APPEAL NO. 92495

On July 16, 1992, a contested case hearing was held in (city), Texas, with (hearing officer) presiding. The hearing officer determined that the claimant, (claimant), had attained maximum medical improvement (MMI) on March 30, 1992, from her work-related back injury that occurred on (date of injury), while she was employed by (employer). The hearing officer adopted the opinion of the commission-appointed designated doctor, (Dr. P), as presumptive on that issue, and found that his assessment, as to both MMI and his impairment rating, was not against the great weight of other medical evidence. On the issue of impairment rating, however, the hearing officer did not adopt the opinion of the designated doctor as presumptive, finding that the designated doctor's report did not refer to specific impairment guides used to determine (Ms. W's) rating. The hearing officer determined that, because of this, Dr. P's impairment rating was not an appropriate rating with the Texas Workers' Compensation Act, TEX. REV. CIV. STAT. ANN. art. 8308-4.24 (Vernon's Supp. 1992) (1989 Act). Although he essentially disallowed Dr. P's impairment rating, the hearing officer did not adopt the rating of one of the other doctors, with the result that the issue of impairment was left unresolved.

The carrier, (carrier), appeals the hearing officer's decision not to give the 0% impairment rating of the designated doctor presumptive weight.

The claimant, (Ms. W), asks for reconsideration for the reason that she feels she presented evidence which impeached the credibility of the designated doctor's report as an impartial evaluation. She argues that she continues to experience pain. She also raises two new procedural arguments, first, that she was not given time to work with the carrier to agree upon a designated doctor, and, second, that the disability determination officer did not inform her that an ombudsman would be available to explain the consequences of accepting a commission-designated doctor as opposed to an agreed designated doctor.

DECISION

After reviewing the record, we reverse the determination of the hearing officer and remand for further development and consideration of the evidence in accordance with this decision. We would further note that, as written, the hearing officer's decision fails to resolve an issue brought before the contested case hearing, specifically the issue of impairment rating, and contains contradictory findings which should be clarified on remand.

There is extensive medical evidence in the record, which, for purposes of this decision, will only be summarized. We will note, however, that some medical records refer to other medical records which are not in evidence. We leave it to the hearing officer to determine whether, in the interest of building a full and complete record, additional medical evidence should be included in the record.

Facts

On (date of injury), (Ms. W) injured her back while lifting a five inch piece of pipe. The unvarying diagnosis throughout the records appears to be severe back strain. Although (Ms. W) indicated that she was told she might have a herniated disc, numerous tests and repeated magnetic resonance imaging (MRI) examinations have failed to find any evidence of herniation. What has been characterized as a "mild" bulge has been detected at the L4-5 level by such tests. Medical opinion in the record is mixed on the existence of nerve-related pathology or the existence of spondylosis or any degenerative condition. (Ms. W) has been accepting chronic pain management therapy, along with recommended psychotherapy. One of her doctors, (Dr. R) stated on April 29, 1992 that "at this time I feel she is approaching maximum medical improvement" but did not certify MMI; Dr. R went on in her letter to assign an impairment rating, based upon the AMA Impairment Guides, of 19% as a result of range of motion examination, plus another 5% based on her diagnosis of spondylosis, for a total of 24%. In September 1991, a doctor for the carrier, (Dr. F), examined (Ms. W) under a medical examination order and determined she attained maximum medical improvement with a 0% impairment as of September 16, 1991.

Dr. P was appointed as designated doctor in February 1992 after the carrier contacted the Commission asking for an appointment of doctor, stating that (Ms. W) and the carrier were unable to agree upon a designated doctor to resolve the dispute (which had been triggered by (Ms. W's), or her doctor's, disagreement with Dr. F's certification of MMI and impairment). After Dr. P's examination, a benefit review conference was held, and the reported issues left unresolved involved both MMI and impairment rating.

