APPEAL NO. 92394

On July 2, 1992, a contested case hearing was held in (city), Texas, with (hearing officer) presiding, to determine the disputed issues, namely, whether (claimant), the respondent herein, had reached maximum medical improvement (MMI), and, if so, the percentage of the impairment assigned. (Ms. V) determined the respondent had not reached MMI, and in so doing adopted the report of the doctor designated by the Texas Workers' Compensation Commission (Commission), (Dr. C). The hearing officer determined that assignment of an impairment rating would be premature given the lack of the threshold requirement that MMI be reached. The hearing officer further determined that the great weight of medical evidence did not overcome Dr. C's report.

Appellant asks for consideration by the Appeals Panel. First, it argues (and has argued throughout the proceedings) that MMI was not in issue, because a claimant cannot, through lay "testimony," raise such a disputed issue where, as here, the treating doctor and insurance carrier doctor have both determined that MMI has been reached. The appellant argues that the treating doctor's MMI report should not have been disallowed as a certification of MMI because only substantial compliance with Texas W.C. Comm'n, 28 TEXAS ADMIN. CODE § 130.1 (Rule 130.1) is required. The appellant further contends that since the designated doctor deferred to the treating doctor's impairment rating, he, in effect, agreed that MMI had been reached.

Second, appellant argues that the hearing officer erred by not finding that respondent had less than 20% impairment. In making this argument, appellant essentially seeks "contribution" for the results of previous injuries, not through the statutory means set forth in the Texas Workers' Compensation Act, TEX. REV. CIV. STAT. ANN. art. 8308-4.30 (Vernon's Supp. 1992) (1989 Act), but through a lowering of the impairment rating assigned to the respondent through the use of the AMA *Guides to the Evaluation of Permanent Impairment*, as required by Article 8308-4.24. Appellant further argues that assignment of an impairment rating due to loss of range of motion represents subjective, rather than objective, standards. Respondent has not filed a reply.

DECISION

After reviewing the record, we reverse and remand the determination of the hearing officer for further development of the evidence, specifically to seek the designated doctor's evaluation of whether, and when, respondent has reached MMI as that term is defined in the 1989 Act, and for his assignment of an impairment rating related to the respondent's back on the date MMI was reached. We remand because we find the report of the designated doctor ambiguous in that it appears to find that MMI has not been reached, yet endorses the treating doctor's assessment of impairment, premised upon his determination that MMI was reached. We further find that we cannot address whether the hearing officer erred in determining that the treating doctor had not certified respondent as having reached MMI based solely on his omission of a date of MMI on the TWCC-69 form because the record does not reflect if a cover letter or other information supplying that date was provided

at the same time. Once clarification is provided by the designated doctor, and a report rendered, the hearing officer should accept the report of the designated doctor unless the great weight of medical evidence is to the contrary.

Respondent's back was injured on (date of injury), when he was lifting a heavy steel retaining rod in the course and scope of employment with (employer). He initially saw Dr. S) for his injury, and was referred to (Dr. I), with whom he has consulted for nearly a year. Respondent stated that he had one previous work-related injury for which he required surgery in 1981 and 1984, but for which he did not recall being assessed "any disability." Respondent said he felt he had not reached MMI because he was still having to see the doctor.

The record includes numerous medical records as well as depositions on written questions of the respondent's treating doctor, Dr. I, and the designated doctor, Dr. C. Highlights from these records are detailed here:

- Dr. S initially diagnosed acute lumbosacral strain. A TWCC-69 signed by Dr. S, undated but completed sometime after June 7, 1991, indicated that respondent has not reached MMI. Referral to Dr. I is noted.

- A May 30, 1991 x-ray report stated an impression of normal lumbar spine.

- Initial medical report completed by Dr. I for a June 10, 1991 visit indicated a back brace and Vicodin was prescribed; diagnosis of low back pain noted.

- A magnetic resonance imaging (MRI) examination, ordered by Dr. I and conducted July 16, 1991, indicated recurrent disc herniation at L5-S1. The report noted a history of two back surgeries: partial removal of disc L5 in 1981, and removal of scar tissue in 1984.

- Intrafacet depomedrol injection conducted August 5, 1991 at (Hospital).

- On August 27, 1991, Dr. I wrote a letter to appellant's adjuster in which he opined that respondent should probably be awarded permanent partial disability and learn to live with his pain.

