APPEAL NO. 93902

This appeal arises under the Texas Workers' Compensation Act of 1989 (1989 Act), TEX. LAB. CODE ANN. § 401.001 *et seq*. (formerly V.A.C.S., Article 8308-1.01 *et seq*.). On June 1, 1993, a contested case hearing was held in (city), Texas, with (hearing officer) presiding. He determined that respondent (claimant) had not reached maximum medical improvement (MMI). Appellant (carrier) makes various assertions in regard to the effect of an agreement between the parties, states that it was error to exclude the testimony of the benefit review officer, states that the designated doctor's opinion was not outweighed by other medical evidence, that the hearing officer did not timely file his opinion, and that the decision is against the great weight of the evidence. Claimant did not respond.

DECISION

We affirm.

Claimant injured his back in late (month) or early (month/year) when he was stacking boxes while working for (employer). He saw (Dr. F) but (Ms. De--wife of claimant) testified that Dr. F decided not to treat claimant anymore because "the insurance company was giving him--pardon my French--hell and that he did not want to continue in this relationship anymore. . . ." Dr. F, however, had stated that claimant could return to work and opined that MMI was reached on January 17, 1992, with 13% impairment. The carrier disputed the impairment rating. A designated doctor was appointed.

The Texas Workers' Compensation Commission (Commission) selected and appointed (Dr. W) to be the designated doctor. On May 12, 1992, Dr. W provided a report which said that claimant had not reached MMI. He recommended an MRI and "possibly a bone scan." He concluded by saying, "I think he needs further work up at this time before determining MMI." Thereafter, by letter dated July 17, 1992, Dr. W wrote to carrier and stated he had reviewed an MRI "you sent" and concluded that MMI was reached on May 12, 1992, with nine percent impairment.

On July 23, 1992, a benefit review conference (BRC) agreement was signed between the claimant, the carrier, and the BRC officer. It provided that there were two issues. (The parties testified that no one had received the July 17th report of Dr. W at the time of this BRC.) The substance of the agreement appeared as follows:

(1)	Who is the treating physician?	(1)	Parties agree that GD will be the Agreed Treating Physician Dr. D will determine the date of Maximum Medical Improvement & Impairment Rating.
(2)	Dates temporary benefits are due.	(2)	Parties agree TIBs will

be paid from 10-30-91 thru 7-22-92 (38 wks) then partial benefits due at 70% while (claimant) is attending work hardening.

The hearing officer made the following findings:

3.The agreement executed on July 23, 1992 provides, in part, that Dr. D will determine the date of maximum medical improvement and impairment rating.

4.The parties intended that Dr. D make findings concerning maximum medical improvement/impairment rating and that these findings would be controlling.

On behalf of the carrier, adjuster (BB) testified. She was at the BRC and signed the agreement on behalf of the carrier. In response to a question of the hearing officer about whether Dr. W's July 17th letter of MMI had been received, she stated:

No, we did not. It was not like it was withheld by the commission or the (claimant) or us. Nobody had it. And no one was aware that the testing in turn, the MRI, or whatever it was that (Dr. W) had wanted, had been sent back to him during the July 23rd hearing. We were not even aware that (Dr. W) was going to even render or do a follow-up opinion. But -- therefore, we were just trying to get him under continued care, treatment and (Dr. D) was just considered to take (Dr. F's) place as the treating physician, since (Dr. F) did not want to continue his treatment. (emphasis added)

BB went on to testify that Dr. D was not discussed as a designated doctor. She added that as Dr. D would be the treating doctor, the carrier would want to "see his opinion as to what he felt of the claimant, but in no way would we mean for him to take place (sic) of a designated doctor." She agreed that she filled in the agreement, stating that the BRC officer made some suggestions.

Ms. De testified that she was at the BRC with claimant and that it was her understanding that Dr. D would replace Dr. W. She believes that the word "designated" was inadvertently left out of the agreement.

The carrier took the position at the hearing that Dr. D was the "agreed treating doctor" but that he was to determine MMI and impairment because the carrier wanted this input; his opinion would be part of the medical evidence as to these points, but would not assume the mantle of presumptive weight. (Dr. D stated on January 15, 1993, in a letter to (Dr. Fo) that MMI has not been reached.)

On appeal, the carrier begins its argument by stating:

> Movant is in agreement with Hearing Officer's Finding of Fact No. 4 in which he states that the parties intended that (Dr. D) make findings concerning maximum medical improvement/impairment rating and that these findings would be controlling.

This may not be what the carrier meant to say; later in the appeal the carrier notes that it merely wanted an opinion as to MMI and impairment since Dr. W had not made such a finding (insofar as was known) as to these points at that time. Carrier then restated that at the time of the agreement Dr. D had not been discussed as the designated doctor and argues that the evidence does not support Finding of Fact No. 4.

