APPEAL NO. 94301

This appeal arises under the Texas Workers' Compensation Act of 1989 (1989 Act), TEX. LAB. CODE ANN. § 401.001, *et seq*. On January 6, 1993, a contested case hearing was convened in (city), Texas, with (hearing officer) presiding. At the hearing, the issue reported from the benefit review conference (BRC) as: "Does the report of the designated doctor carry presumptive weight or is there medical evidence to the contrary of this report?" was reworded by the hearing officer as: "1) Has claimant reached maximum medical improvement [MMI] and, if so 2) what is claimant's impairment rating." The hearing officer noted that, as reported from the BRC, the issue as phrased could result in him answering both parts of the question as "yes" without resolving the issues of MMI and impairment.

The hearing was held. The hearing officer did not determine the issues of impairment and MMI. Rather, he determined that the designated doctor had not been properly appointed because he was appointed prior to a dispute, in that there was no certification that claimant had reached MMI that was in turn disputed at the time the designated doctor was appointed. He therefore determined that the issue was not ripe for decision and remanded it back to the Texas Workers' Compensation Commission's (Commission) field office for further processing. No orders were issued with respect to the payment, or nonpayment, of any benefits.

The carrier has appealed this decision, arguing that the hearing officer erred by changing the issues. The carrier further argues that the hearing officer's findings and conclusions that the designated doctor's appointment was not properly done, or that there was no ripe dispute, were erroneous. Although styled as a request for review, the claimant responds that the decision of the hearing officer should be upheld and does not assert error in the decision.

DECISION

After reviewing the record of the case, we reverse the hearing officer's conclusion that the appointment of the designated doctor, valid on its face, was premature. We note that the claimant did not timely raise an issue as to the doctor's appointment, and that there was a dispute ripe for resolution when the designated doctor was appointed. Noting that there was no error in the hearing officer's rewording of the issues, and that the issues at the hearing reflect the issues discussed at the BRC, we remand the case for substantive determination of those issues.

FACTS

The claimant did not testify, so there was virtually no development (as there should be) of the underlying facts surrounding claimant's injury or of the course of his medical treatment prior to the events giving rise to a dispute over his alleged status of MMI. What can be surmised from history of the injury set forth in medical records is that claimant slipped, but did not fall, on (date of injury), in the course and scope of his employment by (employer). The history in some reports indicated that claimant had had previous back surgery in 1989. The doctor who performed that surgery was (Dr. C), who also became claimant's treating

doctor for the present injury. It was stated in one history that claimant worked until April 4, 1993, and was treated by Drs. B and V prior to Dr. C.

Although there was an indication in one of Dr. C's medical reports (dated November 22, 1993) that he thought claimant could have a herniated disc, objective testing apparently did not confirm this. Objective tests, including x-rays, a myelogram and an MRI, indicated the presence of degenerative disc disease, and claimant's diagnosis according to more than one doctor in the records in evidence is this condition plus a lumbar strain.

In July 1993, the carrier (apparently) sought to have a doctor appointed to perform a medical examination. The claimant complained that this "appointment" (evidence of which was never entered into the record) was not done in accordance with applicable rules, in that a TWCC-22 form was not used, which would have required certification by the carrier that it attempted to get the agreement from the claimant to the exam. In any case, on July 30, 1993, carrier sent a letter scheduling an appointment with (Dr. CT), indicating that carbon copies of the letter were sent to the claimant. The claimant showed up for his examination, and the record developed in this hearing is devoid of any evidence of a protest raised at the time about Dr. CT's examination. Dr. CT examined the claimant on August 17, 1993; he filed a Report of Medical Evaluation (TWCC-69) form stating that claimant's MMI date was September 1, 1993 with a zero percent impairment. His narrative indicated that claimant complained of pain, and some numbness in his left leg. Dr. CT found no muscle spasm upon examination. Dr. CT said that, in his opinion, claimant had osteoarthritis of the spine, and had sustained a mild sprain to the lumbar spine from which he had essentially recovered. Dr. CT apparently noted that two weeks of therapy would be the only further treatment he saw indicated.

On August 25, 1993, the carrier, treating Dr. CT's prospective MMI opinion the same as a certification, sent a copy to Dr. C and sought his opinion. On September 8th, Dr. C responded on his own TWCC-69: "I do not agree with [Dr. CT]. I have been waiting for [Dr. S] report see attached." Nothing, however, was attached to the TWCC-69 in the record.