- On September 5, 1991, the appellant's doctor, (Dr. P), filed a TWCC-69 finding MMI as of that date, with 0% impairment. Dr. P stated that he reviewed "the most recent" MRI and CT scans and "they are negative." Dr. P stated that he does not have reason to believe that appellant has a ruptured disc, and that all symptoms he had were those of functional overlay. There was no indication that Dr. P's report was forwarded to Dr. I at the time it was rendered.

- At some point after August 13, 1991 Dr. I completed a TWCC-69.[1] This states that MMI was reached, does not list a specific date, and assesses a 20% impairment rating. An October 30, 1991 letter reiterated the 20% rating and referenced the AMA impairment guides. On June 4, 1992, however, Dr. I wrote a "To Whom It May Concern" letter indicating that the wrong impairment guidelines were used in rendering his October 30th rating.

- By letter dated January 16, 1992, to the adjuster, Dr. I stated that he cannot attribute a specific percentage of the impairment rating to respondent's two prior surgeries because he did not examine him then.

- On February 4, 1992, the adjuster sent Dr. I a copy of Dr. P's TWCC-69 evaluation, and solicited his agreement or disagreement. No response to this is noted in the record.

- A February 18, 1992 report submitted by Dr. I to the Texas Rehabilitation Commission, Vocational Rehabilitation Division, stated "[t]he patient will not benefit from any other RX. He has reached MMI."

- (Dr. E), by letter dated March 20, 1992 to Dr. I, indicated that he examined respondent on referral from Dr. I. This letter, in summary, indicated that respondent may be able to get back into the work force in a light job, but will continue under restrictions indefinitely. In a May 11, 1992 letter, Dr. E opined that much of respondent's impairment resulted from prior surgeries, but he declined in a May 26, 1992 letter to assess respondent's whole body impairment at the request of the appellant's adjuster.

- On April 2, 1992, Dr. I referred respondent to a pain management clinic at (Hospital). However, an undated note to Dr. I from the hospital indicated that respondent put the pain management program on hold "until he sees physician again."

- On April 24, 1992, a Commission-generated form letter to Dr. C, the designated doctor, states that "the claimant may have reached [MMI]" and instructs him to complete the TWCC-69. On April 29, 1992, Dr. C filed a TWCC-69 stating that respondent had not reached MMI, that the

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[1] The appellant states in its appeal that this report was completed August 13, 1991. The report in the record is not date-stamped, and other correspondence from Dr. I refers to an impairment rating as assigned October 30, 1991. His October 30, 1991 letter refers to "enclosures." The date Dr. I certified MMI should be cleared up on remand.

estimated date of MMI was "undetermined," and that the whole body impairment is "as per Dr. [I]." A June 16, 1992 letter from Dr. C to the adjuster further confuses the issue in that Dr. C apparently endorses Dr. I's impairment rating but indicates that further testing is recommended.

- A May 26, 1992 letter report by (Dr. G), sent to both Dr. C and Dr. I, recaps respondent's history and assessment. Dr. G had not reviewed the MRI, but opined that a CT myelogram might yield useful information. Dr. G characterized this as a "difficult case" and states "the patient has asked me to assign him a permanent impairment rating, however, I will decline this at the present time, since it is unclear whether his impairment is permanent right now."

Depositions on written questions were taken from Dr. C and Dr. I by the appellant. Neither doctor was asked whether respondent had reached MMI. However, both confirmed that their diagnoses and reports were based upon reasonable medical probability. Dr. C, who has practiced a specialty in neurological surgery since 1973, stated that he had not done an impairment rating using the AMA guides because he had not been asked to make such an assessment. He stated that there would be some impairment relating to respondent's prior surgeries. Dr. I has practiced in the specialty of bone and joint disorders for 12 years. Dr. I agreed that a portion of respondent's impairment would relate to prior surgeries, although he stated that it was not possible for him to separately rate impairment only for the injury of (date of injury).

MMI means the earlier of the expiration of 104 weeks from when benefits begin to accrue, or "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." Art. 8308-1.03 (32). This will not, in every case, mean that the injured worker is completely free of pain or impairment, or that the injured worker is able to return to the prior occupation. In addition, evidence of impairment must be based on objective clinical or laboratory findings. Art. 8308-4.25(a). We agree that the ultimate determination of the achievement of MMI, and of the degree of impairment, must be made upon medical and not lay evidence. *See* Texas Workers Compensation Commission Appeal No. 92312 (Docket No. redacted) decided August 19, 1992.

