APPEAL NO. 93955

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 28, 29 and September 15, 1993, a contested case hearing was held in (city), Texas, with (hearing officer) presiding. He determined that the appellant (claimant) reached maximum medical improvement (MMI) on January 24, 1993, with eight percent impairment. Claimant asserts errors, primarily in the report of the designated doctor, (Dr. B), the process, the decision of the hearing officer, and the exclusion of certain evidence. Carrier replies that the hearing officer should be upheld.

DECISION

We reverse and remand.

The date of injury was "on or about (date of injury)." At that time claimant tripped on a bolt and injured his back. He had surgery in April 1992, which was performed by (Dr. A). After this surgery to repair a degenerated disc at L4-5, claimant has not recovered well and has been seen by several doctors. Dr. A found that claimant reached MMI on January 12, 1993, with 25% impairment. Both claimant and carrier disputed this opinion. Claimant uses a wheelchair outside of his mobile home where he testifies that he moves around by his ability to hold onto objects, such as tables. He testifies to constant pain, frustration, inability to walk normally, bladder problems, inability to work, and other problems.

He has seen several neurologists including (Dr. R), (Dr. W), and (Dr. C). He has also seen (Dr. We) a neurosurgeon. In September, 1992, Dr. We stated, in part:

> I find no evidence that there is a continued anatomic lesion in his lumbar spine, compressive in nature which would be causing his radicular-type symptoms.
>
> * * * * *
>
> His studies do not show evidence of a compressive lesion and his symptoms are probably most consistent with arachnoiditis.

Then in March, 1993, Dr. We added:

> As far as [claimant's] problems are concerned, apparently there are some questions as to the diagnosis of arachnoiditis. This, of course, is a diagnosis which is not always easy to make. It is a combination of the patient's clinical symptoms as well as objective findings. The objective findings suggesting arachnoiditis with this gentleman include the fact that he has had an MRI with gadolinium which suggested it, as well as an EMG and a postmyelographic CT scan which shows nerve root clumping. The causes of arachnoiditis include previous surgery, myelography or infection.

The Texas Workers' Compensation Commission (Commission) appointed Dr. B in

March 1993, to provide an impairment rating only. He reported on March 23, 1993, that MMI was reached on January 24, 1993, with eight percent impairment. In answer to questions propounded by the hearing officer, Dr. B, on September 1, 1993, pointed out that he observed no atrophy in either the muscles of the lumbar area or of the "lower extremity." He states that he recommended further follow up including with a urologist, adding, "[i]f this has been carried out, I am totally unaware of it." (Since Dr. B also refers to reports by Dr. We and Dr. C by name and does not refer to the report of (Dr. D), a urologist, dated June 16, 1993, entered into evidence as Claimant's Exhibit 23, a question arises of whether Dr. B saw the report of Dr D. This question can impact upon Finding of Fact 11 which said that Dr. B evaluated the complete clinical history of claimant.) Dr. B goes on to say:

> There is no clinical evidence in the patient's objective studies to indicate the presence of arachnoiditis.
>
> * * * * *
>
> It is my impression, after reviewing all of the medical records, that [claimant] does not have arachnoiditis based on objective studies not deposition (sic) of probabilities or lack of a better diagnosis.

The report of the designated doctor, Dr. B, which found MMI on January 24, 1993, with eight percent impairment had called for further testing without making it clear whether such testing was necessary to provide a rating. The report stated in this regard:

> Yet in view of the patient's <u>subjective</u> complaints and apparent paralysis, it was our recommendation that the patient undergo further diagnostic testing. The patient is claiming sexual dysfunction and paralysis which needs additional documentation to render an impairment.
>
> The patient was initially scheduled for additional testing, however, the patient cancelled this process. With the absence of additional documentation to substantiate and truly delineate the patient's impairment status, we are unable to grant any additional impairment, other than that granted under Table 49, section 2e which renders a 5% impairment. (emphasis added)

The designated doctor's report is also noted to state:

> TWCC guidelines indicate that when a medical condition has reached a static course under appropriate medical treatment and there has been no change in the clinical condition of the patient after three months, maximal medical improvement can be assumed.

Claimant sought to introduce six medical articles that dealt with arachnoiditis and the lower spine. Each was objected to on the basis that the only issues were MMI and impairment and that the appeals panel has stated that such are to be decided "by treating physicians." The hearing officer excluded each. One of the six stated, "arachnoiditis may develop up to

several years after an episode of meningitis (infection of the meninges) . . . ." Dr. C's report, in evidence, stated that claimant thought he had had meningitis in Vietnam in the 1968 time frame.

