APPEAL NO. 93215

This case arises under the Texas Workers' Compensation Act, TEX. REV. CIV. STAT. ANN. ART. 8308-1.01 *et seq.* (Vernon Supp. 1993) (1989 Act). A contested case hearing was held in (city), Texas, on January 27, 1993, (hearing officer) presiding, to determine whether the respondent (claimant) had reached maximum medical improvement (MMI), and, if so, his impairment rating. The hearing officer concluded that a designated doctor was duly selected by the Texas Workers' Compensation Commission (Commission) pursuant to Articles 8308-4.25 and 8308-4.26 to examine claimant and determine when he reached MMI and his impairment rating, and further concluded, giving presumptive weight to the report of the designated doctor, that claimant reached MMI on July 14, 1992, with a 9% whole body impairment rating. Appellant (carrier), challenging those conclusions and certain related findings, asserts that claimant reached MMI with a 0% impairment rating on September 25, 1991, the date originally determined by his treating doctor, because claimant did not timely dispute such MMI date and because the treating doctor lacked the authority to rescind and change the MMI date. In the alternative, carrier asserts claimant reached MMI on January 27, 1992, the date subsequently determined by claimant's treating doctor after taking claimant off work and commencing further treatment with the 9% impairment determined by the designated doctor. In his response, claimant urges the Commission's Appeals Panel to find that he reached MMI on January 19, 1993, with a 9% or greater impairment rating.

DECISION

Finding the evidence sufficient to support the challenged findings and conclusions, we affirm.

Appellant, the sole witness, testified that on February 6, 1991, while working as an iron worker for (employer), he slipped in the mud while carrying a heavy load of bolts on his left shoulder and hurt his shoulder. He immediately reported the injury to his foreman and was treated by (Dr. W) for about a month. He then commenced treatment with (Dr. H), an orthopedic surgeon, who apparently became his treating doctor. Claimant underwent surgery by Dr. H on his left shoulder (rotator cuff repair) on May 23, 1991. There was no dispute concerning the compensability of the injury on the job and no medical records were introduced other than the various reports related to claimant's having reached MMI and to his impairment rating.

Claimant said that Dr. H stated he had reached MMI on September 25, 1991, with a 0% impairment rating. He did not testify as to when he was advised of those determinations however. A Report of Medical Evaluation (TWCC-69) signed by Dr. H and accompanied by his narrative report dated September 25, 1991, was introduced into evidence. This TWCC-69 stated that claimant reached MMI on "9-25-91" with a whole body impairment rating of "0%." Dr. H's narrative report stated that claimant's rotator cuff repair had taken place four months earlier, that he was released to work and to his normal activities on September 25th, that claimant had full range of motion (ROM) and denied any pain or

problems, that his examination was benign, that he showed no signs of recurrence or problems with his shoulder at that time, and that claimant's treatment plan was to be discontinued.

Claimant said he returned to Dr. H several weeks later, however, and that Dr. H took him off work, initiated a work hardening program because his arm was weak, "retracted" his previous determination of MMI, and later determined that claimant reached MMI on January 27, 1992. A second TWCC-69 signed by Dr. H was introduced which stated that claimant had not reached MMI, that while MMI had been previously determined, claimant's injury was "giving him problems," that claimant was working on ROM and building strength, and that there was no impairment rating at that time. Introduced with this TWCC-69 as a single exhibit was a document dated November 27, 1991, which took claimant off work for four weeks. Claimant testified, however, that Dr. H had taken him off work in October. Also a part of the exhibit was a letter from Dr. H to Dr. W dated October 30, 1991, which stated that claimant had pain in his left shoulder that had increased since he was last seen, that he had tenderness directly over the incision, and that claimant's physical exam showed "essentially normal" ROM and motion "quite similar to that which he showed the last time" but that there was some abduction and flexion weakness of the shoulder. Dr. H stated he wanted to start claimant on a work hardening program to see if his shoulder girdle muscles can be strengthened to decrease his discomfort. A third TWCC-69 from Dr. H was introduced which stated that claimant reached MMI on January 27, 1992, but which made no assignment of an impairment rating. This TWCC-69 was accompanied by Dr. H's narrative report of January 27, 1992, stating that claimant had virtually full ROM but that his strength had continued to be "significantly decreased as compared to normal," despite the fact claimant had "worked very hard and been very compliant in his exercise program." Dr. H further stated that claimant had a 50% loss of his ability to abduct and flex his affected shoulder which amounted to a permanent loss of ROM, and that he had at least a 25% loss of shoulder function, secondary to loss of strength, which was also permanent.

