APPEAL NO. 92522

On August 14, 1992, a contested case hearing was held in (city), Texas, with (hearing officer) presiding as the hearing officer. The hearing was held pursuant to the Texas Workers' Compensation Act, TEX. REV. CIV. STAT. ANN. art. 8308-1.01 *et seq*. (Vernon Supp. 1992) (1989 Act). The hearing officer determined that the great weight of other medical evidence was contrary to the designated doctor's report that the claimant had not reached maximum medical improvement (MMI), and he further determined that the claimant had reached MMI. Appellant, referred to as the claimant herein, states that he would like the Appeals Panel to review all the evidence presented and reconsider the decision of the hearing officer. Respondent, who is the employer's workers' compensation insurance carrier and is referred to as the carrier herein, responds that the Appeals Panel should refuse to hear this matter because the claimant has failed to meet the requirements for filing an appeal, and, in the alternative, requests that we affirm the hearing officer's decision because the evidence supports the decision that the claimant has reached MMI.

DECISION

The decision of the hearing officer is reversed and remanded.

The carrier contends that the claimant, who was represented at the hearing and is represented on appeal, has failed to comply with the requirement in Tex. Workers' Comp. Comm'n, 28 TEX. ADMIN. CODE Sec. 143.3 (a)(2) that a request for review shall "clearly and concisely rebut each issue in the hearing officer's decision that the appellant wants reviewed, and state the relief the appellant wants granted." In addressing a similar contention in Texas Workers' Compensation Commission Appeal No. 91131, decided February 12, 1992, we stated that "we are mindful of the general rule that where pleadings are required in administrative proceedings, their validity should not be tested by the technical niceties of pleadings and practice required in court trials," citing Thacker v. Texas Alcoholic Beverage Commission, 474 S.W.2d 258 (Tex. Civ. App.-San Antonio 1971, no writ). Judging the claimant's request for review as a whole, we find that it is not so deficient as to render it inadequate for the purpose of perfecting an appeal under the 1989 Act and rules of the Texas Workers' Compensation Commission (Commission).

Some background information is in order. On March 18, 1992, a benefit review conference (BRC) was held to resolve a reimbursement issue, which was not brought forward to a contested case hearing, and to resolve the issue of whether the claimant has reached MMI. MMI means 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). The claimant's position at the BRC was that he had not reached MMI based on the report of (Dr. G), the designated doctor. The carrier's position was that (Dr. W), a doctor who apparently initially examined the claimant pursuant to a Commission medical examination order and who subsequently examined the claimant on at least three other occasions over a six month period, had certified that the

claimant had reached MMI. The carrier also contended that the claimant's complaints of hip pain to (Dr. G) were not part of the "original injury." The benefit review officer recommended that the claimant had not reached MMI. A contested case hearing was set for April 16, 1992, to resolve the issues raised but not resolved at the BRC. However, on April 2, 1992, the carrier requested that the hearing officer include the additional dispute of whether the claimant was injured in the course and scope of employment. The request was based on newly discovered evidence. On April 24, 1992, a second BRC was held to resolve the same issue of reimbursement from the first BRC, which again was not brought forward to a contested case hearing, and to resolve the issue of whether the claimant sustained an injury in the course and scope of his employment with his employer, (employer). In regard to the compensability issue, the benefit review officer recommended that the claimant was not entitled to benefits because it appeared that he did not have an accident. On June 4, 1992, a contested case hearing was held to determine the issue of whether the claimant suffered an injury in the course and scope of his employment. (hearing officer), the same hearing officer who presided at the subsequent hearing on August 14, 1992, was the hearing officer. The date of injury was (date of injury). The hearing officer determined that the "claimant suffered an injury in the course and scope of his employment," and that the claimant was entitled to benefits under the 1989 Act. No finding was made as to the nature of the injury. As far as can be determined, the hearing officer's decision from the June 4th hearing was not appealed. A second contested case hearing was held on August 14, 1992. The decision of the hearing officer from that hearing is the subject of this appeal.

At the August 14th hearing, the hearing officer said that he understood that the issue at the hearing was whether the claimant had reached MMI, and then asked the parties if that was a correct statement of the issue. The carrier said it was, but then stated that as a "component part" of the issue its position was that any hip or sacroiliac joint injury that had been diagnosed by the designated doctor in January 1992, was either nonexistent or was caused by some other accident not related to the injury of (date of injury). The carrier further stated its position to be that the claimant reached MMI on January 6, 1992, with a zero percent whole body impairment rating per (Dr. W's) report of medical evaluation, and that the sacroiliac joint injury is not related to the "original injury" that was before the Commission. The claimant's attorney said that he agreed that the issue was whether the claimant has reached MMI, and further stated that he was not sure that he agreed "as to the causation factors, as alleged by the carrier, but we will leave it there at this point." The parties then proceeded to opening statements. During the course of the hearing the claimant's attorney said that "we are talking about the medical determination of whether the hip injury is related to the original injury of (date of injury) of '91." Also during the hearing the hearing officer said that "the issue here is maximum medical improvement, and I am going to interpret that fairly broadly as to maximum medical improvement, because there is some discrepancy as to whether we are talking about from the back injury or from an alleged sacroiliac problem as stated by (Dr. G)." In closing argument the claimant's attorney said that " We believe the issue-- the only issue here is whether this SI [sacroiliac] hip injury was related to the injury that occurred on (date of injury)."

