APPEAL NO. 94245

This appeal arises under the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq*. (1989 Act). A contested case hearing was held in (city), Texas, on January 13, 1994, (hearing officer) presiding, to consider the following disputed issues: 1. Are the appellant's (claimant) shoulder problems after March 30, 1993, a result of the compensable injury sustained on or about (date of injury); 2. Has the claimant reached maximum medical improvement (MMI), and if so, on what date; 3. If the claimant has reached MMI, what is the impairment rating (IR); 4. Was the certification of MMI and IR timely disputed by the claimant; and 5. Did the claimant have disability resulting from the injury sustained on (date of injury), entitling him to temporary income benefits (TIBS), and if so, for what periods. The hearing officer determined that claimant's right shoulder problems from March 30, 1993, to the hearing date were not the result of his compensable injury of (date of injury), and did not result in claimant's having disability from March 30, 1993, to the hearing date. The hearing officer further determined that claimant did timely dispute his treating doctor's certification of MMI; that the great weight of the medical evidence was contrary to the report of the designated doctor; and that claimant reached MMI on October 5, 1992, with a zero percent IR as determined by his treating doctor. Claimant's timely request for review asserts the insufficiency of the evidence to support such adverse findings. The respondent (employer/carrier) first contends in its response that the evidence sufficiently supports the findings challenged by the claimant; employer/carrier then challenges the finding that claimant timely disputed his treating doctor's determination of MMI under Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 130.5(e) (Rule 130.5(e)).

DECISION

Reversed and remanded.

The employer/carrier's response was timely filed as a response to claimant's request for review; however, as a cross-appeal it was not timely filed. Accordingly, employer/carrier's appeal of the hearing officer's finding that claimant timely disputed his treating doctor's MMI date and IR will not be reviewed by the Appeals Panel. *See* Texas Workers' Compensation Commission Appeal No. 92141, decided May 21, 1992.

The claimant testified that on (date of injury), he was employed by the employer/carrier as a surveyor instrument technician and that while working in the field that day he pounded on a railroad spike with an eight pound sledge hammer to drive it into some asphalt as a survey marker and the spike struck concrete beneath the asphalt. Claimant said he immediately felt pain in his right shoulder and at the base of his neck on the right side.

At the outset of the hearing, the parties entered into five stipulations including a stipulation that on (date of injury), the claimant sustained a compensable injury to his right shoulder. Also at that time, the employer/carrier represented that it did not contest claimant's having sustained a right shoulder injury on that date, but rather that it disputed that claimant had any disability from such injury asserting that claimant continued to work until he voluntarily quit his job on March 30, 1993, to start a lawn care business. Claimant's

position was that he did not reach MMI on October 5, 1992, with a zero percent IR as his treating doctor certified, that his right shoulder never healed but got progressively worse when he returned to heavier duties, and that he had disability from his (date of injury), injury commencing on March 30, 1993, the date he voluntarily resigned from his employment because he could not do the heavier work assigned to him. The hearing officer stated that notwithstanding the carrier's position on the injury issue, he would leave that issue in the case and address it in his findings.

The hearing officer's decision failed to include the stipulation to the compensable injury but purported to include a stipulation not made by the parties to the effect that (Dr. K) was the designated doctor appointed by the Texas Workers' Compensation Commission (Commission). Claimant testified that he attended a benefit review conference (BRC) on October 8, 1993, at which the benefit review officer (BRO) appointed Dr. K to examine him. The record contained no BRC report of that date. However, the record did contain the report of a BRC held on November 30, 1993, in which the BRO stated that Dr. K "was an independent medical examiner appointed by the Commission" and recommended that claimant had not reached MMI based on the reports of claimant's current treating doctor, (Dr. L), and "the Commission's independent medical exam by [Dr. K]."

The hearing officer's decision also stated that the witnesses, in addition to the claimant, were (Mr. RM) and (Mr. AM). The record disclosed that the names of these witnesses were (Mr. E) and (Mr. M). Neither party has complained on appeal of the misstatements respecting the stipulations and identity of witnesses and, other than noting them for the integrity of the record, we need not further consider them.

