APPEAL NO. 92233

This appeal arises under the Texas Workers' Compensation Act of 1989, TEX. REV. CIV. STAT. ANN. art. 8308-1.01 *et seq*. (Vernon Supp. 1992) (1989 Act). A contested case hearing was held in (city), Texas, on August 14, 1991, and reconvened on April 24, 1992 ("hearings"), (hearing officer), presiding, to resolve the sole disputed issue as to whether or not temporary income benefits (TIBS) should be continued for respondent (claimant below). Respondent was injured on (date of injury), when part of an overhead door at his place of employment struck him on the head. During the first hearing, medical evidence of respondent's condition, obtained from his treating doctor and from two consulting neurologists, one of whom was selected by appellant, was presented. At the conclusion of the hearing, the hearing officer decided that an "independent medical examination" of appellant was necessary to determine the disputed issue; accordingly, on August 23, 1991, he ordered that, pursuant to Article 8308-4.16 (1989 Act), appellant be examined within 45 days by a physician "designated" by the Texas Workers' Compensation Commission (Commission). At the second hearing, medical reports from that doctor (Dr. P), a neurosurgeon, were adduced, as was additional medical evidence from the treating doctor and the two consulting neurologists. Appellant contended that respondent was not entitled to TIBS after he commenced light duty work on June 25, 1991, while respondent contended to the contrary because he still had pain in his neck and shoulder, hearing problems, and couldn't take medications while working with a machine. The hearing officer found, *inter alia*, that the Commission's "designated physician" (Dr. P) had determined that respondent had not reached maximum medical improvement (MMI), said he gave such determination "presumptive weight," and found further that the great or greater weight of other medical evidence was not contrary to (Dr. P's) determination. He concluded that respondent had not reached MMI, had disability since his date of injury, and was entitled to TIBS from June 17, 1991. Appellant asserts on appeal that (Dr. P's) determinations were not entitled to presumptive weight because he was not a designated doctor pursuant to Articles 8308-4.25 or 8308-4.26 (1989 Act). Appellant also challenges the hearing officer's findings regarding MMI, disability, and entitlement to additional TIBS. In response, the respondent avers that the hearing officer, as the fact finder, was "free to assign the amount of weight" to give the conflicting medical evidence, and that the challenged findings were correct.

DECISION

Finding that the hearing officer applied an incorrect evidentiary standard to the medical evidence of (Dr. P), we reverse and remand.

On (date of injury), while working as an electric forklift operator at (employer), respondent was struck in the head and knocked to the ground by a panel which fell from an overhead door. He was treated in an emergency room and released. Later at home he experienced dizziness and nausea and visited (Dr. B), his family doctor, who had him admitted to (Hospital) for observation and testing. Over the next few weeks respondent said he was again hospitalized twice for brief periods for observation after complaints of headache, dizziness, and pain in his neck and left shoulder. CT scans of his brain were

normal and his x-rays apparently revealed no significant abnormalities. His treating doctor, (Dr. B), took respondent off work and prescribed physical therapy. Respondent obtained 23 physical therapy treatments for his neck and left shoulder from February 14 through May 15, 1991, at which time his therapist stated that "no documented objective deficits [were] remaining."

Appellant had respondent examined, with his consent, by (Dr. Bl), a neurologist, on May 1, 1991. Respondent testified he forgot to take his x-rays to this exam and contended that (Dr. Bl's) exam was perfunctory at best. (Dr. Bl's) report of this exam indicated she reviewed respondent's previous medical records, as well as performed her own neurological examination, and her "[I]mpression" included: "1. History of minor head trauma, (date of injury), without objective neurological abnormality at this time. 2. Obesity. 3. Hypertension, treated." This report also indicated that extensive x-ray and CT studies had revealed no significant or specific abnormalities, and that her own examination "does not demonstrate an objective abnormality that would preclude patient's return to work." A "Job Analysis" was prepared by employer and signed by (Dr. Bl) which stated that respondent's job as a "receiver operator" involved approximately one-half of his eight-hour day standing on the forklift he operated to handle the receipt of cartons of materials while most of the balance of his time was spent updating the computer with the materials he received. This report also stated that "light duty is available." Respondent didn't know what the report meant by "light duty" but agreed the report described his job duties.