The carrier introduced a Notice of Refused/Disputed Claim (TWCC-21), dated January 28, 1992, which stated, in effect, that carrier disputed the "MMI dates" because claimant reached MMI on September 25, 1991, as Dr. H had first reported, and carrier then received another report from Dr. H on January 16, 1992, stating that claimant had not reached MMI.

Claimant testified there were four BRCs, the first held on March 11, 1992, the second held sometime after the first of two TWCC-69 forms was filed by the designated doctor on or about July 14, 1992, the third held on October 22, 1992, and the fourth held on December 17, 1992. The hearing officer made the BRC Report of the final BRC a part of the record. However, the record fails to indicate whether BRC reports were prepared following any of the three prior BRCs.

After the first BRC, the benefit review officer (BRO) wrote Dr. H on March 19, 1992, advising that a BRC was held on March 11, 1992, to determine whether claimant was entitled to any further temporary income benefits (TIBS), that claimant's TIBs were suspended on September 26, 1991, following Dr. H's first TWCC-69, and seeking clarification from Dr. H regarding claimant's MMI date and impairment rating, if any. According to this letter, claimant filed documents which indicated that Dr. H took him off work on November 27, 1991, which released him to return to work on January 27, 1992, and which reported that he reached MMI on January 27, 1992, but which did not assign an impairment rating. The letter queried Dr. H concerning whether he had "retracted" the September 25, 1991 MMI date and redetermined an MMI date of January 27, 1992. The letter further indicated concern about an impairment rating based on the American Medical Association Guides to the Evaluation of Physical Impairment (AMA Guides), noting that his initial TWCC-69 assigned a 0% rating and that his January 27, 1992 report, which assigned no rating, "seems to indicate that there is impairment that has not been measured." Dr. H responded on April 7th that while he had indeed released claimant to return to work in September 1991 without restrictions, claimant after some time returned saying he was having trouble with his work, was having a significant amount of pain, and was unable to tolerate the lifting required in his work. Dr. H said he then took claimant off work and put him into rehabilitation in an effort to try to improve claimant to the point he could return to work without restrictions, and that while the success of this effort was limited, claimant does have "a good functional shoulder." He further stated that while he did give claimant a new impairment rating, the AMA Guides were problematical in the determination of an exact number of impairment percentages for every type of injury. He recommended that claimant be sent to (Dr. G) for the determination of an impairment rating. He described Dr. G as an expert with specialized training in impairment ratings who limits his practice to the assignment of impairment ratings in workers' compensation cases.

In his extensive report of June 3, 1992, Dr. G reported to the carrier that at its request of April 7th, he had evaluated claimant on June 1, 1992. Dr. G reported that Dr. H's post-operative diagnosis was a tear of the rotator cuff supraspinatus muscle, anterior impingement syndrome, and supraspinatus syndrome of the left shoulder. Dr. G determined claimant's impairment for his left shoulder was 47% which converted to a whole person impairment rating of 28% using the "AMA Guides 3rd edition revised." However, Dr. G went on to evaluate claimant's right shoulder also and found it to have an impairment of 12% which converted to a whole body impairment of 7%. Dr. G then added the 7% for the right shoulder to the 28 % for the left shoulder and said "we obtain a whole person impairment of 33% which contributes to both upper extremities."

Apparently at this juncture the carrier, having already disputed Dr. H's determination of claimant's MMI date, disputed Dr. G's impairment rating and claimant testified that the Commission then selected (Dr. W) as a designated doctor to examine him. The carrier introduced a TWCC-69 from Dr. W, accompanied by a written narrative report dated July

14, 1992, which stated that claimant reached MMI on "7-14-92" with a "13%" impairment rating. The carrier introduced another TWCC-21, dated August 11, 1992, stating it disputed Dr. W's "rating" and wanted to show the Commission a videotape of claimant "working at Oscar's Car Care on July 28, 1992 using his injured shoulder with no apparent difficulty."