Claimant testified that he commenced medical treatment on May 7, 1992, with (Dr. T) who restricted claimant to light duty; that on June 11, 1992, he commenced treatment with (Dr. D) who continued him on light duty; that on October 5, 1992, Dr. D released him for regular duty; that he did not know until August 9, 1993, that Dr. D had on October 5, 1992, determined that he had reached MMI on October 5, 1992, with an IR of zero percent; that he disputed Dr D's MMI and IR determinations and agreed with the determinations of the designated doctor (Dr. K) that he had not yet reached MMI because his shoulder injury had not yet healed. Claimant stated that he sustained no new trauma to his right shoulder after the (date of injury), incident (and there was no evidence to the contrary) and returned to Dr. D in April 1993, after not having received treatment since October 5, 1992, because his change to heavier duties prior to quitting his job exacerbated his symptoms. Claimant asserted that because his injury had never resolved, he has not reached MMI and the assignment of an IR is premature; that Dr. K took that position; and that claimant's position was evidenced by his continued pain, by an MRI report obtained in June 1993 by his most recent treating doctor, (Dr. L), which showed a small rotator cuff tear not earlier seen in diagnostic tests, and by his undergoing surgery on his shoulder on July 20, 1993.

Claimant further testified that he quit his job on March 30, 1993, because he had been returned to his former instrument technician position involving heavier duties which he could not perform because of his right shoulder pain. While claimant, who said he was 33

years of age, denied quitting his job to go into business for himself doing landscaping work, he did concede that he had planned after quitting to use his retirement money to start a "horticulture" business hiring high school boys to do the work.

Claimant said he had not worked or held another job since quitting on March 30th, but acknowledged having mowed lawns for relatives a few times. He stated he has not been able to obtain employment because he is still under a doctor's care and he maintained that he has had disability from and after the day he quit, March 30, 1993. The 1989 Act defines disability in Section 401.011(16) to mean "the inability because of a compensable injury to obtain and retain employment at wages equivalent to the preinjury wage. [Emphasis supplied.]"

Mr. E, employer/carrier's manager of surveying services, testified that a few days before March 30, 1993, claimant called him and said he was quitting to go into business for himself doing landscaping jobs. Mr. E did not recall claimant mentioning his right shoulder injury at that time and denied claimant's contention that claimant said he was quitting because of having been rotated back to a position with heavier duties which he could not perform due to his injury. Mr. E said he became aware of claimant's injury in October 1992 when claimant provided him with his doctor's release to return to regular duties.

An MRI report of May 27, 1992, obtained by Dr. T reported: "Minimal amount of increased signal seen in the rotator cuff . . . most consistent with a small focal area of tendinitis/mucoid degeneration. No evidence to suggest rotator cuff tear." Dr. T's diagnosis on June 11, 1992, included right shoulder strain with tendinitis and rotator cuff damage, and neck strain with spasm and nerve root irritation.

On June 19, 1992, Dr. D, an orthopedic surgeon, diagnosed a sprained right shoulder with bicipital tenosynovitis; and on August 24, 1992, reported that claimant's arthrogram of that date was normal and that he had nothing else to recommend but continued exercise. Dr. D's narrative report of October 5, 1992, stated that on that date claimant had full mobility without point tenderness, had no significant positive objective orthopedic findings, that claimant was doing a different type of work and not carrying a transit, that his shoulder pain was about resolved with only occasional morning discomfort which resolved after claimant got up and moved about, that claimant had reached MMI, and that he had "no residual permanent disability." In a Report of Medical Evaluation (TWCC-69), Dr. D stated that claimant reached MMI on "10-05-92" with an IR of "0%." Pertinent to the timely dispute issue under Rule 130.5(e), which employer/carrier has not timely appealed, claimant denied knowledge of Dr. D's assessment, and two copies of Dr. D's TWCC-69 in evidence bore dates of "5/28/93" and "5/31/93," as well as various "received" date stamps of the employer/carrier's adjusting firm and the Commission. Dr. D's record of April 19, 1993, stated that claimant said he still had shoulder soreness, that Dr. D could not demonstrate any positive findings and had no objective findings to treat, and that claimant would request another doctor.

