APPEAL NO. 94081

This appeal arises pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act). A contested case hearing (CCH) was begun on August 30, 1993, and continued on December 14, 1993. Both sessions of the CCH were conducted in (city), Texas, with (hearing officer) presiding as hearing officer. The issues at the CCH were the date of maximum medical improvement (MMI) and the appellant's (claimant herein) correct impairment rating. The hearing officer found that the claimant reached MMI on September 13, 1992, with a 12% whole body impairment based upon the report of a designated doctor selected by the Texas Workers' Compensation Commission (Commission). The claimant appeals contending that the designated doctor did not properly apply the Guides to the Evaluation of Permanent Impairment, third edition, second printing, dated February 1989, published by the American Medical Association (AMA Guides) and that his opinion as to impairment is therefore invalid. The claimant also takes issue with the MMI date of the designated doctor arguing that it does not take into account the psychological component of his injury. Finally, the claimant argues that one of his treating doctors expressed the opinion that the claimant has a two percent whole body impairment due to scarring and the designated doctor does not address the issue of impairment due to scarring. The carrier argues that the claimant has failed to establish that the designated doctor did not properly apply the AMA Guides, did not provide any medical evidence to overcome the opinion of the designated doctor in regard to the MMI date, and is raising the issue of scarring for the first time on appeal with no evidence that the designated doctor was required by the AMA Guides to rate scarring.

DECISION

We affirm the decision of the hearing officer regarding MMI but reverse the hearing officer's decision and remand for further consideration and, if necessary, development of the evidence regarding the issue of impairment.

The claimant was the only witness to testify live at the CCH. The claimant testified that he was employed as a truck driver on (date of injury), when he fell asleep at the wheel and was involved in a very serious motor vehicle accident, running into a car and killing five people. The claimant testified that as result of the accident he injured his head, neck, shoulders, low back and knees and suffered psychological injuries due to the accident.

The claimant testified that he was treated by a number of different doctors for his physical and psychological injuries. The Commission selected (Dr. O) to be the designated doctor.[1] In August 1992 the claimant underwent various range of motion, physical and psychological testing by and at the direction of Dr. O. Dr. O felt that a neuropsychological examination was needed to properly evaluate the claimant's injury and he referred the claimant to a neuropsychologist for examination. Apparently there was difficulty in scheduling this evaluation and it was not performed until December 1992. After receiving the results of the evaluation in February 1993, Dr. O issued a narrative report along with a Report of Medical Evaluation assessing a 12% impairment rating. One component of this

[1] This was done by order signed by KB signed June 25, 1992.

rating was seven percent due to specific disorders of the lumbar spine and five percent due to brain (cognitive) injury which combined for a 12% whole body impairment.

On February 16, 1993, the claimant's attorney wrote a letter to the designated doctor.[2] In this letter claimant's attorney stated he believed that Dr. O's rating was invalid for a number of reasons and requested that Dr. O respond. Specifically, the letter questioned Dr. O's failure to rate the claimant's knees and neck, his failure to provide a rating for loss of range of motion, and the correctness of his rating for mental and behavioral disorders. Dr. O responded that he did not rate the claimant's knees because he had "no medical documentation showing either a new injury [to the knees] or the aggravation of the old injury."[3] Dr. O stated that with a soft tissue injury to the neck, it is discretionary with the examining doctor to give up to four percent impairment, but due to the claimant's invalidation of cervical range of motion testing, lack of cervical muscle spasms, and indications of symptom magnification, he would give zero impairment for the neck.

Claimant's attorney was dissatisfied with Dr. O's response and sent a letter to the Commission requesting that the Commission propound further questions to Dr. O. At the time of the first session of the CCH on August 30, 1993, no action had been taken by the Commission on this request, so the hearing officer decided she would send a letter to Dr. O propounding the questions and the parties then agreed to recess the hearing.[4] The hearing officer wrote the designated doctor a letter requesting the basis of his opinion that the claimant did not suffer a knee injury in the accident either by new injury or aggravation of his pre-existing knee condition. The letter also requested that Dr. O express an opinion as to the impairment to the claimant's knees without regard to causality. The letter requested an impairment rating of claimant's neck injury and left shoulder injury. The hearing officer's letter also requested that Dr. O repeat range of motion testing, obtain an MMI date and impairment rating from the neuropsychologist to whom he had referred the claimant, and express his own opinion as to MMI date.

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[2]We have frequently and soundly criticized unilateral communications between a party and a designated doctor. *See* Texas Workers' Compensation Commission Appeal Nos. 92595, decided December 21, 1992; 93272, decided May 24, 1993; 93336, decided June 16, 1993; 93496, decided August 3, 1993; 93613, decided August 24, 1993; 93702, decided September 27, 1993; 93762, decided October 1, 1993; 93835, decided November 3, 1993; 93888, decided November 12, 1993; 93970, decided December 9, 1993; 931107, decided January 21, 1994; 931130, decided January 26, 1994. We again emphatically state that such activity is disapproved for the reasons stated in the foregoing decisions. In the present case the claimant's attorney stated that he was unaware at the time he wrote this letter in February 1993 that this practice was improper and indicated that he would not further engage in it.