I. **The Claimant's Appeal**

At the hearing, (Ms. W) stated that she felt that Dr. P had not given a fair and impartial rating. There were two major reasons. First, Dr. P (as reported in a newspaper article in evidence) had been the intended victim of a thwarted murder, at sometime around the first of March 1992. She felt that Dr. P, when he examined her on March 30, 1992, may have been disturbed by this. The only actual behavior of Dr. P that she could point to as an indicator of a troubled frame of mind was that Dr. P did not greet her when he came into the examining room.

In the report itself, (Ms. W) says that it incorrectly described her as obese, as male, and called a congenital foot condition a "deformity". (Ms. W) stated she was 5 feet, 4 inches and 130 lbs at the time of examination. She did not indicate, however, that she felt Dr. P had mistaken another person for her in rendering his report. She said that these statements indicated to her that Dr. P was not fair.

We are not persuaded that the evidence indicates that the thwarted crime impaired Dr. P's examination. We note that the 2-1/2 page narrative medical report clearly identifies (Ms. W), several times, as female, except for one line where a "he" appears for "she". It looks like a typographical error was made. On the other statements to which (Ms. W) objected, it is possible that, from a medical standpoint or a clinical description, the use of the

terms "obese" or "deformity" do not mean quite the same things as they do in everyday life.

Although (Ms. W's) appeal says that the attempted crime occurred the week before her examination, it in fact was nearly a month prior. Dr. P's failure to greet her, along with the items from the report that we listed above, may not have been diplomatic, but do not indicate that the incident affected Dr. P's medical judgment.

The second piece of evidence that (Ms. W), who was unrepresented, brought to the hearing was not included in the record. The hearing officer received testimony, over objection from the carrier, about the document. (Ms. W) described it as a computer printout from the (city) Civil Courts Building. She said it was a list of all cases in which Dr. P had been a party or a witness. (Ms. W) testified that she concluded, after reading it, that Dr. P was a doctor for insurance companies. The list was not offered into evidence, or taken into the record by the hearing officer without an offer. (Ms. W's) appeal, however, refers to it as a document that was included in the evidence she presented.

We emphasize at this point that the designated doctor is a key part of the 1989 Act and the legislation has enhanced the role of a designated doctor by according "deemed" or "presumptive" weight to his or her opinion. We have emphasized the unique status the designated doctor plays in the workers' compensation system. Texas Workers' Compensation Commission Appeal No. 92412 [decided September 28, 1992]. Because of the importance of the designated doctor in the resolution process, it is imperative that legitimate questions supported by some pertinent evidence not be left unanswered and that full confidence is maintained in the position of designated doctor.

It is also important to point out at this juncture that "maximum medical improvement" (MMI) will not, in all cases, mean pain-free recovery from an injury. MMI is either the expiration of 104 weeks from the date income benefits began 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). "Impairment" has to be decided from objective findings, and not from subjective findings. Art. 8308-4.25(a). The impairment assessed must be one that is "reasonably presumed to be permanent." Art. 8308-1.03 (24).

Thus, even though (Ms. W) continues to experience pain, she would not be entitled to impairment benefits without some clinical or laboratory findings that point to an objective, and reasonably permanent, reason for the pain. The 1989 Act provides that if her own doctor finds impairment, such a finding must be confirmable by a designated doctor. Art. 8308-4.25(a). The medical opinion in a designated doctor's report will be considered correct by the Commission (given "presumptive weight") unless the great weight of other medical evidence is to the contrary. And it must be <u>medical</u> evidence that outweighs the designated doctor; a party cannot come into the hearing with no doctor's statement and argue that a claimant has, for example, a 10% impairment rating, and with only this testimony overcome a designated doctor's opinion that is different.

