APPEAL NO. 93293

On March 22, 1993, a contested case hearing was held in (city), Texas, with (hearing officer) 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) had reached maximum medical improvement (MMI), and, if so, what is the claimant's whole body impairment rating. Based on the report of the designated doctor selected by the Texas Workers' Compensation Commission, the hearing officer determined that the claimant reached MMI on October 2, 1992, with a seven percent whole body impairment rating. The claimant contends that the hearing officer's decision is incorrect because he needs back surgery which has not yet been performed. He asserts that he has not reached MMI for this reason and that he has greater than a seven percent whole body impairment rating. The respondent (carrier herein) responds that there is no testimony based on reasonable medical probability that surgery is required and requests that the decision of the hearing officer be affirmed.

DECISION

The decision of the hearing officer is reversed and remanded for further consideration and development of evidence.

The claimant sustained an injury at work on (date of injury). He testified that the employer sent him to (Dr. V) who, he said, diagnosed a fractured coccyx and released him to return to work. The claimant said he worked with "duress" and back pain. The claimant said that he then chose to go to (Dr. W), in June or July of 1992. Medical reports indicate that he was actually referred to Dr. W by (Dr. HA) at the end of August 1992 and that he saw Dr. W in the first part of September 1992. The record does not indicate Dr. HA's status or when the claimant began seeing him. The claimant said that Dr. W ordered a magnetic resonance imaging (MRI) scan and diagnosed him as having a herniated disc. The claimant said he subsequently saw (Dr. D). A medical report from Dr. D, dated January 5, 1993, was offered into evidence, but was excluded for failure to timely exchange the report. No complaint is made of that ruling on appeal. Dr. D's status is not reflected in the record. The claimant said that both Drs. W and D told him he has to have a discectomy operation and that he is not going to get any better without the surgery. He said he has had increasing numbness in his legs and has "had a few problems where I fell down." He also said that he feels that he needs the discectomy surgery. The claimant further testified that surgery has not been scheduled because he wants to get a "series of opinions before I went into that." He said he recently "put in a change of doctor form" to see (Dr. C), that it had been "0k'd," and that Dr. C "will be my new doctor." The hearing officer refers to Dr. C as a treating doctor in her decision. The claimant testified that he was going to see Dr. C on April 14th and that if Dr. C recommends surgery then he will have surgery, but if Dr. C recommends something else then "that's fine with me." The claimant also testified that the carrier has not sent him to a doctor for a second opinion regarding surgery. He further stated that he saw (Dr. H), the designated doctor selected by the Commission, on October

2, 1992. The claimant said that Dr. H is neither a neurosurgeon nor an orthopaedic doctor. The claimant further stated that he intends to have surgery.

Testimony from a witness for the carrier indicated that the claimant was given light duty work for a period of time after returning to work from his injury, but that the claimant was laid off by the employer around September 3, 1992, because the employer no longer had light duty work available. The claimant said he has not worked since being laid off.

According to (Dr. HI), an MRI scan of the claimant's lumbar spine done on October 2, 1991, revealed evidence of disc degeneration at the L4-5 level manifested by loss of hydration and bulging and/or herniation of the disc with encroachment into the spinal canal for perhaps 3 mm with also very slight encroachment on the thecal sac for perhaps 1 or 2 mm. In a letter to the carrier dated August 28, 1992, Dr. HA wrote that the claimant continues to have pain in his lumbar spine and difficulty bending. He noted that the claimant had been working, but that the employer had not made him do any heavy lifting. He also noted that a bone scan revealed no evidence of any fracture of the sacrum and was reported as normal, that an EMG showed nerve root irritation at L4-5 on the left (the EMG study was in evidence), and that an MRI was positive for a herniation at the L4-5 level. Dr. HA stated that the claimant is suffering from "a herniated disc syndrome at L4-5 with radiculopathy on the left, most likely related to the industrial accident of (date of injury)." Dr. HA referred the claimant to Dr. W for consultation and continued the claimant's therapy and medication. Dr. W released the claimant to light duty work on September 3, 1992, and stated in the work release form that a discogram had been ordered.