The claimant testified that at the first contested case hearing he had described his accident at work on (date of injury), as follows:

> I was lifting an oversized package, and I had got the package up off of the conveyor belt that goes down in front of us, and I turned, using all specific rules and regulations that [the employer] have, and I put the package--I stepped into the back of my truck and I felt a crunch in the lower part of my back.
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> And then I stepped up with my left leg into the back of the truck and I felt a pain up in my neck. So when I went to put the box under the shelf in front of the wheel well, something just ran (sic) my spine and I collapsed over the box.

The claimant testified that he has had lower back pain and hip pain since his accident of (date of injury). He said he was able to distinguish between the lower back pain and the hip pain, but that his main concern was his back because that pain was more prominent.

The claimant testified that he was taken to a hospital by ambulance on the morning of the accident and was released from the hospital the same day. The hospital records were not in evidence. On May 31st, the claimant was examined by (Dr. M), D.C. (Dr. M's) initial medical report indicated that the claimant told him he had lifted an oversized package in the truck and his low back began to hurt. The report further indicated that the claimant presented with mild antalgia and complained of pain with any type of movement. (Dr. M) diagnosed the claimant as having "lumbar sprain/strain, neuritis (lumbar), and muscle spasm (lumbar). He anticipated that the claimant could return to full time work on June 3, 1991, but did not indicate when he anticipated that the claimant would achieve MMI. The claimant first testified that he could not recall whether he told (Dr. M) about his hip hurting, and later testified that he told (Dr. M) that he had back and hip pain. The claimant did not return to (Dr. M).

The claimant was next examined by (Dr. L), D.C., on June 3, 1991. (Dr. L's) initial medical report indicated that the claimant told him that at the time of the accident he felt a sharp pain in his neck that radiated to his lower back. (Dr. L) diagnosed the claimant as having "cervicobrachial syndrome, acute sprain/strain thoracic spine, acute sprain/strain lumbosacral." (Dr. L) anticipated that the claimant could return to full time work and would achieve MMI in three to six months. In a report dated July 22, 1991, (Dr. L) noted that an orthopedic examination revealed positive tests in the lumbosacral area, cervical area and in the "thoraco lumbar area." (Dr. L) also examined the claimant on August 12, 1991, and gave the same diagnosis as in his initial report. On September 3, 1991, (Dr. L) gave a diagnosis of "moderate lumbosacral sprain/strain." The claimant testified that he told (Dr. L) that his hip hurt.

(Dr. L) referred the claimant to a therapy and rehabilitation center for a four week work hardening program. A September 4, 1991 report from the rehabilitation center indicated that the claimant reported that he injured his low back at work. The location of the pain was reported to be in the "L-S" area. However, the report noted that the claimant reported "no buttock/leg radiating-type of pain." After the claimant had completed 12 days of a work hardening program, the physical therapist noted that initially the claimant was working very hard with few complaints of pain or discomfort, but that the last three or four sessions the claimant complained of lower back pain. The therapist stated that observation of the claimant's activities while in therapy did not reveal a great deal of distress nor any inability to perform exercises. The claimant testified that he told the physical therapist that he had hip pain.

On June 18, 1991, the claimant was examined by (Dr. W), M.D. The carrier indicated that the examination was pursuant to a Commission medical examination order. (Dr. W) reported that the claimant complained of mid and lower back pain, that the claimant's main problem was his difficulty with bending and lifting, that lateral bending and extension were fairly normal, that there was no muscle spasm, and that there was a negative straight-leg test bilaterally. He also stated that x-rays were negative as far as the thoracic and lumbar areas were concerned. (Dr. W) diagnosed claimant as having a lumbar strain and recommended treatment for four to six weeks. On October 16, 1991, (Dr. W) reported that examination revealed that the claimant could bend normally, that there was no spasm, and that straight-leg tests were again negative. He further noted that the only problem that the claimant had at that point was a little pain in the right hip area which occurred occasionally with activity. (Dr. W) recommended that the claimant undergo rehabilitation for one month. On November 22, 1991, (Dr. W) reported that the claimant was doing fairly well, that he had started work hardening, that he bends well, and that he had no spasm. (Dr. W) anticipated that the claimant could return to work in one month. On December 20, 1991, (Dr. W) reported that the claimant had done his work hardening program, that he was bending well, and that there was no spasm. (Dr. W) noted that the claimant complained of "varied difficulties as far as his back is concerned." (Dr. W) stated that the claimant would be allowed to return to work in two weeks. In an undated report of medical evaluation (TWCC-69), (Dr. W) reported that the claimant had reached MMI on January 6, 1992, and that he had a zero percent whole body impairment rating. He noted that the claimant was bending well and had no spasm. The claimant testified that he told (Dr. W) that he had pain in his left hip during his initial visit on June 18th and throughout the whole time he saw (Dr. W).

