APPEAL NO. 94078

This appeal is brought pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act). A contested case hearing was held on November 11, 1993, in (city), Texas, with (hearing officer)., presiding as hearing officer. The issues at the hearing were whether the respondent (claimant) reached maximum medical improvement (MMI), and if so, what was his correct impairment rating. The parties stipulated and the hearing officer found, that the Texas Workers' Compensation Commission (Commission) appointed "Workable Center" (Center) as designated doctor in this case to determine MMI and assign an IR. Since the Center was not an individual physician but a business entity, the hearing officer further determined that no designated doctor was properly appointed as part of the dispute resolution process in this case and, therefore, the issues of MMI and IR were not ripe for adjudication.

The appellant (carrier) appeals this decision arguing that the hearing officer created an issue of the validity of the designated doctor's appointment "when the issue was not properly before the Contested Case Hearing Officer" and that neither party raised this issue until after the hearing officer "suggested that such a ruling needed to be made." The carrier also argues that the appointment of the Center as designated doctor was not defective because the "intent of the Commission's Disability Determination Officer [DDO] was to accept the certification of any physician associated with the [Center]." Since (Dr. D) works for the Center and completed a "Report of Medical Evaluation" (TWCC-69), the carrier asks that the Appeals Panel reverse the decision of the hearing officer and render a new decision adopting the report of Dr. D as the "designated doctor" in this case. The claimant replies that Dr. D was not selected as a designated doctor by the Commission and that his opinion cannot be given presumptive weight. Claimant further argues that issues of MMI and IR cannot be resolved until a designated doctor is appointed and requests that the decision of the hearing officer be affirmed.

DECISION

The decision and order of the hearing officer are affirmed.

It was not disputed that the claimant suffered an injury in the course and scope of his employment as a convenience store clerk when, on (date of injury), he resisted a robbery attempt. In the ensuing struggle with the robber, he was thrown against a counter and injured his back. The exact extent of his injuries, to the degree it directly bears on both MMI (now statutorily reached) and IR, remains in dispute. Five different proposed dates of MMI spanned an 18 month period with IRs ranging from zero percent to the 52 percent assigned by (Dr. H), the claimant's treating physician.

The hearing officer refused to decide the stated issues of MMI and IR because he believed, based on his review of the evidence, that no valid designated doctor had first addressed these issues. The initial and dispositive question on appeal is thus whether the hearing officer can be compelled, under these circumstances, to determine disputed MMI and IR. We conclude that he acted properly and within his authority to decline to decide

these issues. We have pointed out in the past the unique role of the designated doctor in determining a correct date of MMI and IR and that the designated doctor is an agent of the Commission. *See, e.g.*, Texas Workers' Compensation Commission Appeal No. 92412, decided September 28, 1992. For this reason it is essential that the Commission take the necessary and timely steps to insure a "good and viable" designated doctor program beginning with a properly appointed designated doctor. Texas Workers' Compensation Commission Appeal No. 931071, decided January 6, 1994. *Compare* Texas Workers' Compensation Commission Appeal No. 931106, decided January 11, 1994, for a discussion of the options available to a hearing officer to insure compliance by a properly selected designated doctor with the 1989 Act and Commission rules.

In previous cases we have advised that the selection of a clinic as a designated doctor "does not appear to comply with (Sections 401.011(17) and 408.125(d)) of the 1989 Act." Texas Workers' Compensation Commission Appeal No. 93833, decided October 25, 1993. *See also*, Texas Workers' Compensation Commission Appeal No. 93769, decided October 11, 1993, and TWCC Advisory 93-04 which views the pertinent statutes and Commission Rules pertaining to designated doctors as contemplating medical examinations "by doctors." However, in neither of these cases was an issue raised about the validity of the appointment of a clinic as a designated doctor and the parties, at least by implication, agreed that the clinic doctor's report would function as, and receive the deference of, a report of a designated doctor. Because the parties did not object to the hearing officer proceeding to a determination of MMI and IR under those circumstances, we found no reversible error in that procedure. However, we pointed out that the hearing officer is not compelled to resolve these issues without a properly appointed designated doctor, and the hearing officer could equally as well have continued the hearing in order to have the claimant examined by a designated doctor as provided for in the 1989 Act. The same options are generally available to the hearing officer when faced with other problems concerning the report of a designated doctor, even when not raised as issues, or affirmatively waived as issues, by the parties, such as failure to sign a TWCC-69 or failure to follow the mandated version of the American Medical Association's Guides the Evaluation of Permanent Impairment, 3rd edition, 2nd printing, February 1989. *See also* Texas Workers' Compensation Commission Appeal No. 94052, decided February 28, 1994, for a discussion of what action a hearing officer may take when confronted with disputes about underlying unresolved issues that bear directly on the issues presented for resolution at a contested case hearing.

In its appeal, carrier cites Texas Workers' Compensation Commission Appeal No. 93612, decided September 3, 1993, for the proposition that the hearing officer should have proceeded to a decision on MMI and IR in light of all the medical evidence before him and afforded Dr. D the status of designated doctor. In that case, the hearing officer in effect invalidated a designated doctor's report and did not give it presumptive weight on the issues of MMI and IR because, among other reasons, in the opinion of the hearing officer, the appointment of the designated doctor was "premature." The appeals panel reversed and rendered an opinion which adopted the report of the designated doctor. The decision in No. 93612 pointed out that the validity of the appointment of the designated doctor was "crystal clear." In the present case, the validity of the appointment was highly suspect and

the issues of MMI and IR were being hotly contested with accusations about the quality of the examinations done by various doctors, possible bias on the part of a so-called "carrier" doctor, and arguments of what weight, if any, to give Dr. D's report. Under these circumstances, we are unwilling to hold that the hearing officer did or did not have to go forward and resolve the issues of MMI and IR without benefit of a report of a designated doctor on the record before him. The option was simply his and we find no reversible error in his conclusions that no designated doctor had been properly appointed and that the issues of date of MMI and IR were not ripe for decision.

The carrier also asserts that "it seems clear that the intent of the Commission's Disability Determination Officer was to accept the certification of any physician associated with the Center," and that since Dr. D meets this criterion, he is a designated doctor and the Appeals Panel should render in accordance with his report. Disregarding the lack of evidence on this point, we do not consider the "intent" of the DDO, whatever that may have been, determinative of the validity of an appointment of a designated doctor. The date of MMI and correct IR are questions of fact. As an appellate body, we normally are not fact finders. Given the lack of a designated doctor's report and the conflicting evidence in this case we decline the invitation to render a decision as suggested by the carrier.

Finally, we note that the actual document appointing the Center as the designated doctor was not introduced into evidence at the hearing. It was first produced by the claimant in response to the carrier's appeal. We do not consider new evidence on appeal except in limited circumstances not present here. Texas Workers' Compensation Commission Appeal No. 93970, decided December 9, 1993. In this case, the parties' stipulation that the Center was the appointed designated doctor created a sufficient record for us to decide this appeal. We caution, however, that whenever a party intends to rely on the report of a designated doctor, that party, or the hearing officer, should insure that documentary evidence of the appointment of the designated doctor be made part of the record. We suggest that the Commission consider prompt appointment of a designated doctor in order to resolve the issues of MMI and IR. *See* Texas Workers' Compensation Commission Appeal No. 92511, decided November 12, 1992.

The decision and order of the hearing officer are affirmed.

Alan C. Ernst
Appeals Judge

CONCUR:

Philip F. O'Neill
Appeals Judge

Thomas A. Knapp
Appeals Judge