In an undated Report of Medical Evaluation (TWCC-69) Dr. H, the designated doctor, certified that the claimant reached MMI on October 2, 1992, with a seven percent whole body impairment rating. Dr. H stated in the report that:

> [The claimant] fell on 9-6-91 and injured his back. MRI of the lumbar spine on 7-13-92 revealed L4-5 disc herniation. The patient does not desire surgery unless absolutely necessary. Without surgery he has reached MMI at (sic) 7% disability.

The carrier represented at the hearing that it had paid the claimant impairment income benefits (IIBS) in accordance with the seven percent impairment rating assigned by Dr. H. The benefit review conference (BRC) report indicates that as of February 8, 1993, the carrier had paid 18 weeks of IIBS.

In a letter to the carrier dated January 4, 1993, Dr. W stated as follows:

> [The claimant] is a candidate for discography, he had an L4-5 bulging disc noted on

a positive MRI. The bone scan was normal on 8-14-92. The EMG on 7-20-92 showed L-5 nerve fiber irritation, which is clinically correlative with the L4-5 bulging disc.

We wanted to do the discogram to evaluation (sic) the remainder of the discs. He is still symptomatic. Straight leg raising and flip tests are positive on the left and the right. He is a candidate for one-level L4-5 discectomy bilaterally.

No other medical records or reports were admitted into evidence. The disputed issue forms from the BRC indicate that Dr. V assigned the claimant a 24.5 percent impairment rating. In regard to the MMI issue, the benefit review officer recommended that the claimant has reached MMI "per the designated doctor, [Dr. H], if the claimant does not have surgery." In regard to the impairment rating issue, the benefit review officer stated that "I recommend a 7% whole body impairment is due without surgery per the designated doctor, [Dr. H]."

At the hearing the claimant said that he has not reached MMI because he is a "surgical candidate." On appeal the claimant states that he has a herniated disc in his lower back which will, in all reasonable medical probability, require surgery. The claimant further states in his appeal that, at the outset of his treatment, he had concluded that he did not want surgery unless absolutely necessary, but at this time, he has lost the use of his legs several times and it appears as though the only possible way to relieve the pain and allow him to lead a normal life is surgery. At the hearing the carrier relied on the opinion of the designated doctor as to MMI and impairment rating. On appeal the carrier continues to rely on the opinion of the designated doctor and further contends that "there is no testimony, in reasonable medical probability, that surgery would be required."

The hearing officer found that on (date of injury), the claimant injured his coccyx while engaged in the exercise of his regular job duties; that Dr. H is a designated doctor appointed by the Texas Workers' Compensation Commission (Commission); that Dr. H certified the claimant as having reached MMI on October 2, 1992, with a seven percent whole body impairment rating; and that Dr. H's opinion has not been overcome by the great weight of contrary medical evidence. The hearing officer concluded that the claimant reached MMI on October 2, 1992, and that the claimant has a seven percent whole body impairment.

After noting that the designated doctor's report is entitled to presumptive weight, the hearing officer stated in the discussion of the evidence portion of her decision that:

A review of the medical evidence introduced at the Contested Case hearing reflects that Dr. [W], claimant's initial treating doctor for his injury of (date of injury), did consider claimant as (sic) surgical candidate. However, the record does not

> contain evidence to indicate whether or not such surgery would be considered reasonable and necessary treatment for claimant's injury, and would be approved either by carrier or by the Division of Medical Review of the Texas Workers' Compensation Commission. For this reason, it cannot be said that claimant has met his burden of overcoming Dr. [H's] opinion with the great weight of contrary medical evidence. Therefore, a decision in favor of carrier is appropriate.