Claimant took issue with the fact that the designated doctor was over 75 miles from his home. He cited Texas Workers' Compensation Commission Appeal No. 91073, decided December 21, 1991. He pointed out that the designated doctor did not refer to the report of a test of (Dr. M) performed in March, 1992 which indicated stenosis. He objected to the fact the hearing officer took over 10 days to provide his decision. He stated that the hearing officer should not have reopened the hearing; that the hearing officer improperly compelled additional discovery; and that he asked subjective questions. He stressed that a designated doctor was appointed without power to order further testing by other doctors. While he takes issue with several Findings of Fact from 10 through 13, the most significant findings in determining the decision were 10 and 13. Finding of Fact 10 said that the designated doctor certified that MMI was reached on January 24, 1993, with eight percent impairment. Finding of Fact 13 said that the designated doctor's report was not contrary to the great weight of the other medical evidence.

Appeal No. 91073, *supra*, specifically dealt with medical examinations ordered under the 1989 Act at Article 8308-4.16 (Section 408.004), and states it is the article "which Rule 126.6(h) implements." (Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 126.6(h)) It did not discuss designated doctors or Rule 130.6. Texas Workers' Compensation Commission Appeal No. 92233, decided July 16, 1992 pointed out that Rule 126.6 dealt with required medical examinations while Rule 130.6 dealt with designated doctors. Rule 130.6 contains no provision imposing any restriction on distance regarding a designated doctor. Appeal No. 91073 is not controlling in this case; the appointment was not flawed because of distance to be travelled. The hearing officer did not err in refusing to return the case for appointment of another designated doctor.

Whether the hearing officer completes his report in 10 days or not is not mandatory. *See* Texas Workers' Compensation Commission Appeal No. 92456, decided October 8, 1992.

The designated doctor may, upon reviewing the medical evidence, choose a date of MMI that predates the date of his examination. *See* Texas Workers' Compensation Commission Appeal No. 92648, decided January 21, 1993. However, in view of the recitation as to an assumption of MMI in the designated doctor's report, the basis for choosing January 24, 1993, as the date claimant reached MMI is open to question and should be one point raised by the hearing officer to the designated doctor. If the designated doctor based the MMI date on an assumption, he should be also queried as to the specific basis that calls for making such an assumption.

The hearing officer may reopen a hearing and may query the designated doctor about his report. *See* Texas Workers' Compensation Commission Appeal No. 92617, decided January 14, 1993.

The claimant states that the hearing officer erred in compelling additional discovery (by asking questions of the designated doctor) and cites the 1989 Act, Article 8308-6.33 (c) and (d) (*see* Sections 410.160 - 410.162). These provisions apply only to the "parties" and do not apply to the hearing officer, who is not a party.

The claimant also cites Texas Workers' Compensation Commission Appeal No. 91038, decided November 14, 1991, which dealt with a sole cause question, for the proposition that subjective questions cannot be asked of the designated doctor. While it is true that the designated doctor has to base his impairment rating on objective data, he does not have to disregard subjective data in determining MMI. The criteria for MMI and impairment are different. *See* Texas Workers' Compensation Commission Appeal No. 93482, decided July 29, 1993. The 1989 Act controls the determination of MMI, not the Guides to the Evaluation of Permanent Impairment, third edition, second printing, dated February, 1989, published by the American Medical Association (Guides) (*see* Section 408.124). In addition, the designated doctor's report may be used as part of the evidence to help the hearing officer determine injury or scope of injury, even though the designated doctor's opinion on those points is entitled to no presumptive weight; opinion as to injury is not limited to the use of objective data as it is in providing an impairment rating. *See* Texas Workers' Compensation Commission Appeal No. 93735, decided October 4, 1993.

The claimant objects on appeal to the designated doctor not referring to the report of Dr. M of March 1992. This report predated the surgery of April 1992, which was performed by Dr. A. The designated doctor did refer to Dr. A and his surgery, which did not specify any stenosis in the operative report. The failure to mention Dr. M in these circumstances is not reversible error.

The hearing officer is only required to make findings of fact and conclusions of law; he is not required to provide a Statement of the Case or Statement of the Evidence. *See* Section 410.168. When the hearing officer chooses to set forth more information in his decision, he is not required to mention every piece of evidence admitted, but should generally provide a reasonably fair summary of the material. The contents of the Statement of the Case or Statement of the Evidence do not amount to reversible error.

The claimant also stresses that he was sent to one designated doctor, who, he says, has no power to send him to any other doctor for testing. Texas Workers' Compensation Commission Appeal No. 93007, decided February 18, 1993, states that the designated doctor can call for added tests and consults.

The claimant objects that no impairment rating was provided as to "station and gait" found on page 99 of the Guides. The hearing officer as finder of fact decides whether the impairment rating reflects the correct injury. *See* Appeal No. 93735, *supra*. If the hearing officer determines that the claimant has not shown the injury includes a condition that is applicable to "station and gait," the absence of it in the designated doctor's opinion will probably not cause the hearing officer to find the report invalid or that the great weight of medical evidence is to the contrary.

