APPEAL NO. 92561

A contested case hearing was held in (city), Texas, on September 22, 1992, (hearing officer) presiding as hearing officer. She determined that the appellant's (claimant) impairment rating was 7% in accordance with the assessment of the designated doctor and ordered benefits under the Texas Workers' Compensation Act, TEX. REV. CIV. STAT. ANN. art. 8308-1.01 *et seq* (Vernon Supp.1992) (1989 Act). Claimant urges that the great weight of the other medical evidence is contrary to the designated doctor's assessment and that the impairment rating of the treating doctor should be used.

DECISION

Determining that an important conclusion of law does not find support in the record and that it may have had an effect on the outcome, we reverse and remand.

That the claimant injured his back on (date of injury), within the course and scope of his employment was not in dispute. The evidence also indicated he had sustained several previous back injuries (prior to (date)) which had been covered by workers' compensation and that he had undergone spinal surgery on at least one occasion. His current injury occurred while he was "pushing in skids" on an automobile transport truck. He was seen by employer's doctor who subsequently referred him to an orthopaedic specialist (Dr. C), who became his treating doctor. Dr. C remained his treating physician, including during a work hardening program, until on or about January 14, 1992. In a "final" report dated January 14th, Dr. C indicated he saw no reason the claimant "may not return for gainful employment" with lifting, stooping, bending and stressful activities restrictions, and that he (Dr. C) had nothing further to offer in the way of diagnostic or therapeutic maneuvers. His report indicates that the claimant has reached maximum medical improvement (MMI) and states the following:

An impairment rating has been calculated by the A.M.A. Guides, today, in regard to range of motion. He has a 15% impairment of the lumbar region as well as a 16% impairment of the cervical spine. This, therefore, represents a 29% total spinal impairment, using the Combined Values Chart.

In a subsequent report to the carrier dated March 2, 1992, Dr. C states that the AMA Guides were strictly followed and that by the "combined values chart, he has a 29% <u>whole person impairment</u> due to his decreased spinal range of motion" (emphasis ours). He pointed out that no additional impairment was given for radiculopathy diagnosed prior to the injury, and no additional impairments were given for specific disorders for his previous diagnoses.

The carrier requested the appointment of a designated doctor by the Commission and an examination was set for June 1, 1992. Dr. P, an orthopaedic surgeon, examined the claimant, took x-rays and reviewed medical records concerning the claimant. (There is no indication whether or not Dr. P had or considered the various reports and letters of Dr. C

which addressed his opinion on impairment.) In a Report of Medical Evaluation (TWCC Form 69) filed on June 6, 1992, Dr. P indicates that the claimant reached MMI on "06/01/92" and assigned a whole body impairment rating of 7% based upon 4% cervical spine and 5% lumbar spine. His report notes degenerative disc disease and states:

> [t]he degenerative changes pre-existed the accident. The accident may well represent an injury superimposed on the pre-existing condition. The contribution each makes as regards his symptoms cannot be meaningfully quantified.

The only issue stated at the contested case hearing was: what is the correct impairment rating resulting from the claimant's injury of (date of injury). The parties stipulated, and the hearing officer accepted, that the claimant reached MMI on January 14, 1992 per the certification of his treating doctor, Dr. C. (Dr. P's report indicated MMI June 1, 1992). (There is some potential ambiguity as to whether the parties agreed that MMI was in fact reached on January 14th, or if it was agreed only that Dr. C certified that MMI was reached on January 14, 1992.)

We find two matters troubling in this case: the hearing officer's Conclusion of Law No. 7, and the substantial and unexplained disparity in the impairment ratings of the two orthopaedic surgeons, both of which ratings are apparently based upon the AMA Guides. In the first instance, we do not find support for the hearing officer's seventh conclusion which states:

> The 29% impairment rating assigned by (Dr. C) on January 14, 1992 does not refer to the percentage of permanent impairment of the Claimant's *whole body* resulting from his compensable injury of (date of injury), and thus, the rating is not within the purview of Article 8308-1.03(25) of the Texas Workers' Compensation Act.