According to the report of the benefit review conference (BRC) of June 17, 1991, requested by appellant, respondent had not worked from (date) to the date of the conference and was being paid TIBS. Respondent, then unrepresented, took the position at that conference that his treating doctor, (Dr. B), had not released him to return to work and that he was still under treatment and unable to work. Appellant's position was that (Dr. Bl), an "independent medical examiner," could find nothing wrong with respondent and had released him to return to work. Appellant wanted to stop paying TIBS. The benefit review officer recommended that respondent be sent to a third doctor for an opinion as to whether respondent was exaggerating his complaints, and that TIBS be continued. Respondent testified, however, that TIBS payments ceased after the conference and that he returned to work, despite his treating doctor's statement that he was not able to work, because he had no choice since his TIBS were to cease. Respondent's answers to interrogatories stated that respondent had previously received workers' compensation benefits for six prior injuries or illnesses between "6-20-83" and "1-16-89."

At the hearing, respondent testified that he was seen in the (W R Hospital) emergency room after the accident and released. The records of that visit stated that respondent's diagnosis included a severe head contusion, neck sprain, and a contusion of the upper back. His skull and cervical spine were x-rayed. Later that day, respondent experienced dizziness and nausea and saw his family doctor, (Dr. B), who admitted him to (Hospital) for observation and tests. Respondent also testified to later symptoms of headaches, dizziness, and nausea which prompted subsequent admissions to (W R

Hospital) and to (Hospital) for observation and testing. He said that (Dr. B) took him off work and told him to rest. CT scans of respondent's brain on February 21st were normal. Appellant said that after he was examined by (Dr. Bl) on May 1st, an exam he regarded as incomplete, he saw (Dr. B) who told him (Dr. Bl's) exam was "invalid" and who continued his treatment for headaches and neck and shoulder pain with medications and physical therapy. Respondent introduced a letter from (Dr. B), dated June 10, 1991, which stated that respondent complained of continued headaches, dizziness and neck pain, also has complaints of hearing and visual loss, remained under physical therapy, and "is presently unable to work." He testified that after the BRC on June 17th, however, he obtained from (Dr. B) a release to return to work effective June 25th because he understood TIBS would cease after the BRC. (Dr. B's) written release, dated June 24, 1991, stated that respondent's diagnosis was "cerebral concussion, cervical sprain;" that respondent was totally incapacitated from (date of injury) to June 24th; and it went on "to further certify that [respondent] has now recovered sufficiently to be able to return to regular work duties on 6-25-91 except restrict lifting to 10 lbs., avoid noisy environment."

Respondent also testified that (Dr. B) referred him to a neurologist, (Dr. C). (Dr. C's) report of his July 12, 1991 examination noted that respondent returned to work on light duty on June 26th and that he works in noisy surroundings. (Dr. C's) "impression" was "[s]tatus post-closed head injury with post-traumatic headaches." He felt respondent had "significant functional overlay also." This report made no reference to respondent's being unable to continue working. It did mention that respondent had been off work for nine months following a 1989 back injury.