At the BRC on October 22, 1992, claimant said that Dr. W's MMI date of July 14, 1992 and his 13% rating were discussed and that he was shown a photograph of his rolling a tire at a car shop, but was not shown the carrier's videotape. Claimant denied he had worked for shop. Claimant said the carrier wanted him to return to Dr. W and wanted Dr. W to view the videotape. Claimant said he then agreed to be seen again by Dr. W in return for the carrier's agreeing to pay him TIBS up to July 14, 1992. Claimant introduced without objection a BRC Agreement (TWCC-24) signed by the parties and the BRO on October 22, 1992. This agreement reflected that the resolution of the MMI issue was that MMI was reached on July 14, 1992, and that the carrier agreed to pay TIBS through that date. Respecting the impairment rating issue, the resolution was stated to be that Dr. W would review the videotape and reexamine claimant, that Dr. W's impairment rating remains in dispute due to the videotape of claimant's working, and that Dr. W would "provide a response to the reexamination and videotape on the correct and final impairment rating." We view the latter resolution as an agreement of the parties that Dr. W would provide the correct and final rating upon his reexamination.

On cross-examination the claimant testified, variously, that at the BRC on October 22nd he did not recall the BRO saying that sanctions should be entered against the carrier, that he did recall the BRO stating that if the carrier did not voluntarily pay TIBS she would enter sanctions, and then later that he did not know about the BRO entering sanctions if the carrier would not agree to pay TIBS. Claimant did recall that an agreement was reached that he would return to Dr. W, that Dr. W would review a videotape, and that carrier would pay TIBS to July 14, 1992. Carrier did not adduce any evidence from the BRO or any other source, aside from the inconclusive cross-examination of claimant, to establish the invalidity of the BRC agreement based upon duress. However, the carrier in argument at the hearing asserted that claimant's testimony showed "good cause" for carrier's not being bound by the BRC agreement.

Claimant testified he returned to Dr. W for further examination and that Dr. W reduced his impairment rating from 13% to 9%. A second TWCC-69 from Dr. W was introduced which stated that claimant reached MMI on July 14, 1992, with a 9% impairment rating. According to the narrative report of October 28, 1992, which accompanied this TWCC-69, Dr. W viewed the videotape and photographs and read carrier's investigative report. Dr. W also examined claimant and discussed his shoulder. In Dr. W's July 14th examination, he had found claimant's ROM impairment to his shoulder to be 16% which resulted in a whole body impairment of 10% to which Dr. W added 3% to appropriately rate the severity of claimant's condition. Dr. W's October 28th exam showed claimant's ROM impairment to

his shoulder to be 10% which resulted in a whole body impairment of 6% to which Dr W again added 3 %. Thus, it would appear that Dr. W's reduction of claimant's rating from 13% to 9% may have been based on improvement in claimant's ROM between the two exams and not on the videotape and photographs. However, this reduction in claimant's impairment rating is not an appealed issue. The claimant voiced a number of complaints in his response. However, while timely filed as a response, claimant's response was not filed in sufficient time to be treated as a request for review. Article 8308-6.41(a).

Notwithstanding the terms of the BRC Agreement of October 22nd, claimant said that at the fourth BRC on December 17, 1992, the carrier asked the BRO to recommend both an earlier MMI date, pursuant to the reports of Dr. H, as well as the lower impairment rating of 9%. According to the BRC Report in evidence, claimant's position at the BRC was that he reached MMI on July 14th as indicated by Dr. W's report, whereas the carrier contended claimant reached MMI on January 27th as indicated by Dr. H. The BRO recommended that carrier had no valid reason for breaching the BRC agreement respecting an MMI date of July 14th, and further, that MMI was reached on July 14, 1992, as indicated by Dr. W. As for the impairment rating, the BRC Report stated that claimant agreed with Dr. W's rating and that the carrier wants to challenge the 9% rating although it did not then know what the proper rating should be. The BRO recommended the 9% rating as determined by Dr. W's later report.

