APPEAL NO. 93192

On February 4, 1993, a contested case hearing was held in (city), Texas, with Nannette Webster-Amador presiding as the hearing officer. The hearing was held under the provisions of the Texas Workers' Compensation Act, TEX. REV. CIV. STAT. ANN. art. 8308-1.01 *et seq*. (Vernon Supp. 1993) (1989 Act). The issues at the hearing were whether the appellant (claimant herein) reached maximum medical improvement (MMI), and, if so, what is his impairment rating. Based on the report of the designated doctor selected by the Texas Workers' Compensation Commission (Commission), the hearing officer determined that the claimant reached MMI on October 22, 1992, with a whole body impairment rating of six percent. The hearing officer further determined that the report of the designated doctor is not contrary to the great weight of the other medical evidence. The claimant disagrees with certain findings of fact and conclusions of law. The respondent (carrier herein) responds that the findings and conclusions are supported by the evidence and requests that the decision be affirmed.

DECISION

The decision of the hearing officer is reversed and remanded.

The claimant had left shoulder surgery in 1977 and right shoulder surgery in 1979 and 1981. The operations were for recurrent shoulder dislocations and he had screws put in his right shoulder. He testified that on (date of injury), he injured his back and right shoulder when he carried a coworker out of flood waters when exiting the employer's driveway. A screw in his right shoulder broke during the incident. The claimant was treated by Dr. H., who performed surgery on the claimant's right shoulder in September 1991. The surgery consisted of "hardware removal and arthroscopy of the shoulder." Dr. H referred the claimant to Dr. B, a neurologist, and then to Dr. G. The claimant said that he does not remember if he complained about his back to Dr. S., the designated doctor selected by the Commission, and that the designated doctor told him that he had everything that he needed.

In an undated Report of Medical Evaluation (TWCC-69), Dr. Henry certified that the claimant reached MMI on May 7, 1992 with a 42 percent whole body impairment rating. Dr. H noted in Section 15 of the report, which requests the doctor to list the specific body part/system and rating if the impairment rating is five percent or greater, that the claimant's right upper extremity has "severe O-A shoulder," and gave a rating of 70 percent for that body part/system. However, in a letter dated January 18, 1993, Dr. H stated that the claimant's "impairment and maximum medical improvement rating was for his shoulder only, and did not include his back." Dr. H further stated that the claimant is currently under his care for osteoarthritis of his right shoulder; that the claimant is currently being seen by Dr. G for his lumbar spine; and that questions regarding the claimant's back problem need to

be addressed to Dr. Greenfield.

In a TWCC-69 report dated October 22, 1992, Dr. Sn, the designated doctor selected by the Commission, certified that the claimant reached MMI on October 22, 1992, with a six percent whole body impairment rating. In response to the instruction on the report to list the body part/system, Dr. S wrote "Upper Extremity Range of Motion," and gave a rating for that body part/system of "10% UE = 6% WP." In an attached three page report to the Commission, Dr. S said that the claimant was referred to him by the Commission for an impairment rating, and later said that the claimant was seen for the purpose of evaluation and providing an impairment rating. Dr. S also stated that it was his understanding that the claimant is at MMI. Dr. S further stated that he had gone over the claimant's history and treatment to date, including physical examination, a CT scan, an NCT, surgery, physical therapy, and medicines. Dr. S diagnosed the claimant as having osteoarthritis of the right shoulder. On the third page of the report entitled "Evaluation of All Noted Impairments," Dr. S assessed a 10 percent impairment for the upper extremities. In addition, he stated that "no lower extremity impairment noted," and, in regard to the claimant's head, spine, trunk, and pelvis, stated "no impairment noted." Dr. S then stated that "Combined Total Impairment of Whole Person = 6% WP."

On October 27, 1992, Dr. B, reported that he had seen the claimant for a follow-up in regard to his low back pain. Dr. B said that there was no obvious precipitating factor for the claimant's random low back pain; that he did not have a definite diagnosis in regard to the claimant's low back pain; and suggested that the claimant have an magnetic resonance imaging scan (MRI).

Dr. Gs patient records indicate that on December 11, 1992, he examined the claimant for back pain and found that the claimant had a normal heel/toe gait; that there was no evidence of any muscle spasm or scoliosis; that he could forward flex reaching his fingertips to about mid-calves; that straight leg raising was negative to 90 degrees; and that deep tendon reflexes, and motor and sensory examination were all normal. Dr. G said that x-rays showed a questionable defect at the left L5 lamina without evidence of any olisthesis, and suggested an MRI scan and bone scan. Dr. G said that the claimant was not a candidate for surgical intervention and that there was no evidence that anything more aggressive than a physical therapy program and lumbosacral support should be done. He noted that Dr. B had evaluated the claimant from a neurological standpoint and that no neurological deficits had been noted.

