APPEAL NO. 931076

This appeal arises under the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act) (formerly V.A.C.S., Article 8308-1.01 *et seq*.). On September 30, 1993, a contested case hearing (CCH) was held in (city), Texas, with (hearing officer) presiding as hearing officer. The record remained open to allow clarification by (Dr. BL) on his date of maximum medical improvement (MMI) with the record being closed on October 21, 1993. The issues presented and agreed upon to be resolved were: "When did the Claimant, MA . . . reach maximum medical improvement, and what is his whole body impairment?" The hearing officer determined that the appointment of Dr. BL as a designated doctor was invalid, and that a final adjudication of MMI and percentage of impairment, if any, cannot be determined until a properly designated doctor has been appointed by the Texas Workers' Compensation Commission (Commission).

Appellant, carrier herein, contends that the issue of whether Dr. BL had been a properly appointed designated doctor was neither raised nor argued by either party at the benefit review conference (BRC) or the CCH and that it was error for the hearing officer "to arbitrarily raise an issue when such was not before him." Carrier requests that we reverse and render or remand on the contention of error it raises. Respondent, claimant herein, responds the hearing officer's decision was proper or in the alternative that Dr. BL did not properly evaluate the claimant and did not follow the mandated version of the Guides to the Evaluation of Permanent Impairment, Third Edition, Second Printing (AMA Guides). Claimant requests that a second designated doctor be appointed to evaluate claimant's physical and mental injuries and illnesses.

DECISION

We reverse and remand for the development of appropriate evidence, if any, and reconsideration not inconsistent with this opinion.

Claimant testified he injured his neck and back putting up a 40 inch screen television while employed with (employer), employer, on (date of injury). Claimant testified he went to the hospital emergency room (ER) that afternoon was seen by an ER physician, admitted overnight and released. Claimant stated he saw another physician in "the same hospital clinic" as the ER physician and was subsequently referred to (Dr. BE) who became claimant's treating doctor. Dr. BE treated claimant conservatively, encouraged weight loss and noted "[h]is depression is not well controlled and he is quite volatile and prone to tears on every examination." Dr. BE referred claimant to (Dr. M), a psychiatrist, who hospitalized claimant on two occasions as emergencies, because "of imminent suicide . . . secondary to his back pain." Dr. BE in a Report of Medical Evaluation (TWCC-69) certified claimant reached MMI on 3-9-93 with 16% whole body impairment rating. Carrier disputed Dr. BE's report on March 29, 1993. A designated doctor was requested and claimant was sent to the Waco Impairment Center (WIC) where he was evaluated by Dr. BL and others on June 8, 1993. By TWCC-69 and a 23 page report (a portion of which is a computer generated report in a format copyrighted to a (city) physician) Dr. BL marked that claimant had reached

MMI, then stated "[n]o Comment" for the date of MMI and assessed a whole body impairment rating of five percent. This report was apparently made available to Dr. BE, who by report dated August 4, 1993, pointed out some errors he believed Dr. BL had made. Dr. M, the psychiatrist, by letter dated August 6, 1993, also stated he had seen claimant on a number of occasions and "[t]here is little doubt in my mind that this man is significantly impaired as a consequence of a back injury . . . . At no point during this treatment have I seen him significantly improved with regard to his pain." Dr. BL by letter dated August 13, 1993, stated "we have reviewed the medical impairment rating on [claimant]. We are aware of the patient's depressive process, however I feel that this was a pre-existent condition and does not relate to the work related incident . . . . I do not wish to alter my impairment of 5% whole person." At the CCH on September 30, 1993, the hearing officer and the parties noted Dr. BL's "no comment" in the space for certification of an MMI date. Claimant took issue with Dr. BL's rating, stressing little time was spent by Dr. BL in doing the impairment evaluation. The hearing officer announced he would send Dr. BL the most recent reports, ask for a specific date of MMI, notify the parties of the response and allow the parties to respond in a teleconference call. The hearing officer also requested that the order appointing the designated doctor be included in the record and carrier submitted the letter dated May 14, 1993, appointing WIC to determine whether MMI has been reached and the percentage of impairment, if any, as Carrier's Exhibit 3. The hearing officer, by letter dated October 1, 1993, wrote Dr. BL stating:

> You were appointed by the Texas Workers' Compensation Commission on May 14, 1993, to evaluate and examine [claimant] on June 8, 1993."