As indicated above, although Dr. C.'s January 14, 1992 report may not have made it clear that his 29% rating related to the whole body, his subsequent March 2, 1992 report did so and could be properly considered by the hearing officer. *See generally* Texas Workers' Compensation Appeal No. 92441, decided October 8, 1992, where we stated an amended or revised report may be considered. We cannot determine from the record whether the hearing officer overlooked this report in arriving at the questioned conclusion of law or if it was considered and rejected. Given the importance of the matter, we cannot leave it to chance. We are also mindful of the provisions of the American Medical Association's Guides to the Evaluation of Permanent Impairment, third edition, second printing (AMA Guides), §3.3 The Spine, which provides that:

> The spine as a whole is considered equivalent to the whole person for purposes of impairment evaluation. For the sake of simplicity, all impairments in this section have already been adjusted for each regional percentage, permitting

their expression as a percent impairment of the whole person.

Regarding the 22% disparity in the impairment ratings of the two orthopaedic surgeons, there is no explanation or rationale apparent from the record. While we by no means hold it necessary that differences in impairment ratings be explained any time there is some disparity, in the circumstances found in this case we believe it appropriate and helpful to have the matter developed in the evidence, if reasonably possible. This is not intended to detract in any way from our previous holdings which acknowledge and accord the special consideration given the opinions of designated doctors, as provided for in Articles 8308-4.25 and 4.26, 1989 Act. *See* Texas Workers' Compensation Commission Appeal No. 92412, decided September 28, 1992; Texas Workers' Compensation Commission Appeal No. 92522, decided November 9, 1992; Texas Workers' Compensation Commission Appeal No. 92553, decided November 30, 1992. Rather, it is an attempt to remove speculation and conjecture in deciding an issue in a critical area and, hopefully, to resolve what appear on the surface to be significant irreconcilably diverse opinions of two specialists utilizing the same objective guidelines. Too, we cannot, under the circumstances, rule out the possibility of mistake or error occurring during the process of assigning the impairment ratings in this case.

In this same vein, we note that Dr. P's report assessing the 7% impairment rating determines the MMI date to be June 1, 1992, and that Dr. C's report assessing the 29% rating shows MMI effective January 14, 1992. This four and a half month time difference may account for all or some of the disparity in the impairment ratings since it is possible that the claimant's physical condition may have improved to some degree during that period. In this regard, the determination of MMI is contemplated to be that point in time "after which further material recovery from or lasting improvement to an injury can no longer reasonably be anticipated, based on reasonable medical probability." Article 8308-1.03(32) And, the AMA Guides in §2.1, Medical Assessment of Impairment, instruct that impairment should not be considered "permanent" until clinical findings over the course of time support a conclusion that the medical condition is static or well stabilized, and cautions that over time, changes may occur resulting in a condition becoming worse or improving. We have voiced our concern regarding the use of the date from one doctor's report for purposes of determining MMI, then using the impairment rating of another doctor whose rating is based upon a different MMI date. *See* Texas Workers' Compensation Commission Appeal No. 92546, decided November 23, 1992. Where the time factor between the MMI dates results, as may be the situation here, in significantly disparate impairment ratings, there needs to be some reconciliation or explanation to give meaning and effect to the provisions of Articles 8308-4.25 and 4.26. Although we have not held, nor do we here, that the matters of MMI and impairment rating cannot be individually considered, they can become somewhat "inextricably" tied together in determining the impairment rating at a given, critical time. *See* Texas Workers' Compensation Commission Appeal No. 92517, decided November 12, 1992; Texas Workers' Compensation Commission Appeal No. 92394, decided September 17, 1992; Texas Workers' Compensation Commission Appeal No. 92366, decided September 10, 1992.

The decision is reversed and the case remanded for further consideration and the development of evidence, as deemed necessary and appropriate by the hearing officer, not inconsistent with this opinion. Pending resolution of remand, a final decision is not rendered.

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Stark O. Sanders, Jr.
Chief Appeals Judge

CONCUR:

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Philip F. O'Neill
Appeals Judge

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Lynda H. Nesenholtz
Appeals Judge