On December 14, 1992, the claimant had a whole body bone scan done at the request of Dr. G. The scan was negative. In particular, the lumbar spine was said to be unremarkable. An MRI of the claimant's lumbar spine was done on December 15, 1992, also at the request of Dr. G. In a patient note dated January 14, 1993, Dr. G noted that the claimant's bone scan was negative; that the MRI only showed some mild disc degeneration,

but no evidence of any herniation; and stated that:

I feel the best option is an industrial back support and a physical therapy program. I feel the likelihood of him having continued back pain is almost 100%. The only thing we cannot define is how much of an impairment this will be in his normal day-to-day activities. At this point in time, we will get the industrial back support for him, let him start working with that, start him in a physical therapy program and follow him up in about two months. Based on the levels of degeneration, I would rate his impairment at 14%.

In a letter dated January 20, 1993, Dr. G stated that the claimant is currently under his care for a diagnosis of low back pain, that the claimant has not reached MMI "from his back," and that an MRI scan and bone scan had been ordered to see if there is any evidence of a defect. As previously noted, the bone scan was done on December 14, 1992, the MRI was done on December 15, 1992, and in a patient note dated January 14, 1993, Dr. G noted that the claimant's bone scan was negative and that the MRI only showed some mild disc degeneration.

On appeal, the claimant disputes the hearing officer's findings of fact that Dr. S, the designated doctor, determined that the claimant reached MMI on October 22, 1992, with a whole body impairment rating of six percent; that Dr. S specifically found that the claimant had no percentage of permanent impairment attributable to his back; and that Dr. S's report concerning MMI and impairment rating is not against the great weight of the medical evidence. The claimant also disputes the hearing officer's conclusions of law that the claimant reached MMI on October 22, 1992, and that the claimant has a whole body impairment rating of six percent.

Pursuant to Article 8308-4.25(b), the report of the designated doctor has presumptive weight and the Commission shall base its determination as to whether the claimant has reached MMI on that report unless the great weight of the other medical evidence is to the contrary. Pursuant to Article 8308-4.26(g), if the Commission selects a designated doctor, the report of the designated doctor shall have presumptive weight and the Commission shall base the impairment rating on that report unless the great weight of the other medical evidence is to the contrary. We have stated in prior decisions that it is not just equal balancing evidence or a preponderance of evidence that can outweigh the report of the designated doctor, but only the "great weight" of other medical evidence that can overcome it. *See* Texas Workers' Compensation Commission Appeal No. 92412, decided September 28, 1992.

It is obvious that there is a significant, unexplained disparity between the 42 percent impairment rating given by Dr. H and the six percent impairment rating given by Dr. S. Perhaps the disparity can be explained by the fact that Dr. H gave his impairment rating on

May 7, 1992, whereas Dr. S gave his impairment rating over five months later in October 1992, thus allowing the claimant's condition to improve over the course of time. However, that is only conjecture, and not supported by any firm evidence of record. We think that the facts of this case are somewhat analogous to those in Texas Workers' Compensation Commission Appeal No. 92561, decided December 4, 1992. In Appeal No. 92561, the treating doctor said the employee reached MMI in January 1992, with a 29 percent impairment rating, and the designated doctor said the employee reached MMI in June 1992 with a seven percent impairment rating. Based on the report of the designated doctor, the hearing officer in Appeal No. 92561 determined that the employee's impairment rating was seven percent. The Appeals Panel found two matters troubling in that case: the hearing officer's conclusion that the treating doctor did not assign a "whole body" impairment rating, which conclusion was not supported by the evidence; and the substantial and unexplained disparity in the impairment ratings. In regard to the second point, the Appeals Panel stated that:

> 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.

Appeal No. 92561 was reversed and remanded for further consideration and development of evidence. For the reasons set forth in Appeal No. 92561 concerning the substantial, unexplained disparity between the assigned impairment ratings in that case, we believe that it is appropriate to reverse and remand the instant case to have the matter of the 36 percent disparity in the impairment ratings in this case developed in the evidence, if possible. Again, we do not intend to detract from our previous holdings concerning the special consideration to be given the opinions of designated doctors. Rather, remand is an attempt to remove speculation and conjecture in deciding this critical issue.

The hearing officer should also put into evidence the Commission order appointing Dr. S as the designated doctor. We observe that the Appeals Panel has held that a designated doctor must himself examine the injured employee and not just review records and totally rely on examinations of others. *See* Texas Workers' Compensation Commission Appeal No. 93095, decided March 19, 1993.

We note that in the request for review the claimant says that Dr. S is issuing a letter to the carrier and the Commission concerning MMI, and that in its response the carrier states that an undated letter from Dr. S is attached to its copy of the request for review. No such letter accompanied the request for review received by the Appeals Panel. On remand, the parties may want to introduce such letter into evidence for consideration by the hearing officer.

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

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 Commission's division of hearings, pursuant to Article 8308-6.41. *See* Texas Workers' Compensation Commission Appeal No. 92642, decided January 20, 1993.

Robert W. Potts
Appeals Judge

CONCUR:

Stark O. Sanders, Jr.
Chief Appeals Judge

Susan M. Kelley
Appeals Judge