The hearing officer further requested a specific date of MMI. Dr. BL on an amended TWCC-69 dated October 8, 1993, certified MMI on "3-9-93" (the same date as the treating doctor) with five percent whole body impairment. The CCH was reconvened on October 21, 1993, and the parties apparently had nothing further to offer at that time.

The hearing officer determined, in pertinent part:

FINDINGS OF FACT

Finding 9:The Texas Workers' Compensation Commission appointed [WIC], as designated doctor to examine and determine whether or not Claimant reached maximum medical improvement and the percentage of whole body impairment, if any.

Finding 10:The [WIC] as the appointed designated doctor of the Texas Workers' Compensation Commission, selected [Dr. BL] to examine and evaluate Claimant on June 8, 1993.

Finding 11:[Dr. BL] certified in his report that Claimant reached maximum medical improvement on March 9, 1993, and assigned to Claimant a 5% whole body impairment rating due to

Claimant's neck and back injury.

Finding 12:[Dr. BE] and [Dr. BL] were medical doctors who are licensed and authorized to practice certain health related skills.

Finding 13:The [WIC] is not a doctor who is licensed and authorized to practice certain health related skills.

CONCLUSIONS OF LAW

Conclusion 3:The dispute as to whether Claimant has reached maximum medical improvement including sometime in the past, and if so, the date, percentage of impairment, if any, is not ripe for adjudication because there has been no proper designated doctor to evaluate the Claimant.

Conclusion 4:[Dr. BL] was not the designated doctor.

Carrier had appealed Findings of Fact Nos. 9-13 and Conclusions of Law Nos. 3 and 4, quoted above, on the basis that the hearing officer's decision is in error because "he decided an issue that had neither been raised nor argued by either party . . . . (and) It was error for him (the hearing officer) to arbitrarily raise an issue when such was not before him." Claimant responded, among other contentions, that the proper appointment of a designated doctor "was indeed subsumed into the larger and broader question integral to the controversy, viz., when did the claimant reach [MMI] and what is his whole body impairment."

First of all, we would note Texas Workers' Compensation Commission Appeal No. 93769, decided October 11, 1993. In that case, as in the instant case, neither of the parties took issue with the Commission order designating the WIC as the designated doctor. In the instant case, as apparently in Appeal No. 93769, the parties referred to Dr. BL as the designated doctor. In a case where a clinic was appointed as designated doctor, the Appeals Panel stated:

Section 408.125(d) and (e) of the 1989 Act appears to give only the parties or the Commission the power to choose a designated doctor; a doctor, per Section 401.011(17) of the 1989 Act is one who is "licensed and authorized to practice" certain health related skills. Since there was no issue raised about whether a "center" can be a designated doctor, or can choose the doctor who will do the evaluation, an issue regarding that questionable practice will not be addressed.

As suggested in Appeal 93769, the 1989 Act requires the appointment of a "doctor" as a designated doctor. Doctor is defined in Section 401.011 (17) in terms that make clear it is

a licensed individual, not a clinic, center, or institution.[1] While the hearing officer was correct in questioning the appointment of a clinic, he did so notwithstanding the apparent representations on the record that Dr. BL was the designated doctor. He then simply invalidated Dr. BL's apparent status but did not resolve the dispute presented to him.

Carrier's point that the matter was not raised at the CCH is well taken. In Texas Workers' Compensation Commission Appeal No. 93045, decided March 3, 1993, we had an analogous situation. In that case, although not raised or discussed at the hearing, the hearing officer found and concluded in the decision, for the first time, that the designated doctor had not followed the correct version of the AMA Guides. After again noting that the use of a designated doctor is clearly intended to finally resolve disputes of MMI and impairment, we cited another case where the hearing officer had invalidated the designated doctor's impairment rating on his own initiative, and without allowing or soliciting any comment from the parties. In those cases we reversed and remanded stating:

> . . . the parties had not been given sufficient time to respond to a designated doctor's report at the close of the hearing . . . where the hearing officer apparently invalidated the designated doctor's report, when the correct edition of the AMA Guides had never been at issue. In the cited case we observed that "[h]ad a period of time been specified for comment by the parties regarding the designated doctor's report prior to the decision, this remand may have been avoided." Similarly had the hearing officer indicated that an improper version of the AMA Guides was used prior to his decision, the matter might have been resolved at the CCH level.