[3]The claimant had previous knee injuries which resulted in knee surgery. Dr. O also stated that in light of the prior surgery it was very difficult to use the AMA Guides to obtain an impairment rating.

[4]For a party to request the Commission to communicate a request for information to the designated doctor is certainly an appropriate way to seek clarification from the designated doctor. The hearing officer is to be commended for facilitating this clarification as such action both discourages unilateral communication between a party with a designated doctor and furthers the quest for truth.

Dr. O re-examined the claimant and reconducted range of motion testing in response to the hearing officer's letter. In his report of this re-examination Dr. O indicated that he did not believe that there was any structural worsening of the claimant's knees due to his present accident. Dr. O stated that if he rated the impairment to the claimant's knees, then he would rate the right lower extremity as 35% impaired, translating into a 14% whole body impairment. He also stated that he would rate the left as 21% impaired which equaled an eight percent whole person impairment. In regard to the neck, Dr. O stated that under the AMA Guides, the rating would range between zero and four percent based upon a medically documented neck injury with six months of medically documented pain, but that due to the claimant's invalidation of range of motion studies and other validity criteria, he would assign zero impairment. Dr. O also explained that he would rate the left shoulder at zero percent impairment due to the results of range of motion studies. As to the neuropsychological assessment, Dr. O declared that medical literature indicated that after 18 months from the date of the injury the claimant should be at MMI from his head injury. He stated that with the neuropsychological condition from which the claimant suffered, there was a range of impairment (from 5% to 15%). He stated that he assigned five percent because again the claimant's psychological profile indicated symptom magnification and invalidation of testing. Dr. O's final opinion was that the claimant had attained MMI on September 13, 1992, with 12% permanent impairment. He issued an amended TWCC-69 to that effect.

Aside of Dr. O's reports, there is limited medical evidence in the record. The claimant submitted a report from a (Dr. C) from March of 1992 in which he expressed the opinion that the claimant had a 14% whole body impairment rating. There is a TWCC-69 from a (Dr. D), dated in May 1992, which stated the claimant had not attained MMI but had a four percent whole body impairment. Another TWCC-69 is in evidence from (Dr. H) stating that the claimant attained MMI on January 21, 1993, with zero percent impairment. There is also a TWCC-69 in evidence from (Dr. S) which describes impairment due to scars on the claimant's face and scalp and rates the claimant's impairment from scarring at two percent with an MMI date of November 20, 1991.

Section 408.122(b) provides:

> If a dispute exists as to whether the employee has reached maximum medical improvement, the commission shall direct the employee to be examined by a designated doctor chosen by mutual agreement of the parties. If the parties are unable to agree on a designated doctor, the commission shall direct the employee to be examined by a designated doctor chosen by the commission. The designated doctor shall report to the commission. The report of the designated doctor has presumptive weight, and the commission shall base its determination of whether the employee has reached maximum medical improvement on the report unless the great weight of the other medical evidence is to the contrary.

Section 408.125(e) provides:

If the designated doctor is chosen by the commission, the report of the designated doctor shall have presumptive weight, and the commission shall base the impairment rating on that report unless the great weight of the other medical evidence is to the contrary. If the great weight of the medical evidence contradicts the impairment rating contained in the report of the designated doctor chosen by the commission, the commission shall adopt the impairment rating of one of the other doctors.

We have previously discussed the meaning of "the great weight of the other medical evidence" in numerous cases. We have held that it is not just equally balancing the evidence or a preponderance of the evidence that can overcome the presumptive weight given to the designated doctor's report. Texas Workers' Compensation Commission Appeal No. 92412, decided September 28, 1992. We have also held that no other doctor's report, including the report of the treating doctor, is accorded the special, presumptive status accorded to the report of the designated doctor. Texas Workers' Compensation Commission Appeal No. 92366, decided September 10, 1992; Texas Workers' Compensation Commission Appeal No. 93825, decided October 15, 1993.

Whether the great weight of the other medical evidence was contrary to the opinion of the designated doctor is basically a factual determination. Texas Workers' Compensation Commission Appeal No. 93459, decided July 15, 1993. In the present case, particularly in light of the paucity and inconsistent nature of the medical evidence other than that of the designated doctor, Dr. O, we agree with the hearing officer that the great weight of the other medical evidence is not contrary to the opinion of the designated doctor as to MMI and impairment.