However, the raising of a "dispute" over MMI (as distinguished from prevailing on a dispute that has been developed) does not carry a similar requirement for medical evidence. Rule 130.6(a) makes clear that an employee or insurance carrier can dispute MMI or impairment, and does not require that the disputing party have medical expertise. Thus, appellant's point that a carrier should be allowed to dispute MMI on lay testimony if the claimant can is already possible under the Commission's rules. In this case, the respondent can, and did, raise a dispute over the existence of MMI, while the appellant disputed the treating doctor's impairment rating. Consequently, the designated doctor's

opinion regarding the existence of MMI was properly considered by the hearing officer as an issue.

But, even assuming that a "dispute" over the existence of MMI had not been expressly raised, it is clear that the threshold issue of the existence of MMI cannot be neatly severed from assessment of an "impairment rating." Article 8308-1.03(25) defines impairment rating as the "percentage of *permanent* impairment of the whole body resulting from a compensable injury." (emphasis added). The Appeals Panel has noted that the issues are somewhat inextricably tied together. Texas Workers' Compensation Commission Appeal No. 92366 (Docket No. redacted) decided September 10, 1992. The Commission cannot, and should not, ignore a designated doctor who is unable to exercise his expertise to resolve a dispute over impairment rating, in good conscience, because he finds that the threshold requirement of MMI does not exist. *See* Article 8308-4.26(d).

Appellant has raised an issue involving assessment of contribution of a prior injury. We note that an impairment rating must be based upon the "compensable injury." As this tribunal has noted many times, an aggravation of a preexisting condition is a "compensable injury." *See* Texas Workers' Compensation Commission Appeal No. 92010 (Docket No. redacted) decided March 5, 1992; INA of Texas v. Howeth, 755 S.W.2d 534 (Tex. App.-Houston [1st Dist.] 1988, no writ). An impairment rating under Articles 8308-4.24 and 4.26 is rendered based upon the physical condition of the respondent resulting from the compensable injury at the point that he reaches MMI.

While this matter was not developed fully at the contested case hearing, we note that Article 8308-4.30 provides that the insurance carrier may request the Commission to order a reduction of impairment and supplemental income benefits "equal to the proportion of a documented impairment that resulted from earlier compensable injuries." Article 8308-4.30(a).[2] This statute provides that it is the "benefit," not the rating, that is so reduced.

We would note that appellant's arguments regarding measurement of range of motion are lacking in merit inasmuch as the range of motion finds its source in the 1989 Act which mandates use of the AMA Impairment guides. Article 8308-4.25(a) cannot be read in isolation from the rest of the statute, and it therefore follows that the legislature did not find that use of the guides would be contrary to an objective assessment of impairment. *See* Texas Workers Compensation Commission Appeal No. 92335 (Docket No. redacted) decided August 28, 1992, for an analysis of this issue.

We cannot determine if the hearing officer erred by finding Dr. I's MMI certification invalid solely because he did not put a date on the TWCC-69 form. Any information accompanying the TWCC-69 which may have supplied a reference date was not articulated

[2] Only earlier compensable injuries may be used to offset the impairment or supplemental income benefit. See Carey v. American General Fire and Casualty Co., 827 S.W.2d 631 (Tex. App.-Beaumont 1992, n.w.h.)

or identified. In any case, before discarding the substance of the treating doctor's opinion altogether for lack of a date on remand, the hearing officer may wish to consider whether such can be cleared up by other documents submitted with the TWCC-69, or by holding the record open, consistent with the responsibility of the hearing officer to ensure the full development of facts required for determination to be made. Article 8308-6.34(b). In light of our holding that MMI was in dispute, any error may be harmless as the hearing officer's decision on Dr. I's report was applied to an analysis of whether MMI was disputed.

While we might otherwise concur in the hearing officer's determination that the great weight of medical evidence did not overcome the presumptive weight accorded to Dr. C's assessment, we find ambiguity in what that assessment is. It is true that Dr. C finds that MMI has not been reached; however, it is equally true that he endorses Dr. I's assessment of a permanent impairment rating. These two conclusions appear to be conflicting, and should be resolved. Given the presumptive weight granted to the designated doctor's report, Dr. C's opinion should be clarified.

The case is reversed and remanded for action consistent with this opinion. We would note that, pending resolution of these disputes over whether MMI has been reached and the appropriate impairment rating, the appellant's obligation to pay temporary income benefits continues. Pending resolution of this remand, a final decision is not rendered.

Susan M. Kelley
Appeals Judge

CONCUR:

Stark O. Sanders, Jr.
Chief Appeals Judge

Philip F. O'Neill
Appeals Judge