The provisions of the agreement in question are open to interpretation and have certain inconsistencies. For instance, the parties used the term "agreed treating physician." At that time Article 8308-4.62 of the 1989 Act applied and allowed the claimant an initial choice of doctor and the right to one change by notifying the Commission of that change. In addition, it was not considered a change under Article 8308-4.64 of the 1989 Act if the original physician became unavailable or unable to perform. No agreement was needed for claimant to choose a treating doctor after Dr. F stopped treatment. On the other hand, at that time, Articles 8308-4.25 and 4.26, both refer to whether the parties "agree" as to a designated doctor, indicating that the phrase "agreed designated doctor" would have a basis in statute.

The 1989 Act at Article 8308-4.26(d) provides that "a doctor" may certify a claimant as having reached MMI, but the 1989 Act does not even state that the designated doctor "determines" MMI or the impairment rating; Articles 8308-4.25 and 4.26 say the designated doctor "shall report," and Article 4.25(b) states that the "commission shall base its determination as to whether the employee has reached maximum medical improvement. . . ." Not even the designated doctor is referred to as making a determination. Absent an agreement between the parties, (*see* Section 410.028) the Commission makes determinations (*see* Sections 410.168 and 410.204). Calling attention to the word "determine" in the agreement does not indicate that its use is viewed as imparting special power, but we observe also that such word is not generally used in the 1989 Act to indicate responsibilities placed on any doctor. The hearing officer is the sole judge of the weight and credibility of the evidence. In an agreement that was ambiguous, he could consider that carrier wrote the agreement - possibly with suggestions by the BRC officer, but claimant did not compose it. The meaning given the agreement by the hearing officer was based on sufficient evidence of record. The agreement, as written, is not without inconsistency whether interpreted as done so by the hearing officer or given a more limited scope.

The carrier states also that the testimony of the BRC officer was erroneously excluded. Carrier, in a letter to the Commission dated May 3, 1993, observes that the "claimant" wanted to subpoena the BRC officer. In carrier's opening statement, it said that it would "request" that the BRC officer be brought in to testify. In its presentation of

evidence, however, the carrier never called the BRC officer to testify; the hearing officer, therefore, never ruled that the BRC officer could not testify. The record shows that the question was often touched upon but not met directly. At a point in the hearing when the hearing officer had another hearing scheduled to begin shortly, he said:

> I want to look and I want to consider myself several options. One of them is the option of (BRC officer) and what he might or might not say. I guess, for the record, (carrier) would you prefer -- would you urge to me that you are entitled or it would be in the best interest of whatever justice to get (BRC officer) in and allow him to answer some questions, so to speak?

To which the carrier replied, "I think so. I think it would be helpful." The hearing officer then observed that he would not do that today, "but I am strongly considering doing that in some fashion." Later, carrier proposed to the hearing officer, "[w]hat about if we pose the questions to (BRC officer) in the form of a deposition or --." The hearing officer replied that such was an excellent idea; he then chose to describe the possibility of getting a statement and talked of appellate rights. He added that if he got anything from (BRC officer) he would provide each party with a copy. He then pointed out that he was recessing the hearing. After this, the carrier gave a closing argument without obtaining anything more specific as to what, if anything, would be done in regard to testimony of (BRC officer). Finally, the hearing officer observed that the hearing was recessed for ten days. "If either one of you think of anything else you need, contact me in the way of documents, whatever. If I do not hear anything, I will have some response for you as far as I am closing the hearing." These exchanges indicate a lot of talk but very little action. The carrier's appeal does not indicate any attempt to obtain a statement or a deposition from (BRC officer) during the time that the record was left open. In these circumstances, while the rulings of the hearing officer were less than clear, the testimony of (BRC officer) was not excluded by the hearing officer.

The failure to write a decision within 10 days has been held not to void a decision and order because the applicable rule is not mandatory. *See* Texas Workers' Compensation Commission Appeal No. 92456, decided October 8, 1993.

The hearing officer is not required to give presumptive weight to a designated doctor's opinion when the parties have chosen to enter into an agreement as to how MMI and impairment rating will be determined. *See* Section 401.011(3) which states that an agreement resolves a dispute. No issue was raised on appeal that the "agreement" was actually a "settlement;" the facts do not require that it be treated as a settlement on review.

With a finding by the fact finder that the agreement indicated the parties would follow the determination of Dr. D as to MMI and impairment rating, the decision and order that MMI has not been reached reflects the determination of Dr. D that MMI has not been reached and is sufficiently supported by the evidence. Affirmed.

Joe Sebesta
Appeals Judge

CONCUR:

Philip F. O'Neill
Appeals Judge

Gary L. Kilgore
Appeals Judge