The analogy we draw to the instant case, and the basis of our reversal is that once the hearing officer noted what he considered an improper appointment of a designated doctor, the hearing officer should have reopened the hearing for clarification of Dr. BL's status and further action deemed necessary to resolve the MMI and impairment issues. Throughout the hearing, Dr. BL was referred to as the designated doctor. In fact at one point, the hearing officer stated "I would like to take a look at the letter from the Texas Workers' Compensation Commission appointing [Dr. BL] as the designated doctor." We also note that the hearing officer wrote Dr. BL by letter dated October 1, 1993, and stated "[y]ou were appointed . . . to evaluate and examine [claimant]." There may exist supplemental orders or other documentation of Dr. BL's appointment as the designated doctor. Rather than invalidate a designated doctor and leave a case in limbo, it is advisable to give the parties an opportunity to agree, or, to take action to correct the misunderstanding.

Claimant in his response has raised the issue that even if Dr. BL was the designated doctor, he has not properly evaluated the claimant. As the hearing officer apparently based his decision on the fact that WIC had improperly been appointed as the designated doctor,

---

[1]This does not mean that a medical practitioner who is incorporated as a professional corporation is precluded from being a doctor, provided he/she is named as an individual.

it would appear he did not thoroughly evaluate Dr. BL's report. Some aspects of Dr. BL's report are troublesome and indicate some apparent discrepancies such as; notwithstanding Dr. BL's assertion that claimant's range of motion (ROM) measurements were invalid, two schedules attached to his report appear to indicate that lumbar ROM measurements were within +/- or five degrees. In fact, percentages of impairment have actually been assigned, on attachments labelled "Figure 83c," after apparently two courses of testing, and those percentages are 21% and 22%. The ability to assign percentages of impairment appears to be inconsistent with the assertion that ROM measurements were invalid. (It is also not clear why Dr. BL's cover letter talks in terms of cervical ROM validity criteria, when claimant's impairment is in the lumbar area). Also there is a reference on page 9 of Dr. BL's report that "[l]umbar studies invalid due to lack of cross-validation between studies." However, for lumbar lateral flexion, the same impairment percentages and maximum flexion angles are yielded on the two charts. There may well be explanations for these discrepancies, or perhaps we are not reading the charts correctly, however if Dr. BL's report is used, some clarification might be in order. We would point out that in a very recent case, Texas Workers' Compensation Commission Appeal No. 931085, decided January 4, 1994, the Appeals Panel reversed a decision in which it appeared that the designated doctor, who delegated performance of ROM testing to someone else, as appears to be the situation in the instant case, apparently overlooked two ostensibly valid ROM measurements.

As we are unable to determine from the record whether Dr. BL had ever been appointed as the designated doctor, or whether anyone had been properly appointed as a designated doctor we reverse and remand the case for clarification on the proper appointment of a designated doctor, and resolution of the issue of the claimant's impairment rating, and if necessary MMI, although we note there is apparent agreement by the doctors that MMI had been reached on March 3, 1993.

The decision and order are reversed and the case is remanded for further consideration and for the hearing officer to take necessary action, including the development of evidence as deemed necessary and appropriate, to resolve the matter concerning the appointment of a designated doctor and the impairment rating (and MMI, if necessary). Pending resolution of the remand, a final decision has not been made in this case. However, since reversal and remand necessitate the issuance of a new decision and order by the hearing officer, a party who wishes to appeal from such new decision must file a request for review not later than 15 days after the date on which such new decision is received from the Texas Workers' Compensation Commission's division of hearings, pursuant to Section 410.202. *See* Texas Workers' Compensation Commission Appeal No. 92642, decided January 20, 1993.

_____

Thomas A. Knapp
Appeals Judge

CONCUR:

_____
Stark O. Sanders, Jr.
Chief Appeals Judge

_____
Susan M. Kelley
Appeals Judge