APPEAL NO. 94213

This appeal is considered in accordance with the Texas Workers' Compensation Act (1989 Act), TEX. LAB. CODE ANN. § 401.001 *et seq.* On December 21, 1993, a contested case hearing (CCH) was held in (city), Texas, with (hearing officer) presiding. The issue literally reported from the benefit review conference (BRC) was whether the Texas Workers' Compensation Commission (Commission) abused its discretion by appointing a second designated doctor. The claimant, RH (who is the respondent in this appeal), was injured on (date of injury), while employed by the self-insured governmental entity, a school district (referred to as carrier).

At the hearing, the hearing officer asked for agreement on the BRC issue, noting that it reflected the "underlying issue" which was the correct impairment rating to be assigned to the claimant. The parties agreed. The parties then announced their agreement to send claimant back to the first designated doctor for an impairment rating. The hearing officer also solicited and obtained agreement that his "report" would use the date of statutory maximum medical improvement (MMI).

After receiving the report of the designated doctor agreed to by the parties, and allowing both parties the opportunity to comment, the hearing officer closed the hearing record on January 21, 1994, and issued a decision that the claimant reached MMI on the statutory date, which he found to be March 19, 1993, and adopted an impairment rating of 13% as determined by the agreed designated doctor.

The carrier appeals, arguing that the date of MMI was never an issue and that carrier never agreed or intended to agree to the statutory MMI date. It argues further that the date of MMI selected by a designated doctor must have a medical basis, and there is none in this record. There is no response from the claimant.

DECISION

We affirm the hearing officer's decision and order.

The issue somewhat awkwardly reported from the BRC was "whether or not the commission used proper discretion in appointing a second designated doctor, [Dr. R]." The claimant apparently took the position that (Dr. W), the first designated doctor who had reviewed MMI and impairment on his case at an earlier stage, should be used to re-evaluate him when another dispute arose; the carrier was of the position that the Commission had authority to appoint Dr. R. Claimant injured his back on (date of injury). Dr. R was appointed by the Commission to evaluate both MMI and impairment when the carrier indicated dispute after claimant's doctor certified a 29% impairment.

At the hearing, the hearing officer noted that the BRC issue was reflective of an "underlying issue" of the correct impairment rating to be assigned to the claimant. There was no dispute from either party as to this characterization. Moreover, the hearing officer then asked:

And also do the parties agree that the date of maximum medical improvement in the case would be the statutory date which would be 105 weeks from the date of injury which I will figure out . . . .

A brief discussion ensued as to what this date would be and the hearing officer opined it would be somewhere around (date). He then asked again:

So that both sides agree that when I apply the commission's rule which is contained in commission procedures and issue my report that I will include that statutory date in the report?

Claimant: "As far as I know . . . "

Carrier's Attorney: "Yes sir, we do."

Other stipulations relating to employment status, coverage and venue issues were also requested and entered in the record. The hearing officer then went on to recite that the parties agreed that they would return to Dr. W to do an impairment rating. The hearing officer stated that he would take the initiative to arrange for an examination. The hearing officer then declared that when he received Dr. W's report, he would issue his decision. The carrier's attorney at this point asked that he be given an opportunity to review and comment on this report. The hearing officer agreed that both parties would be sent a copy of Dr. W's report. He then asked both parties to respond by telephone, within ten days after the date of his letter conveying the report, to request either an opportunity to comment or another hearing.

The record in the case indicated that the hearing officer wrote to Dr. W on December 21, 1993, and requested him to evaluate claimant to assign an impairment rating. The letter identified the parties and contained the carrier's case number as well. A copy was sent to the carrier's attorney's law firm, although the attorney who had appeared at the CCH was not specifically designated. Dr. W was instructed in this letter to accept March 19, 1993, as the date MMI was reached.

On January 6, 1994, the hearing officer forwarded Dr. W's report, which used the date of statutory MMI (as instructed) and assessed a 13% impairment rating. The letter informed both parties that they had ten days to file comments, and until January 16, 1994, and to telephone the hearing officer's secretary with any comments. This letter was sent to carrier's attorney at his law firm, and to the claimant, as well as to the school district as both carrier and employer. It was also put into the Texas Workers' Compensation Commission box of the carrier's Austin representative, in this case the same law firm as appeared at the hearing. No response is in the record from any entity.