Claimant argued at the hearing that not only did carrier make a binding BRC agreement that his MMI date was July 14th, but further that the great weight of the other medical evidence was not against Dr. W's report that he reached MMI on July 14, 1992, with a 9% impairment rating. The carrier argued that neither claimant nor carrier contested within 90 days Dr. H's initial determination of MMI as of September 25th with 0% impairment and thus that date and rating should stand; that it mattered not that claimant's condition worsened after September 25th given the definition of MMI in Article 8308-1.03(32); and that no authority existed for Dr. H to "rescind" his original report. In the alternative, carrier argued that even if Dr. H could so rescind, he next determined that claimant achieved MMI on January 27, 1992, and that all that remained to be determined thereafter was the impairment rating for which he recommended Dr. G. Carrier further argued that it's disputing Dr. H's rescission of his original report resulted in the Commission's selection of a designated doctor; that the carrier only entered the BRC agreement of October 22nd because the BRO threatened the carrier with sanctions if TIBS were not paid; that the carrier thus showed "good cause" for not being bound by the BRC agreement; that the "preponderance" of the medical evidence established an MMI date of September 25, 1991, or of January 27, 1992, at the latest; and that it agreed with the 9% impairment rating.

The hearing officer made no findings regarding the BRC agreement nor has the carrier raised an appealed issue concerning the agreement. Article 8308-1.03(3) defines "agreement" as the resolution by the parties to a dispute under the 1989 Act of one or more

issues regarding an injury, death, coverage, compensability, or compensation. The term does not include a settlement. Article 8308-6.15(a) provides, in part, that a dispute may be resolved at the BRC either in whole or in part by mutual agreement which shall be in writing and signed by the parties and the BRO. Article 8308-6.15(b) provides that such an agreement binds the insurance carrier through the final conclusion of all matters relating to the claim unless the Commission (or court) relieves the carrier from the effect of such agreement for a finding of fraud, newly discovered evidence, or other good and sufficient cause. *And see* Rule 147. 4(d) (Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 147.4(d)). The BRC agreement was prepared on a Form TWCC-24, Benefit Dispute Agreement, was signed by the claimant, carrier's attorney, and the BRO on October 22, 1992, and thus complied with Rules 147.2 and 147.3. Rule 147.4(b) provides that the presiding officer at the benefit proceeding will review the agreement to ascertain that it complies with the 1989 Act and the Commission's rules, and if it does comply, sign it and provide copies to the parties. Rule 147.4(b) provides further that "[a] written agreement is effective and binding on the date signed by the presiding officer."

The "good cause" argument advanced by the carrier at the hearing for being relieved of the effects of the agreement, apparently signing the agreement under duress, was based on the unsworn assertions of counsel and certain equivocal testimony from the claimant regarding the BRO's discussion of sanctions. As we noted above, the hearing officer made no findings regarding the BRC agreement which met the requirements of Articles 8308-1.03(3) and 8308-6.15(a) and (b). *Compare* Texas Workers' Compensation Commission Appeal No. 92124, decided May 11, 1992, and Texas Workers' Compensation Commission Appeal No. 92592, decided December 21, 1992. Accordingly, we determine as a matter of law that the carrier was bound by its agreement that claimant reached MMI on July 14, 1992, and that the designated doctor would determine "the correct and final impairment rating" upon reexamination of claimant and review of the carrier's videotape. We can and do uphold on that basis the hearing officer's decision.

The carrier also asserts that the great weight of the other medical evidence is against the designated doctor's determinations that claimant reached MMI on July 14, 1992, with an impairment rating of 9%. The designated doctor stated that claimant reached MMI as of July 14, 1992, while Dr. H stated that claimant reached MMI as of January 27, 1992. The carrier does not enlighten us as to how the opinions of Dr. H and Dr. G constitute the "great weight of the other medical evidence" to the contrary of Dr. W's opinion. Article 8308-4.25(b) provides, in part, that "[t]he report of the designated doctor shall have presumptive weight and the Commission shall base its determination as to whether the employee has reached [MMI] on that report unless the great weight of the other medical evidence is to the contrary." We have observed that "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." Texas Workers' Compensation Commission Appeal No. 92412, decided September 28, 1992. Dr. H's opinion that claimant reached

MMI nearly five months earlier than the date determined by the designated doctor and Dr. G's opinion that claimant had "stabilized" as of June 1st hardly constitutes the "great weight" of the other medical evidence to the contrary of the designated doctor's determination that claimant had reached MMI as of July 14, 1992. Accordingly, we affirm the hearing officer's conclusion that the designated doctor's report was entitled to presumptive weight and that it established claimant's MMI date as July 14, 1992, and his impairment rating as 9%.