In a Specific and Subsequent Medical Report (TWCC-64) dated May 20, 1993, which reflected claimant's May 17, 1993, visit, Dr. L diagnosed anterior impingement syndrome and his treatment plan stated that an MRI would be obtained and that claimant could "continue to work." However, Dr. L's narrative report of May 20th stated claimant's work status as "off," that Dr. L expected claimant to return to light duties in one month and to full duty one month later, unless surgery were necessary, "at which time he should have reached [MMI]." Right shoulder x-rays of May 20, 1993, were "normal." A right shoulder MRI of June 22, 1993, stated findings suggestive of "a small focal mid supraspinatus partial rotator cuff tear" and "no evidence for full thickness rotator cuff tears." This report also noted evidence of a "congenitally low lying acromion producing minimal compression . . . ." On July 20, 1993, Dr. L performed arthroscopic surgery and his postoperative diagnosis included "anterior impingement syndrome right shoulder, Villonodular synovitis loose body, and tear of the anterior glenoid labrum." Dr. L's report of January 12, 1994, stated that the "5/27/92" MRI showed evidence of anterior impingement syndrome but no evidence of rotator cuff tear; that the "6/2/93" MRI showed "the condition had worsened considerably and due to the chronic irritation there was now evidence of a partial rotator cuff tear;" and that Dr. L recommended the arthroscopy with acromioplasty done on July 20, 1993. Dr. L's surgical report of July 20, 1993, stated that the "rotator cuff was examined and no tears were noted." This report further stated that frayed areas of the anterior glenoid were shaved and that Dr. L advised claimant "of the defect in the anterior glenoid labrum and he was made aware that if he had significant symptoms of instability in the future that another surgery might be necessary."

The BRO on October 14, 1993, signed an "Order of Commission for Designated Doctor" which directed that claimant be examined by Dr. K on November 8, 1993, for MMI and IR. In a letter of October 21, 1993, the BRO asked Dr. K to comment on the MRI exams of May 27, 1992, and June 22, 1993, stating that the carrier questioned whether the July 20, 1993, surgery was related to the (date of injury), injury since the earlier MRI and the August 24, 1992, arthrogram were normal. The BRO also asked for an opinion as to whether the rotator cuff tear could have been present from the time of the injury and gone undetected, or whether it was a new tear. The Appeals Panel has said that while a designated doctor can be used to resolve disputes other than those involving MMI and IR (Texas Workers' Compensation Commission Appeal No. 92712, decided February 12, 1993), a designated doctor's report does not have presumptive weight on matters other than MMI and IR. *See* Texas Workers' Compensation Commission Appeal No. 93784, decided October 18, 1993.

Dr. K's report of November 8, 1993, recited in the history portion that the claimant stated he "returned to more physical type labor in April or May of 1993 with an increase in symptoms," and that Dr. D could find nothing specifically wrong with the shoulder and recommended claimant get another opinion so claimant saw Dr. L. Dr. K's assessment was chronic right shoulder anterior impingement syndrome with associated rotator cuff tendinitis. Dr. K felt claimant may have rotator cuff weakness following the July 1993 surgery and recommended one to two months of a formal shoulder rehabilitation program noting that if claimant's symptoms did not thereafter improve, additional surgery might be required. Dr. K felt that for these reasons claimant had not yet reached MMI though he

nonetheless went on to state an IR of "1% whole person impairment" based on two percent right upper extremity impairment. A finding of MMI is necessary to give rise to the entitlement to impairment income benefits. *See* Section 408.121(a) and Texas Workers' Compensation Commission Appeal No. 92366, decided September 10, 1992. Dr. K further stated that it was not uncommon for a rotator cuff injury to present as tendinitis on an initial MRI scan but, in the presence of continued impingement, progress to a partial or full-thickness tear on a subsequent MRI scan. Dr. K felt that the July 20, 1993, surgery was related to the (date of injury), injury with the difference in the MRI scans "merely reflecting a slowly progressive lesion in the face of persistent impingement."