Respondent also testified that, as of the first hearing date, he still had complaints regarding his hearing, and headaches and neck pain; that although he was then working for employer, he still could not do his preinjury job; that he had not attempted to do his preinjury job and no doctor had released him for such work; that he had to stop taking medication for dizziness in order to work in that environment; and, that (Dr. B) said he needs to be off work for treatment. He said he resumed working for employer on June 21st and has worked steadily since then with the exception of a few nights three weeks after resuming work when he was sent home because he had been told to start working with a machine and felt he couldn't do so. He said he receives $9.60 per hour (his preinjury wage rate) for his light duty work which consists of marking codes on boxes and some light sweeping, but contends he would be working some overtime if not on light duty. He agreed with the BRC recommendation that he see a third doctor, apparently because he believed (Dr. Bl's) examination (and presumably her opinion that he could return to work) was invalid, and because he believed (Dr. B) didn't really want him back at work. He argued in his closing statement that he had been "railroaded back to work" before reaching MMI and should be evaluated by a third doctor. Appellant argued that, while not seeing the necessity for such, it had no objection to another medical examination.

At the second hearing on April 24, 1992, the hearing officer, after taking official notice of (Dr. P's) reports, said he had decided, due to conflicting medical reports, to send

respondent to a "designated doctor of our choice," and that, by his August 23rd order, he had requested an "independent medical exam by a designated doctor." Appellant's counsel then stated that respondent's understanding was that "([Dr.] P's) status was just a Commission MEO and not a Commission-designated doctor." He indicated that that is how appellant interpreted the order; that appellant was, accordingly, concerned about "the weight" to given (Dr. P's) reports; and that (Dr. P) "should be treated as just an MEO and not a designated doctor under Section 4.16 and Rule 130.6." The hearing officer took official notice of his August 23rd order, noted appellant's observations, and concluded that the order speaks for itself and "whatever it says to the extent it applies one way or the other, then that will be determinative." The hearing officer had earlier stated that "[t]he applicable provision is Article 8308, Sub. 4.16; so that would be, I guess, the determinative appellation for whatever designation we are going to give him." In his Decision and Order the hearing officer said he decided to have respondent examined by a physician "designated" by the Commission because of the conflict between (Dr. Bl's) assessment and respondent's contention that (Dr. B) had released him to return to work against (Dr. B) own professional judgment.

Respondent introduced a letter from (Dr. B) dated October 17, 1991 which indicated respondent has evidence of a hearing loss consequent to a blow to his head in (date). Respondent then proffered a report from (Dr. S), dated October 4, 1991. After appellant indicated the report had not been exchanged before the hearing, the hearing officer took the parties "off the record" so as to "discuss it at length." When they went back on the record the hearing officer announced that respondent was going to withdraw the exhibit. At that point, respondent indicated he had no further evidence. We note that in the prior hearing in this case, after respondent offered an exhibit consisting of respondent's medical records and appellant objected on the grounds the exhibit had not been previously exchanged, the hearing officer then took the hearing "off the record." When the hearing resumed on the record the hearing officer stated what he understood the parties' positions to have been "in our off the record conversations" and then announced his overruling of the objection. Neither party objected to nor has appealed from such procedure and we are not thus called upon to decide whether the hearing officer's conduct resulted in an incomplete record of the proceedings. We do note, however, that it is advisable that all such conversations involving substantive matters be on the record, because we are required to consider "the record developed at the contested case hearing" (Article 8308-6.42(a)) and have had occasions to reverse and remand decisions for incompleteness of the hearing records, albeit for different problems.

Appellant then introduced a letter from (Dr. B), dated September 9, 1991, which recited a history of respondent's complaints and treatment, and concluded that respondent "was considered disabled to work until June 24, 1991 at which time he was released to return to work as of June 25, 1991. No permanent disability is anticipated." Also put in evidence was a report of respondent's follow-up visit to (Dr. C) on August 30, 1991. The report noted that respondent has stiffness in the neck, no numbness on left side, a moderate amount of spasm in the posterior neck muscles, and that he is working full time. (Dr. C)

started respondent on a medication for headache to be taken in the morning after work and scheduled a follow-up visit in two months.