Carrier's contention that no authority existed for Dr. H to revoke his original determination of MMI on September 25, 1991, with 0% impairment, and change it to January 27, 1992, with some impairment lacks merit. The facts in Texas Workers' Compensation Commission Appeal No. 93089, decided March 15, 1993, bear certain similarities to the case under consideration and certain principles stated in that case are applicable. In that case the disputed issues involved the MMI date and impairment rating, but there was no designated doctor involved nor was there a BRC agreement. The employee's treating doctor had prepared a TWCC-69 stating that the employee had reached MMI on April 20, 1992, with 0% impairment. Apparently there was no evidence that the doctor sent a copy of that TWCC-69 to the employee within seven days, as required by Rule 130.2(b)(2), and the employee was unaware of his doctor's MMI and impairment determinations until he received a copy of the carrier's TWCC-21 mailed on April 30th. The employee then obtained a copy of the TWCC-69 from his doctor's office and ultimately requested a BRC on July 28th to dispute the determinations. The employee's doctor later (apparently on or about August 17, 1992) prepared two other TWCC-69 forms, the first stating the employee had not reached MMI and the second merely adding that the TWCC-69 was "amended 8/17/92 retroactive to 4/20/92." The hearing officer found that the TWCC-69 stating the April 20th MMI date with 0% impairment was not filed with the employee within seven days of April 20th, and that the employee did not become aware of it until on or about April 30th. Accordingly, the hearing officer concluded that the employee's BRC request of July 28th was a timely dispute (within 90 days) of the April 20th MMI date and 0% rating based on the employee learning of it on April 30th, that the employee did not reach MMI on April 20th, and that the 0% impairment rating was thus not valid. Similar to the case under consideration, the carrier in Appeal No. 93089 argued, among other things, that the impairment rating was not disputed within 90 days and thus became final, and that the hearing officer should not have invalidated the 0% impairment rating because it had become final and because it could not be rescinded by the same doctor once it was determined. We noted our prior decisions to the effect that timely dispute under Rule 130.5(e) is required where a claimant disputes MMI, and that the 90 day time period does not necessarily run from the date the rating is actually assigned by the doctor. We also observed that adequate notice to the Commission that a dispute exists is important since "it triggers the appointment of a designated doctor to attempt resolution of the dispute and to move the case expeditiously to the next level of the dispute resolution process. *See* Rule 130.6."

Respecting the matter of the doctor's preparation of the subsequent TWCC-69 forms

to the effect that MMI had not been reached as earlier determined, we further stated in Appeal No. 93089 the following:

> This panel has previously determined that a doctor can amend or revise his or her prior determination of MMI or impairment, under proper circumstances, recognizing that resolution of questions of MMI and impairment should not be indefinitely deferred to an open-ended series of tests. Texas Workers' Compensation Commission Appeal No. 92570, decided December 14, 1992. *See also* Texas Workers' Compensation Commission Appeal No. 92639, decided January 14, 1993 (correction or amendment of the first report generated by designated doctor, especially when the first document was based on incomplete or erroneous facts, which is done fairly soon after the first report, may be given presumptive weight).

The carrier's contention respecting claimant's failure to timely dispute Dr. H's MMI date of September 25, 1991, is also without merit. The carrier did not prove its contention that there was no timely dispute, no finding of fact was made to that effect, and carrier later signed the BRC agreement.

Finding the evidence sufficient to support the challenged findings and conclusions, we affirm the hearing officer's decision.

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Philip F. O'Neill
Appeals Judge

CONCUR:

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Robert W. Potts
Appeals Judge

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Gary L. Kilgore
Appeals Judge