A brief review of some statutory and rule provisions is in order. In regard to entitlement to medical benefits, Article 8308-4.61(a) provides in pertinent part that "an injured employee is entitled to all health care reasonably required by the nature of the compensable injury as and when needed." Article 8308-4.67 pertains to a second opinion on spinal surgery, and provides as follows:

> (a)Except in situations of medical emergency, the insurance carrier is liable for medical costs related to spinal surgery only under the following conditions:
>
> (1)the employee obtains a second opinion from a doctor approved by the insurance carrier or the Commission before surgery and the doctor rendering the second opinion concurs with the treating doctor's recommendation;
>
> (2)the insurance carrier waives the right to an examination or fails to request an examination not later that the 14th day after the date of the notification that surgery is recommended; or
>
> (3)the Commission determines that extenuating circumstances are present and orders payment for surgery.

Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 133.203 (a) (Rule 133.203) provides in part that the injured employee may request approval for a second opinion for spinal surgery through the Commission at the medical review division in Austin, Texas, whether or not the carrier has waived the right to the second opinion. Rule 133.203(d) provides that the carrier's written concurrence with the employee's request for a second opinion examination is deemed to be the carrier's request for second opinion under Article 8308-4.67(a)(2). Pursuant to Rule 133.205, disputes over the need for spinal surgery are medical disputes which are reviewed under Article 8308-8.26. Subsection (d) of that article provides that a party to a medical dispute that remains unresolved after a review of medical services is eligible to proceed to a hearing conducted under the Administrative Procedure and Texas Register Act (APTRA), TEX. REV. CIV. STAT. ANN. art. 6252-13a.

"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). Since 104 weeks have not expired from the date income benefits began to accrue for the claimant's (date of injury), injury, we are concerned in this case with the first part of the definition of MMI. "Impairment" means any anatomic or functional abnormality or loss existing after MMI that results from a compensable injury and is reasonably presumed to be permanent. Article 8308-1.03(24). An "impairment rating" is the percentage of permanent impairment of the whole body resulting from a compensable injury. Article 8308-1.03(25). Article 8308-4.26(d) provides in part that after the employee has been certified by a doctor as having reached MMI, the certifying doctor shall evaluate the condition of the employee and assign an impairment rating.

Pursuant to Article 8308-4.25(b), the report of the designated doctor concerning whether the employee has reached MMI has presumptive weight and the Commission must 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. Pursuant to Article 8308-4.26(g), the report of the designated doctor selected by the Commission concerning the employee's impairment rating has presumptive weight and the Commission must base the 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 have previously observed that it is not just equally balancing evidence or a preponderance of evidence that can overcome the presumptive weight given the designated doctor's report. *See* Texas Workers' Compensation Commission Appeal No. 92412, decided September 28, 1992. No other doctor's report, including that of a treating doctor, is accorded the special presumptive weight given to the designated doctor's report. *See* Texas Workers' Compensation Commission Appeal No. 92366, decided September 10, 1992.

In the instant case, the medical evidence, including the reports of Dr. HA, Dr. W, and Dr. H, the designated doctor, show that the claimant sustained a lower back injury. The carrier made no assertion to the contrary at the hearing. The finding of the hearing officer which appears to limit the claimant's injury to his coccyx is not supported by the evidence of record.

The claimant presented medical evidence in the form of a report from Dr. W that he is a candidate for spinal surgery. He said he intends to have surgery, but wants Dr. C's opinion before proceeding. He was to have seen Dr. C on April 14th, which was a few weeks after the March 22nd hearing, consequently, the record contains no medical report from Dr. C. The carrier did not assert at the hearing that spinal surgery would not result in further material recovery from or lasting improvement to the claimant's injury. The carrier simply relied on the presumptive weight to be given to the report of the designated doctor.

However, the designated doctor gave no opinion as to whether surgery would result in further material recovery from or lasting improvement to the claimant's injury. The designated doctor only stated that the claimant does not desire surgery unless absolutely necessary and that without surgery the claimant has reached MMI. The hearing record does not contain any doctor's opinion that the claimant does not need surgery.