On or about January 28, 1992, the claimant was examined by (Dr. G), M.D., a Commission designated doctor. In an undated report of medical evaluation (TWCC-69), (Dr. G) reported that the claimant had not reached MMI and that the estimated date of MMI was "unknown." Most of (Dr. G's) description of clinical evaluation is difficult to read; however, part of it appears to state that "patient's diagnosis is not back pain; it is a symptomatic sacro iliac joint . . . ." In the TWCC-69, (Dr. G) referred to an attached report. In that report which is dated January 28, 1991, it was noted that the claimant told (Dr. G) that when he had his (date of injury) accident he felt a sharp pain in the left buttock region,

and that he felt a sudden pain in the right flank up and down and through the pelvis. (Dr. G) stated that: "At this point in time the patient presents to us unfortunately with a missed diagnosis. The patient has an SI joint problem on the left." (Dr. G) further stated that:

> He does not have neurological damage. This is not a case of that. This is a case of SI joint pain at least in our initial exam. The patient can bend over well and that is fine because he doesn't really have back pain - he has pelvic injury. The patient's back is much better than previously. Obvious some good was done but the patient continues to have a destabilized left SI joint.
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> In my opinion, x-rays which were taken, are fairly well within normal limits. They are not appropriate x-rays for the SI joint. However, these can be taken as well. A bone scan needs to be accomplished as well. The patient may or may not need electrical studies later if we see that he has some kind of neurological deficit but he does have a left-sided SI joint pain.
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> [The claimant] has not been treated for that at this point. We would suggest that the patient is not reaching his maximum medical benefit. His main problem has not been treated or mentioned at least in the records by the other evaluators.

According to the Attorney's Dictionary of Medicine (Schmidt, M.D., Vol. 3, Matthew Bender, 1990), an excerpt of which was in evidence, the sacroiliac joint is "the joint between the sacrum and the ilium (the upper part of the hip bone). There are two such joints, one on each side of the sacrum." The sacrum is described as the lower part of the spine. The sacroiliac joints are said to be in the back of the pelvis or hips.

The claimant was again examined by (Dr. G) on April 24, 1992. (Dr. G) reported that he was placing the claimant with a physical therapy clinic for a therapeutic trial with a tentative diagnosis of "SI joint strain on the left." (Dr. G) stated that "he has not yet achieved MMI as he has not been treated for the pelvic injury, nor has he been treated really aggressively in a meaningful manner." The claimant said that he did not go to the physical therapy clinic recommended by (Dr. G) because he was told by (Dr. G's)` office that the carrier had refused his treatment there. No other reports from (Dr. G) were in evidence and there is no indication that the bone scan recommended by (Dr. G) was performed.

In a letter dated February 27, 1992, (Dr. W) stated that there was a disparity between his and (Dr. G)'s findings. He said that in (date), the claimant indicated that his main problem was in the center of the mid and lower back and that that was certainly nowhere related to the sacroiliac joint. (Dr. W) wondered if the claimant might have had some occurrence between (date) and February of 1992 which caused a significantly different problem. (Dr. W) noted that his findings in (date) indicated a lumbar problem rather than a

sacroiliac problem, and that (Dr. G) found just the opposite. (Dr. W) then stated that "[t]herefore, it appears that (Dr. G) is correct. His lumbar strain has essentially been totally relieved." (Dr. W) went on to state that he still felt that "from his [the claimant's] original injury he has reached maximum medical improvement with no disability."

In his Decision and Order dated August 28, 1992, the hearing officer stated that the issue to be determined at the hearing on August 14th was "[h]as the claimant reached maximum medical improvement?" In his "Discussion of the Case," the hearing officer stated that the case revolved around the report of a designated doctor who found that the claimant had not reached MMI on the basis of an injury no other doctor had found. The hearing officer noted that normally an MMI dispute would revolve totally around doctors' reports, but in this case the credibility of the claimant was a major factor because the designated doctor's findings are based on apparently new complaints. He further noted that the claimant said he told the doctors about his hip, but that the reports of history and treatment did not reflect that. Findings of fact made by the hearing officer included, among others, the following:

Finding No. 3. Claimant suffered a back and neck injury on (date of injury), that was ruled a compensable injury in Docket No. [* *].