However, this does not mean that all of a party's testimony can be ignored because it is not medical. We do not believe that the hearing officer should totally reject non-medical evidence that a party is prepared to and does offer concerning relevant collateral matters such as whether an examination was rendered, the failure to use the required AMA Guides, whether the doctor had all pertinent test findings made available, or whether the designated doctor was actually aligned with one party or another when the examination was done. Such evidence can appropriately be used by the finder of fact in determining the weight to be given to the other medical evidence in the record. The hearing officer's finding of fact that (Ms. W) had no medical training indicates to us that he may have felt that he was prohibited by Art. 8038-4.25(b) from considering any of her testimony, even that which was collateral to the actual medical opinion contained in the designated doctor's report.

In this case, (Ms. W) actually brought with her a document that was testified about and which, her appeal indicates, she believed was in evidence. She was not represented by counsel. Without the document in question in the record, we are not able to fully consider the points raised in her appeal. We therefore remand for further development of the evidence, which should incorporate a copy of the computer printout into the record.

We emphasize that by taking this action, we are not saying that we believe that the designated doctor did not render an impartial examination. (Respondent has made the point that the testimony about the document indicates that Dr. P has been a witness both for plaintiffs and defendants, on either side of workers' compensation cases and it may well be that, if we had the document in question before us, this is the case). Nor do we agree that a hearing officer must halt a hearing, based upon simple accusations or gossamer speculation of a party, to conduct an inquisition into the impartiality of a designated doctor. Our holding here is limited to the facts of this case where pertinent documentary evidence was brought to and testified to by a party; the hearing officer should, in the interest of making a complete record, include such evidence in the record of the hearing, and not reject it or refuse to consider it because it is not "medical" evidence. (The usual provisions under Art. 8308-6.33(e) regarding fairness and disclosure to the other side, and "good cause" if no disclosure was made, should of course continue in effect). And, as this holding is based upon the facts of this case, we make clear that the failure to offer documents brought to a hearing will not, in and of itself, compel reversal and remand.

Procedural Appeals

The record indicates that the parties tried to reach agreement on a designated doctor, and the Commission appointed one after this did not occur. Although (Ms. W) is concerned because she did not agree to Dr. P, and there was no one to explain the difference between an agreed designated doctor and an appointed one, we'll point out that the difference is that an agreed designated doctor's opinion is <u>conclusive,</u> not just "presumptive", on impairment rating, which means that the hearing officer cannot consider other medical evidence to outweigh his opinion. Art. 8308-4.25(g). Even if (Ms. W) had raised these objections

before this appeal, she does not appear to have been harmed by not agreeing to a doctor.

II. **Carrier's Appeal**

The Appeals Panel has ruled that a designated doctor's opinion on impairment rating cannot be rejected because the hearing officer determines, after a hearing where the issue was never raised, that there is no evidence that the AMA Guides were used and where the designated doctor assigned an impairment rating on a Commission prescribed TWCC-69 Form (which form does not require an affirmation of use of the AMA Guides). Texas Workers' Compensation Commission Appeal No. 92451, [decided October 19, 1992]. Because this case is being remanded for further development of the evidence, we note that it is appropriate also for the hearing officer to render a decision regarding the designated doctor's impairment rating in light of previous decisions of this panel and any further evidence developed below. We remand on this issue because the hearing officer found that Dr. P's impairment rating was not against the "great weight" of other medical evidence, yet also determined that Dr. P's rating was not an appropriate rating and therefore not entitled to presumptive weight. It is up to the hearing officer to clarify apparently contradictory holdings. Without a more detailed finding of fact, we fail to see how an impairment rating that truly was not based upon the required AMA Guides could not be outweighed by an impairment rating that is based upon the AMA Guides.

The case is reversed and remanded for further development and consideration of the evidence, as outlined in this decision, and as deemed necessary by the hearing officer. Pending remand, a final decision is not rendered for purposes of judicial review.

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Susan M. Kelley
Appeals Judge

CONCUR:

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Stark O. Sanders, Jr.
Chief Appeals Judge

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Robert W. Potts
Appeals Judge