On remand, in addition to the query to the designated doctor as to his basis for finding MMI on January 24, 1993, the hearing officer should also query the designated doctor as to his impairment rating; the reference to both eight percent and five percent should be pointed out (table 49, which is referenced, does not appear to list five percent under the lumbar column, but the numbers 8 and 10 do appear therein). (*See* Texas Workers' Compensation Commission Appeal No. 93769, decided October 11, 1993, which ordered a remand when a designated doctor's amounts for impairment varied as to their basis.) In addition, the designated doctor should be asked if he considered the report of the urologist, Dr. D, dated June 16, 1993, and if he did not, it should be provided for his consideration in keeping with his statement on page two of his letter to the hearing officer of September 1, 1993, that he was unaware of claimant having seen a urologist; he should be asked whether Dr. D's report provides a basis for increasing the impairment rating. (The appeals panel does not indicate that a claimant may always refuse testing and compel delay in a designated doctor's report until testing is later done; in this case, for whatever reason, the report of Dr. D was in existence at the time Dr. B was queried by the hearing officer--so if not considered, it should be.)

The six medical articles that were offered were erroneously excluded. Texas Workers' Compensation Commission Appeal No. 92495, decided October 28, 1992, provides that even non-medical evidence should be admitted, when relevant as to issues of MMI and impairment. In addition, Texas Workers' Compensation Commission Appeal No. 93407, decided July 7, 1993, provides that medical evidence may include that of a non-physician. When newspaper articles were correctly excluded in Texas Workers' Compensation Commission Appeal No. 92202, decided July 6, 1992, it was noted that they are generally inadmissible, a statement that does not apply to medical articles. Finally, Appeal No. 93735, *supra*, pointed out that the designated doctor's opinion may be used to help the hearing officer determine whether injury occurred, extent of injury, or whether there was an aggravation. While none of the latter were named as issues in this hearing, the question of whether arachnoiditis was caused by the injury was clearly litigated; any relevant evidence can be used to address a question of injury. As stated, when the designated doctor provides an opinion as to extent of injury, he does so without a presumption, but his opinion therein should be considered as would be any other medical evidence.

Another area in which the designated doctor is entitled to no presumption is in finding MMI when he was only appointed to find impairment. *See* Texas Workers' Compensation Commission Appeals No. 93710, decided September 28, 1993, and Appeal No. 93943, decided December 2, 1993. The lengthy appeal does not appear to assert that the designated doctor should have been given no presumption as to his determination of MMI, but upon remand, as stated, the designated doctor will be queried about his basis for MMI.

The hearing officer is the sole judge of the weight and credibility of the evidence. *See* Section 410.165. The appeals panel will not reverse his decision based on an evidentiary finding unless it is against the great weight and preponderance of the evidence. He certainly may weigh one doctor's opinion against that of another and choose between conflicting opinions. With no issue as to the extent of injury before the hearing, he was not

compelled to make a specific finding whether or not arachnoiditis was caused by the injury. Obviously, as fact finder he must decide whether the designated doctor considered the correct injury when he determines whether the great weight of other medical evidence is contrary to the opinion of the designated doctor--in this case as to impairment rating.

Upon remand, the hearing officer should reconsider whether MMI has been reached based on the response of the designated doctor to his question concerning the basis for finding MMI. He should consider that the Commission appointed the designated doctor only to provide an impairment rating when he considers the evidence as to MMI. He should consider the medical articles and all medical evidence when he evaluates the injury of (date of injury). He should consider whether the designated doctor has provided a correct impairment rating that is not contrary to the great weight of other medical evidence; the designated doctor should apply a rate that is reflected in the Guides, and his own report of the rate should not be contradictory to itself; the designated doctor should state whether Dr. D's report was considered previously and if not, it should be considered in providing the rate of impairment. The hearing officer may reconsider and develop the evidence together with additional or different findings of fact and conclusions of law in a manner consistent with this decision and as determined appropriate by the hearing officer in reaching a decision. The hearing officer may choose to collect and consider additional evidence with or without another hearing, but if evidence is solicited, each party should be offered the opportunity to comment upon and/or rebut such evidence. Since reversal and remand necessitates issuing a new decision 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 the new decision is received, pursuant to Section 410.202. *See* Texas Workers' Compensation Commission Appeal No. 92642, decided January 20, 1993. All other points of error, not previously addressed, have been considered and rejected.

_____
Joe Sebesta
Appeals Judge

CONCUR:

_____
Thomas A. Knapp
Appeals Judge

CONCURRING IN PART AND DISSENTING IN PART

I concur with the majority opinion except to the extent it seeks further clarification from the designated doctor as to the basis for the date on which he certified MMI. While perhaps somewhat inartfully worded, I believe the designated doctor's report shows in substance that he believed the claimant had reached "the earliest date after which, based on reasonably medical probability, further material recovery from or lasting improvement to an injury can no longer reasonably be anticipated." *See* Section 401.011(30)(a). Therefore, I would not remand for clarification of this particular issue.

_____
Lynda H. Nesenholtz
Appeals Judge