CITY), TEXAS (ZIP CODE)**.

_____
Robert W. Potts
Appeals Judge

CONCUR:

_____
Gary L. Kilgore
Appeals Judge

_____
Robert E. Lang
Appeals Panel
Manager/Judge