Under Article 8308-6.34(e), the hearing officer is charged with the responsibility of ensuring the full development of facts required for the determinations to be made. The threshold issue in this case was whether the claimant reached MMI. MMI must be based on reasonable medical probability. Given the medical evidence that the claimant is a candidate for spinal surgery; the claimant's testimony that he intends to have surgery, but wants Dr. C's opinion on that matter and had an appointment scheduled with Dr. C to obtain his opinion; the absence of any opinion from the designated doctor as to whether spinal surgery would result in further material recovery from or lasting improvement to the claimant's injury, despite his reference to surgery; and the absence of any medical evidence of record that the claimant does not need surgery, we are of the opinion that the case should be remanded to the hearing officer for further consideration and development of evidence, as appropriate, on the matter of whether the claimant has reached MMI. In particular, and without limiting the evidence that may be developed on remand, Dr. C's opinion, if any, regarding surgery should be made a part of the record and we believe it would be appropriate and beneficial for the development of the facts to have Dr. C's report, if any, sent to the designated doctor, and to have the designated doctor give an opinion as to whether further material recovery from or lasting improvement to the claimant's injury could reasonably be anticipated from surgery, based on reasonable medical probability. The necessity of addressing the issue of impairment rating on remand will be determined by the hearing officer's determination on the issue of MMI. We distinguish this case from Texas Workers' Compensation Commission Appeal No. 93290, decided June 1, 1993. In Appeal No. 93290 we affirmed the hearing officer's decision that the employee reached MMI based on the report of the designated doctor. In that case, two doctors said that surgery was needed, but the designated doctor specifically found that surgery would not be effective in treating the employee's complaints. The designated doctor in the instant case has rendered no such opinion.

Our decision in this case is not intended to detract in any way from our previous holdings which acknowledge the special consideration given the opinions of designated doctors as provided in Articles 8308-4.25 and 8308-4.26. *See* Appeal No. 92412, *supra*. Rather, in this case, we are troubled by the determination of MMI in light of the hearing officer's finding limiting the claimant's injury to his coccyx where that finding is not supported by the evidence, the uncontroverted medical evidence that the claimant is a candidate for back surgery, the claimant's expressed intent to go forward with surgery should it be recommended by Dr. C, and the somewhat equivocal statement of the designated doctor in his report certifying MMI. We observe that in this case the evidence reflects that the

claimant first became aware that he was a candidate for back surgery after August 1992 when he started treatment with Dr. W, that the designated doctor issued his report in early October 1992, and that while the claimant did not have surgery scheduled, he did at least schedule an appointment with Dr. C to obtain another opinion regarding surgery. In these circumstances, the better course of action would probably have been for the hearing officer to have obtained Dr. C's opinion before closing the hearing record. Our decision is limited to the particular facts of this case. We do not take the position that simply because a treating doctor indicates that a claimant is a candidate for surgery that MMI may not be found. Each case must be decided on its own merits and factors such as when the claimant first learned of the need for surgery, the claimant's
actions after obtaining that information, the reason for delay, if any, in scheduling surgery, and the opinions of doctors may be evaluated in such cases.

With respect to the hearing officer's discussion of the evidence wherein she states that the record does not contain evidence to indicate whether or not surgery would be considered reasonable and necessary treatment for the claimant's injury, and would be approved either by the carrier or the Commission, we do not agree that that forms a basis for determining that the great weight of the medical evidence is not contrary to the designated doctor's opinion on MMI under the evidence in this case. First, Dr. W opined in his report that the claimant is a candidate for surgery and, based on the evidence of record, no doctor has opined to the contrary. Second, carrier or Commission approval of surgery is not an issue because as far as the evidence of record shows, there has been no disagreement by doctors as to the need for spinal surgery. And, if a dispute as to the need for spinal surgery were to arise, such dispute would be considered a medical dispute under Rule 133.205 and, if it remains unresolved after a review of medical services, may be considered at an APTRA hearing under Article 8308-8.26(d), provided that prerequisites for such dispute resolution have been met.

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

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 Article 8308-5.41. *See* Texas Workers' Compensation Commission Appeal No. 92642, decided January 20, 1993.

Robert W. Potts
Appeals Judge

CONCUR:

Philip F. O'Neill
Appeals Judge

Lynda H. Nesenholtz
Appeals Judge