The question remains as to whether the designated doctor properly applied the AMA Guides. Use of the AMA Guides to rate impairment is required by Section 408.124(b). The threshold question in determining whether the designated doctor has properly applied the AMA Guides is determining the extent of a claimant's injury. In other words, to determine whether the AMA Guides have been properly applied, one must know what the injury is that is being rated. This is the crux of the problem in the present case concerning the claimant's alleged knee injury. The claimant testified that he injured his knees in the accident. The designated doctor stated that he did not include any impairment in his rating due to the claimant's knees because he did not believe that the claimant injured his knees, by new injury or by aggravation of his previous knee injuries, in his present accident. The hearing officer made the following Finding of Fact No. 3 which concerned the claimant's injury:

On (date of injury), while driving a big truck for Employer, Claimant fell asleep at the wheel, and ran into a car killing five people and injuring himself by cracking his skull, dislocating both shoulders, injuring his lower back, and knees.

The hearing officer's finding that claimant injured his knees in the accident is certainly both within her province as the fact finder and supported by sufficient evidence. We have

held previously that the extent of injury is a question of fact for the hearing officer. *See* Texas Workers' Compensation Commission Appeal No. 93613, decided August 24, 1993. If there is no injury or aggravation of the claimant's knee condition in the present accident, or no impairment or aggravation to his knees from the compensable injury remaining at the time of MMI, then Dr. O is correct in not rating it. Texas Workers' Compensation Commission Appeal No. 93246, decided May 10, 1993; *See* Texas Workers' Compensation Commission Appeal No. 931098, decided January 18, 1994. If the claimant did injure his knees it was improper for the designated doctor to exclude any impairment for his knees from his rating. Texas Workers' Compensation Commission Appeal No. 93889, decided November 17, 1993; Texas Workers' Compensation Commission Appeal No. 93272, decided May 24, 1993; Appeal No. 931098, *supra*.

We do not find persuasive the claimant's argument that the hearing officer erred in relying on the designated doctor's opinion regarding the date of MMI. As explained, *supra*, the designated doctor's opinion regarding MMI is entitled to presumptive weight. While there were a number of contrary opinions as to MMI, they did not constitute the great weight of the other medical evidence. One reason for the difference of opinion seems to be that the various doctors were rating different aspects of the injury. Dr. S, for instance, only rated for scarring. Dr. O was the only doctor whose records indicated that he considered the psychological aspects of the claimant's injury in determining his MMI date.[5] The claimant argues that he cannot be MMI for his psychological problems because he is still under treatment for them and another doctor, (Dr. M), had found him in December 1992 to be suffering from depression. We have previously held that MMI does not amount to the absence of pain or total recovery, but only that there will be no further substantial recovery from an injury. Texas Workers' Compensation Commission Appeal No. 92686, decided February 3, 1993. Also the hearing officer seems to implicitly reject that the claimant's alleged depression is part of his injury.[6] Under the circumstances of this case we simply do not find the great weight of the other medical evidence to be contrary to the opinion of the designated doctor in regard to MMI and affirm the decision of the hearing officer in regard to MMI which is based upon his opinion.

As to the claimant's contention that the designated doctor failed to rate the claimant's scarring, we appreciate the carrier's argument that claimant should have raised this matter

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[5]Here again there is something of a problem. Dr. O stated that his rating of the claimant's psychoneurological problems involved his rating of the claimant's loss of cognitive function due to his head injury rather than any emotional problems coming from the accident. The claimant alleged extensive depression and other psychological trauma from the accident. The hearing officer never explicitly made a finding as to the extent of the claimant's psychoneurological injury, but by her adoption of Dr. O's MMI date and impairment rating seems to have implicitly adopted his view concerning the extent of injury in this regard.

[6]This was explained in footnote 5. Again the real problem here seems to be determining the extent of injury. Without the same understanding of the extent of injury the doctors are like the blind men in the Indian fable who are trying to describe an elephant. Each examining a different part of the elephant comes up with a very different description of the nature of the animal. *See* Texas Workers' Compensation Commission Appeal No. 931175, decided February 11, 1994.

sooner. Certainly, it would have been better to have requested the hearing officer to inquire about this when requesting she question the designated doctor concerning other matters. Since we are remanding, since Dr. S's report was in evidence below, and since the this question also revolves around the proper impairment rating, we find that on remand the hearing officer should determine what impairment, if any, should be assessed for scarring, consulting the designated doctor if she feels she needs to do so.

Thus the decision of the hearing officer in regard to MMI is affirmed. The decision of the hearing officer in regard to impairment rating is reversed and the case is remanded for consideration and, if necessary, further development of the evidence regarding this issue. 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 Section 410.202. *See* Texas Workers' Compensation Commission Appeal No. 92642, decided January 20, 1993.

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Gary L. Kilgore
Appeals Judge

CONCUR:

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Joe Sebesta
Appeals Judge

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Philip F. O'Neill
Appeals Judge