Appellant also introduced a Report of Medical Evaluation (TWCC-69), signed by (Dr. Bl), which stated that respondent had reached MMI as of May 1, 1991, and which assigned him a whole body impairment rating of 5%. Accompanying the TWCC-69 was a very detailed report of respondent's history and a neurological examination, together with (Dr. Bl's) impression and recommendations. This report was prepared pursuant to a "consultation" (and presumably an examination) on April 7, 1992. (Dr. Bl's) impression included complaint of hearing deficit (unsubstantiated by exam); complaint of soreness over entire neck and low back (without evidence by examination of significant radiculopathy); a herniated disc at C4-5, left, by history; and, obesity. Her recommendations included statements that respondent's history does not clearly correlate his herniated disc to his (date of injury) injury; that he has no history of persistent, localized pain, paresthesia and weakness that would relate to the herniated disc; that respondent does not want surgical intervention on his neck; that he is at MMI; and, that he had previously performed his light duty work without difficulty and "[c]urrent examination does not demonstrate a problem that would preclude continued employment of that nature." Because of the herniated disc, however, (Dr. Bl) recommended that respondent not be required to lift more than 15 pounds repetitively, nor more than 25 pounds occasionally, and that he not do work requiring prolonged looking upward. There was no indication in the record that (Dr. Bl's) TWCC-69 was ever sent to respondent's treating doctor to see whether he agreed with the certification of MMI. *See* Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 130.3. Following that procedure can lead to the selection of a "designated doctor" to resolve a disagreement between claimants' and carriers' doctors pursuant to the provisions of Article 8308-4.25 as to whether MMI has been reached.

(Dr. P's) reports of September 25, October 15, and November 15, 1991, and of February 24, 1992, indicated, in essence, that respondent was tolerating light duty fairly well, that an MRI performed on October 9, 1991, revealed a disc herniation at the C4-5 level which (Dr. P) found to be consistent with respondent's complaints of severe neck pain and pain in left shoulder, that respondent wanted more conservative treatment and declined a myelography and surgery, and that as of February 24, 1992, (Dr. P) didn't feel respondent had yet reached MMI.

The unresolved issue from the BRC was framed as "[c]ontinuation of [TIBS] after a release to return to work." The hearing officer framed the issue as whether or not TIBS should be continued for respondent, without reference to any date. Appellant framed the issue in argument as whether respondent was entitled to any more TIBS than he had already received. The hearing officer's Decision and Order stated the issue as "whether the Claimant is entitled to receive [TIBS] subsequent to June 24, 1991." Respondent had testified his TIBS were stopped after the BRC on June 17th and that the release to return to work he obtained from (Dr. B) was effective June 25th. Appellant challenges not only the

sufficiency of the evidence to support the hearing officer's conclusions that respondent has had disability since (date of injury), and has not reached MMI, but also posits that disability and MMI were not disputed issues at the BRC.

Article 8308-4.23(a) (1989 Act) provides that an employee who has "disability" and who has not attained MMI is entitled to TIBS, which accrue on the eighth day of disability, are paid weekly, and which continue until the employee has reached MMI. "Disability" is defined as "the inability to obtain and retain employment at wages equivalent to the preinjury wage because of a compensable injury." Article 8308-1.03(16). MMI is defined as the earlier of "(A) the point after which further material recovery from or lasting improvement to an injury can no longer reasonably be anticipated, based on reasonable medical probability; or (B) the expiration of 104 weeks from the date income benefits begin to accrue." Article 8308-1.03(32). Respondent's continued entitlement to TIBS requires both that he have disability and that he not have attained MMI. *See* Texas Workers' Compensation Commission Appeal No. 91045 (Docket No. redacted) decided November 21, 1991. Appellant's challenges to the conclusions on disability and MMI on the ground they were not disputed issues at the BRC are without merit since they were subsumed in the disputed issue as it was framed. As the 1989 Act plainly requires, to be entitled to a continuation of TIBS after respondent returned to work, he must have continued to have disability and must not have reached MMI.

