APPEAL NO. 93852

Pursuant to 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*.), a contested case hearing was convened in (city), Texas, on March 26, 1993, and concluded on August 25, 1993, in (city), (hearing officer) presiding as hearing officer. He determined that the respondent's (claimant) maximum medical improvement (MMI) date was January 3, 1993, with an impairment rating (IR) of 20% in accordance with the certification of a second Texas Workers' Compensation Commission- (Commission) appointed designated doctor. The appellant (carrier) appeals urging error by the hearing officer in determining that the original designated doctor did not comply with the 1989 Act, in finding that the second designated doctor was duly selected by the Commission, and in finding that the claimant reached MMI on January 3, 1993, with a 20% IR. The claimant asks that the decision be affirmed.

DECISION

Finding the evidence sufficient to support the decision of the hearing officer and not finding any prejudicial error, we affirm.

It was not disputed that the claimant sustained a compensable injury to his back in a fall on an icy sidewalk on (date of injury). The only issues at the contested case hearing were the correct MMI date and IR. The claimant was seen by a number of doctors and received considerable treatment over the next two years. Because of a dispute over MMI and IR, the Commission eventually selected a designated doctor, (Dr. O), to resolve the dispute over MMI and the correct IR. In a medical evaluation report dated January 15, 1993, Dr. O determined that the claimant had reached MMI on July 3, 1991, with an 11% IR. At the first session of the hearing, the claimant testified, and was uncontradicted, that he never saw Dr. O, and that the doctor who he did see at the (city) Impairment and Disability Evaluation Center advised him that he had determined the IR to be 17% but that Dr. O had persuaded him to take six percent off the range of motion evaluation. After the close of the initial session of the hearing, the hearing officer contacted Dr. O (with appropriate notice to all parties) because of the evidence that he had not examined the claimant in rendering his MMI and IR evaluations. It was determined that Dr. O had in fact not conducted any examination of the claimant. This, as the hearing officer correctly recognized, rendered Dr. O's report invalid as a designated doctor's report. Texas Workers' Compensation Commission Appeal No. 93095, decided March 19, 1993. That case held, in accordance with the statute and Commission directive, that a selected designated doctor is required to personally examine the claimant although recognizing that a designated doctor may also properly rely on other medical reports, tests and examinations. The hearing officer attempted to correct the situation by trying to arrange an appointment with Dr. O for an examination of the claimant. This was a proper procedure. Texas Workers' Compensation Commission Appeal No. 92595, decided December 21, 1992. According to the hearing officer, because of a miscommunication problem not due to the fault of the claimant, the claimant did not make a scheduled appointment with Dr. O and another appointment could not be arranged for approximately two months because of Dr. O's unavailability. Hence, there never was a valid report from Dr. O, the original selected

designated doctor. Under these circumstances, arrangements were made to select another designated doctor, (Dr. C), to perform a proper medical evaluation and certification of MMI and IR. We have stated that the "need or desirability for the Commission to select a second designated doctor should be very limited and restricted to a situation such as, for example, where an initially appointed doctor cannot or refuses to comply with the requirements of the 1989 Act." Texas Workers' Compensation Commission Appeal No. 93045, decided March 3, 1993. We believe the thrust and intent of this principle was followed in this case, even though it appears that there was some unexplained delay in accomplishing the physical examination of the claimant by the second designated doctor. An anticipated delay of a couple of months in scheduling the necessary examination by the originally selected designated doctor could reasonably be considered an appropriate reason to seek a second designated doctor, and we find no abuse of discretion by the hearing officer. Further, we find nothing to indicate any improper action or conduct by the hearing officer, Commission personnel or others in attempting to move this case along to a final resolution. That is not to put our imprimatur on the less than expeditious manner in which this case proceeded.

The second designated doctor, Dr. C, rendered a medical evaluation dated July 2, 1993, which included a narrative report with back-up tests and evaluations, and certified MMI on January 3, 1993, with a 20% IR. Of course, we have steadfastly emphasized the unique position a designated doctor's report occupies under the 1989 Act. *See* Texas Workers' Compensation Commission Appeal No. 93412, decided September 28, 1992. The hearing officer accorded presumptive weight to this validly prepared report and determined that the "great weight of the other medical evidence is not contrary to [Dr. C's] medical evaluation." There is sufficient evidence in support of this determination and legal authority for the extraordinary procedure followed in this case. We do not find merit in the claims of error set forth above. Accordingly, the decision is affirmed.

Stark O. Sanders, Jr.
Chief Appeals Judge

CONCUR:

Joe Sebesta
Appeals Judge

Lynda H. Nesenholtz
Appeals Judge