In Dr. K's deposition of January 12, 1994, he was asked if the opinions in his report of November 8, 1993, would change if a treating doctor had stated in an October 1992 report that claimant's pain was about resolved and manifesting only occasionally in the mornings upon rising, that there was no treatment "for six months before [sic] October 1992," and that Dr. K knew that during the intervening six months claimant quit his job to open a lawn mowing business. Dr. K responded "possibly yes, possibly no" depending on the exact nature of the claimant's activity during his lawn mowing activity. Asked whether the July 20, 1993, surgery was related to claimant's (date) [sic], injury or in reasonable medical probability to the "congenitally low lying acromion producing minimal compression" mentioned in Dr. K's report, Dr. K responded that it was probably related to both stating that claimant "may have been more predisposed to developing impingement with a congenitally low lying acromion, but true impingement & rotator cuff injury probably would not have occurred without concomitant physical labor &/or specific injury."

Concerning MMI and IR, Sections 408.122(b) and 408.125(e) of the 1989 Act provide that a Commission-selected designated doctor's report is entitled to presumptive weight unless the great weight of the other medical evidence is to the contrary. The Appeals Panel has stated that the designated doctor occupies a "unique position" under the 1989 Act (Texas Workers' Compensation Commission Appeal No. 92412, decided September 28, 1992); that no other doctor's report is accorded this special presumptive status (Texas Workers' Compensation Commission Appeal No. 92366, decided September 10, 1992); that medical conclusions are not reached simply by counting the number of doctors who take a particular position but that the medical opinions must be weighed according to their "thoroughness, accuracy and credibility with consideration given to the basis it provides for opinions asserted" (Texas Workers' Compensation Commission Appeal No. 93493, decided July 30, 1993); that lay testimony or evidence does not provide a sufficient basis to overcome the presumptive weight accorded the designated doctor's report (Texas Workers' Compensation Commission Appeal No. 92164, decided June 5, 1992); that a "great weight" determination amounts to more than a mere balancing or preponderance of the medical evidence (Appeal No. 92412, *supra*); that the "great weight" standard is clearly a higher standard than that of a preponderance of the evidence (Texas Workers' Compensation Commission Appeal No. 93432, decided July 16, 1993); and that a designated doctor's report should not be rejected "absent a substantial basis to do so" (Texas Workers' Compensation Commission Appeal No. 93039, decided March 1, 1993).

The Appeals Panel has held that a hearing officer who rejects a designated doctor's report because the great weight of the other medical evidence is to the contrary "must clearly detail the evidence relevant to his or her consideration, clearly state why the great weight of other medical evidence is to the contrary, and further state how the contrary evidence outweighs the designated doctor's report." Texas Workers' Compensation Commission Appeal No. 93087, decided March 15, 1993. The hearing officer's "Summary of Evidence" in his decision does not even mention the designated doctor's report let alone articulate how it is that Dr. K's report is contrary to the great weight of the other medical evidence. Rather, the hearing officer makes the conclusory findings that claimants right shoulder problems after March 30, 1993, were not the result of his (date of injury), injury, that claimant's inability to obtain and retain employment after March 30, 1993, was "the result of something other than the compensable injury," that the great weight of the credible medical evidence was contrary to the designated doctor's report because those findings "were based on the designated doctor's erroneous assumption that Claimant's right shoulder problems" on and after March 30, 1993, were the result of his (date of injury), injury, and that the great weight of the credible evidence is that claimant reached MMI with an IR of zero percent based on Dr. D's findings.