Carrier's point that it did not agree to use the statutory date of MMI is utterly without merit, most especially in light of the quoted passage above, as well as the two written communications clearly citing the MMI date as March 19, 1993. This leaves us to determine if the hearing officer erred by citing the statutory date of MMI.

The dispute resolution proceedings set forth in the 1989 Act are intended to "determine the liability of an insurance carrier for compensation for an injury or death . . . . " Section 410.002. A hearing officer is required to issue, as part of his decision, a determination as to whether benefits are due. Section 410.168(a)(2). The hearing process does not exist to issue advisory opinions on the powers of the Commission outside the context of a question involving benefits or liability of the carrier, in our opinion. Hence, we referred to the statement of the issue from the BRC as "awkward" because it literally requested an advisory opinion on the discretion of the Commission without incorporating the context in which that issue arose: a dispute over claimant's MMI status and impairment rating.

Right at the beginning of the short hearing, the hearing officer attempted to clarify the issue--he announced that he viewed the discretion issue as part of the "underlying issue" of correct impairment. Neither party challenged this characterization. By the agreement on the date of MMI as the statutory date, the parties essentially stipulated that there was no issue on this matter. The announced agreement that claimant be evaluated by the first designated doctor, Dr. W, would appear to resolve the framed issue of discretion of the Commission, but the hearing officer stated that the matters to be covered by his decision were MMI and impairment. Again, neither side challenged the hearing officer's explanation of the scope of his pending decision, and neither moved to dismiss the present hearing. No response was filed to challenge any of the written communications by the hearing officer to the parties. Given the length of time that the matter had been pending, and the agreements announced at the hearing, the hearing officer could well believe that the objective of the parties was to resolve the benefit issue, not prolong it.

We do not depart from our general statement, articulated in past decisions, that the hearing officer should refrain from creating issues not joined by the parties. *See* Texas Workers' Compensation Commission Appeal No. 92071, decided April 9, 1992. However, where it is clear that the issue reported from the BRC is somewhat nonsensically phrased, and is not reflective of the issues between the parties leading to the conference, we believe that the hearing officer may correct the issue as stated, or clarify it. *See* Texas Workers' Compensation Commission Appeal No. 93958, decided December 3, 1993. In this case, whether the Commission properly exercised discretion to appoint Dr. R had meaning to the parties only because an answer to the issue would likely determine the claimant's MMI status and impairment rating, and therefore the benefit for which the carrier would be liable.

At the CCH, it is fair to say that MMI was not an issue for the hearing officer to resolve, because the parties indicated to the hearing officer that they agreed to the statutory MMI date. They effectively stipulated to the date of MMI, just as they stipulated to facts underlying employment status, coverage, and venue. The hearing officer's letter clearly instructs the designated doctor to use the statutory MMI date which was stipulated by the parties. When the words and conduct of the carrier indicate agreement with the hearing officer's articulation of the issues and when pertinent facts are essentially stipulated, inducing a finding on such matters by the hearing officer, we will not find error. The hearing officer's incorporation of the agreed MMI date does not constitute the "determination" of an

issue so much as the acceptance of a stipulation by the parties, comparable to findings relating to other stipulated issues.

The carrier's argument that MMI must be supported by medical evidence is specious relating to what is referred to as "statutory" MMI. While one provision of the definition of MMI, not used in this case, requires medical support, the other definition set out in Section 401.011(30)(b) requires only the passage of 104 weeks from the date on which income benefits begin to accrue. No medical underpinning is required to support this type of MMI, only the passage of time. As the record does not indicate that this amount of time did not pass, the Appeals Panel cannot agree that there was error.

The determination of the hearing officer is not against the great weight and preponderance of the evidence, and we affirm his decision and order.

Susan M. Kelley
Appeals Judge

CONCUR:

Philip F. O'Neill
Appeals Judge

Gary L. Kilgore
Appeals Judge