Finding No. 6. Claimant never reported hip complaints to any treating doctor with the exception of (Dr. W) on October 16, 1991. The complaint was for the right hip.

Finding No. 7. Claimant underwent functional evaluation and a work hardening program at [rehabilitation center], and never reported hip pain or problems.

Finding No. 8. Claimant was certified as having reached MMI on January 6, 1992, by (Dr. W), with 0% impairment.

Finding No. 9. Claimant disputed (Dr. W's) certification of MMI and was ordered to a designated doctor, (Dr. G).

Finding No. 10. (Dr. G) saw claimant on January 28, 1992, and certified that claimant was not at MMI due to a sacro-iliac injury to the left side. (Dr. G) found no back problems.

The hearing officer made the following conclusions of law:

Conclusion No. 2. (Dr. W) became a treating doctor through the operation of Rule 126.7(f) when claimant treated with him for a period greater than 60 days.

Conclusion No. 3. (Dr. G) was a Commission designated doctor pursuant to Art. 8308-4.25(b) and his opinion that claimant had not reached MMI is entitled to presumptive weight which can only be overcome if the great weight of the other medical evidence is to the contrary.

Conclusion No. 4. The great weight of the other medical evidence is contrary to (Dr. G's) report. Claimant has obtained MMI.

As noted in the hearing officer's decision, Article 8308-4.25(b) provides that the report of the designated doctor shall have presumptive weight, and the Commission shall base its determination as to whether the employee had reached MMI on that report unless the great weight of the other medical evidence is to the contrary.

In our opinion, when a hearing officer determines that the great weight of the other medical evidence is contrary to the report of the designated doctor, he should, in his decision, detail the evidence relevant to the issue in consideration, clearly state why the great weight of the other medical evidence is contrary to the report of the designated doctor, and state in what regard the contrary evidence greatly outweighs the designated doctor's report. We do not believe that this was done in this case. Furthermore, the hearing officer did not address in his findings whether the back and neck injuries sustained by the claimant extended to the sacroiliac joint or area. The medical reports in this case clearly show that the claimant complained of low back pain to Drs. (M), (L), and (W) and that they diagnosed lumbar strain or sprain. The claimant also reported to his physical therapist that he had low back pain. (Dr. G), the designated doctor, said that the claimant's problem had been misdiagnosed and had not been treated by the other health care providers. There is a report by the claimant to (Dr. W) of hip pain, albeit on the right side, on October 16, 1991, some two months before he was examined by the designated doctor and found to have sacroiliac joint pain on the left side. Considering the proximity of the sacroiliac joint to the lower back (the sacrum being the lower part of the spine and the ilium being the upper part of the hip bone), it might reasonably be inferred that reports of low back pain encompassed some discomfort in the area of the sacroiliac joint, and that symptoms of an injury to the low back would not necessarily exclude an injury to the sacroiliac joint.

In Texas Workers' Compensation Commission Appeal No. 92412, decided September 28, 1992 we held that the hearing officer erred in her conclusion and decision that the designated doctor's report on MMI and impairment rating was outweighed by the other medical evidence. In that case, we stated that:

Succinctly, a designated doctor (TWCC Rule 133.2, Tex. W.C. Comm'n, TEX. ADMIN. CODE § 133.2 sets forth that prior medical reports and tests are to be provided to a designated doctor) is appointed by the commission and unless the doctor is selected by the mutual agreement of the parties, the report of the designated doctor

> "shall have presumptive weight and the commission shall base (MMI and an impairment rating) on that report unless the great weight of the other medical evidence is to the contrary, in which case the commission shall adopt the impairment rating of one of the other doctors." We do not read this language to require a mere balancing of the evidence, as, for example, occurs in establishing a compensable claim, and determining that a preponderance of the evidence either does or does not establish that fact. Rather, in the area of MMI and impairment ratings, where there is a dispute regarding medical evidence, an attempt is made under the statute and rules to designate an independent doctor to finally resolve these matters. It is for this apparent reason that "presumptive weight" is specifically accorded the designated doctor's report. And, it is not just equally balancing evidence or a preponderance of evidence that can outweigh such report, but only the "great weight" of other medical evidence that can overcome it.

Having reviewed the record and the decision, we are unable to clearly discern how the hearing officer arrived at his conclusion that the great weight of the other medical evidence was contrary to the report of the designated doctor. We reverse the decision of the hearing officer and remand for further development of the evidence, as appropriate, and for consideration not inconsistent with this decision. Pending resolution of the remand, a final decision has not been made in this case.

Robert W. Potts
Appeals Judge

CONCUR:

Joe Sebesta
Appeals Judge

Lynda H. Nesenholtz
Appeals Judge