The hearing officer has failed to enlighten us as to just how the reports of Dr. D amounted to the great weight of the other medical evidence in view of the June 1993 MRI findings, the July 1993 surgery, and the reports of Dr. K and Dr. L. To be sure, there are some inconsistencies among the reports of Dr. K and Dr. L but there is clearly more agreement than not that claimant's shoulder problems after March 30, 1993, were but a continuation of the problems which commenced with his (date of injury), injury. Further, there was no indication in the evidence that Dr. D had been apprised of the June 1993 MRI results and the July 1993 arthrogram procedure and asked if such affected the opinion he reached on October 5, 1992.

The key finding of the hearing officer was that the designated doctor made an "erroneous assumption" that the claimant's right shoulder problems on and after March 30, 1993, resulted from claimant's (date of injury), compensable injury. In our view, what the designated doctor did was determine that claimant had not reached MMI from his (date of injury), compensable injury. The hearing officer further found that claimant's right shoulder problems on and after March 30, 1993, were not the result of the (date of injury), compensable injury and that claimant did not have disability as a result of the (date of injury), injury on and after March 30, 1993. The latter two findings appear premised on the hearing officer's disagreement with the designated doctor's report regarding claimant's not yet having reached MMI. We read the finding that claimant's right shoulder problems on and after March 30, 1993, were not the result of claimant's earlier compensable injury as, in essence, a restatement or another way of stating that claimant had reached MMI on October 5, 1992. We view such finding as one concerning the duration of claimant's right shoulder injury (e.g., MMI or not) and not one concerning the extent of the injury (e.g., different body parts or systems) or the existence of a new injury.

In sum, we do not consider the carrier/employer's untimely cross-appeal on the Rule 130.5(e) issue and that determination is thus affirmed. Finding them to be against the great weight and preponderance of the evidence (Pool v. Ford Motor Co., 715 S.W.2d 629, 635 (Tex. 1986)), we reverse the hearing officer's Findings of Fact Nos. 4, 8, and 9 (and the corresponding Conclusions of Law Nos. 2 and 5) that found that claimant's right shoulder problems on and after March 30, 1993, were not the result of his compensable injury of (date of injury), that the great weight of the other medical evidence was contrary to the report of the designated doctor concerning MMI, and that claimant reached MMI on October 5, 1992, with a zero percent IR. Further, the hearing officer's finding regarding disability similarly appears premised on his MMI determination and will require reconsideration in view of our determination that the hearing officer's finding that claimant reached MMI on October 5, 1992, with a zero percent IR is against the great weight and preponderance of the evidence. We reverse and remand for such additional findings and consideration as are appropriate and not inconsistent with this opinion.

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.

Philip F. O'Neill
Appeals Judge

CONCUR:

Gary L. Kilgore
Appeals Judge

CONCURRING OPINION:

I agree that the hearing officer's decision that the designated doctor's opinion is not entitled to presumptive weight is against the great weight and preponderance of the evidence. I understand that duration of an injury is generally a question within that of MMI. Nevertheless, in this case a stated issue was "[a]re the claimant's shoulder problems after March 30, 1993, a result of the compensable injury sustained on or about (date of injury)?" In addition, there was a finding of fact that "[c]laimant's problems with his right shoulder from

March 30, 1993, to the date [sic] this Benefit Contested Case Hearing was held on January 13, 1994, are not the result of the compensable injury sustained on (date of injury)." Along with this issue and finding, the facts show a lengthy absence of medical care and that claimant changed jobs. While there was no sole cause issue, the majority points out that the designated doctor was of the opinion that surgery subsequent to March 30, 1993, "was related" to the (date of injury), injury. While the designated doctor may certainly add to the evidence in regard to this issue, I believe an issue as to a relationship between injury and condition was stated by the parties as an issue and was for the hearing officer to determine without consideration of whether presumptive weight should be given to it or not. I would hold that the finding of fact that shoulder problems after March 30, 1993, did not result from the compensable injury was against the great weight and preponderance of the evidence. Having disposed of that issue separately, the determination as made on review that the hearing officer erred in not applying presumptive weight to the designated doctor's opinion follows. The case should be remanded to determine disability.

Joe Sebesta
Appeals Judge