Appellant further challenges the conclusion that respondent had disability contending that it was based on the hearing officer's Finding of Fact No. 11 which, argues appellant, was in direct conflict with the evidence. Finding of Fact No. 11 states:

> As of April 24, 1992, the Claimant was, and had been, unable to obtain and retain employment at the rate of $9.60 per hour, the hourly rate for which he was paid as an electric forklift operator.

Respondent testified that while he was not doing and hadn't tried to do his former job operating the forklift, but was instead performing light duty, he was still receiving the preinjury wage of $9.60 per hour. What was not well developed at the hearing, and not even alluded to in the hearing officer's findings, was whether respondent continued to have disability since his post-injury earnings were reduced by not working any overtime since commencing light duty.

The hearing officer's legal conclusion that respondent had not reached MMI was footed on his factual findings as follows:

> 8.(Dr. P), this agency's designated physician, found the Claimant had not yet reached [MMI] as of February 24, 1992; this determination has been given presumptive weight.
>
> 9.Neither the great, nor greater weight of other medical evidence is contrary to (Dr.

P's) determination that the Claimant has not reached [MMI].

10.(Dr. P) also concluded that the Claimant's herniated disc, discovered on the October 7, 1991, MRI scan, was consistent with the Claimant's earlier physical complaints.

Appellant urges that because the hearing officer obtained (Dr. P's) evaluation pursuant to Article 8308-4.16, the hearing officer erred in giving (Dr. P's) evidence presumptive weight because (Dr. P) was not a "designated doctor" selected pursuant to the authority of Articles 8308-4.25(b) or 8308-4.26(g). Article 8308-4.25(b) provides for the resolution of a dispute over whether an employee has reached MMI. To resolve such a dispute, the Commission shall direct the employee to be examined by a "designated doctor," selected by the parties by mutual agreement or, lacking such agreement, by the Commission. The designated doctor's report shall have presumptive weight as to whether the employee has reached MMI "unless the great weight of the other medical evidence is to the contrary." Article 8308-4.26(g) provides for the designated doctor mechanism to resolve a dispute over an impairment rating. This case involved no impairment rating dispute.

Article 8308-4.16(a) authorizes the Commission to require an employee "to submit to medical examination to resolve any question about the appropriateness of the health care received by the employee, the impairment caused by the compensable injury, the attainment of [MMI], or analogous issues." This statute does not provide for the giving of presumptive weight to the report of an examining doctor selected pursuant to the authority of this article. Further, appellant invites our attention to Rule 126.6, entitled "Order for Required Medical Examinations," which in subsection (f) provides that "[a] doctor who conducts an examination solely under the authority of an order issued according to this rule shall not be considered a designated doctor under the Act, §4.25(b) or §4.26(g)." Subsection (a) of that Rule provides, *inter alia*, that when a request for a medical examination is made by a carrier or by a division of the Commission, the Commission shall determine if it should be ordered, and, if so, issue the order. On the other hand, Rule 130.6, entitled "Designated Doctor: General Provisions," provides a mechanism for obtaining a designated doctor which includes the receipt by the Commission of a notice of dispute over MMI or the assignment of an impairment rating, and the allowance of 10 days for the employee and insurance carrier to agree on a designated doctor before a selection by the Commission.

We agree with appellant that the hearing officer erred in giving presumptive weight to (Dr. P's) opinion that respondent had not yet reached MMI as of February 24, 1992. Such a finding was, of course, pivotal to the outcome in that respondent would not be entitled to the continuation of TIBS after he achieved MMI. This misapplication of the presumptive weight standard to a portion of the medical evidence requires our reversal of the hearing officer's decision and remand for further consideration.

We reverse and remand for further development of the evidence, as appropriate, and

for reconsideration not inconsistent with this opinion. Pending resolution of the remand, a final decision has not been made in this case.

_____
Philip F. O'Neill
Appeals Judge

CONCUR:

_____
Susan M. Kelley
Appeals Judge

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Lynda H. Nesenholtz
Appeals Judge