On September 21, 1993, the carrier wrote to the Commission, requesting that the designated doctor procedure be initiated. The facts leading up to the request were briefly spelled out, and the fact that Dr. CT had rendered essentially a prospective MMI opinion is clear from this letter. A copy of this letter to claimant is indicated.

On October 19, 1993, according to a letter to the claimant from the Commission, he was ordered to attend an examination with (Dr. T) on November 1, 1993. The last paragraph of the letter refers to "designated doctor." The earlier part of the letter indicated that the examination was for the purposes of determining the percentage of impairment only. Although both parties in argument discussed a verbal correction of Dr. T's mandate, also referred to in the BRC report, neither party furnished any hard evidence of same.

Dr. T examined claimant on the appointed date and issued a TWCC-69 indicating that claimant had reached MMI on October 5, 1993, with a seven percent impairment,

derived largely from range of motion limitations. The October 5, 1993, date is referred to as the date claimant was examined by Dr. S. In an October 5, 1993, letter to Dr. C, Dr. S opined that claimant was ready to be evaluated for MMI, subject to any further testing Dr. C advised.

On October 25, 1993, claimant requested a change in treating doctors from Dr. C to (Dr. R), citing a personality clash. This was granted by the Commission on November 5, 1993. On November 13, 1993, Dr. C filed a brief TWCC-69 citing agreement with Dr. T. Claimant first saw Dr. R on November 22, 1993. We note that there are other medical reports from Dr. R and Dr. S, relevant to the unresolved issues of MMI and impairment, which will not be summarized here because we are not, in this proceeding, reviewing the record for the great weight of medical evidence contrary to the designated doctor's report.

The BRC report states the position of claimant that Dr. T's appointment was limited to impairment "inappropriately." The position of the claimant was otherwise that the great weight of other medical evidence was against this report. No contention was made that there was not a "dispute." The benefit review officer's recommendation surmises that the designated doctor may have been premature but notes that a dispute did develop. The claimant at the hearing argued that the BRC report contained some inaccuracies and omissions; however, the hearing officer noted for the record that neither party had filed a response to this report. In preliminary statements at the contested case hearing, the carrier argued that claimant was raising a dispute to the designated doctor's appointment "for the first time" on that date.

At the hearing, the hearing officer expressed dissatisfaction with the wording of the issue on the BRC report, and broke it into two issues, over the objection of the carrier. The parties stipulated at the contested case hearing that the Commission had both jurisdiction and venue to decide the issues. Most of the hearing was devoted to tendering medical evidence and arguments relating to the contrary medical evidence and "great weight." In closing argument, the claimant's representative argued that he was not denying that there was a dispute, but that Dr. CT's report should never have been entered into in the first place to get the dispute started, and that the carrier had bent the rules to its favor and the disability determination officer also made a mistake in favor of the carrier. The claimant's representative noted that claimant had not been released to work and still continued to receive medical care even after the date of MMI found by Dr. T.

WHETHER THE HEARING OFFICER ERRED BY REWORDING THE ISSUE

We do not agree with the carrier that the hearing officer "changed" the issue reported out of the BRC. Whether or not a designated doctor's report is to be given presumptive weight and whether there is evidence to the contrary only has meaning in the context of the substantive issues of whether claimant reached MMI, and, if so, his correct impairment rating. We have before endorsed the practice of rewording issues where the literal reading of the reported issue from the BRC is somewhat nonsensical or would not lead to a

resolution of the issues. Texas Workers' Compensation Commission Appeal No. 93958, decided December 3, 1993.

WHETHER THE HEARING OFFICER ERRED IN DETERMINING NOT TO DECIDE THE ISSUES OF MMI AND IMPAIRMENT BASED UPON A FINDING THAT THE DESIGNATED DOCTOR WAS APPOINTED PRIOR TO A DISPUTE AND THEREFORE NOT PROPERLY SELECTED

Pertinent findings of fact and conclusions of law follow:

FINDINGS OF FACT

9.Prior to [Dr. T]'s medical evaluation conducted pursuant to a letter from the Commission, no doctor certified that claimant had reached maximum medical improvement.

10.A dispute as to whether the claimant has reached maximum medical improvement did not exist at the time the Commission directed claimant to be examined by [Dr. T] as the Commission selected designated doctor.

CONCLUSIONS OF LAW

2.The designated doctor procedures pursuant to the Texas Labor Code Ann. Section 408.122(b) were initiated by the Commission prior to a dispute existing concerning whether the claimant had not reached maximum medical improvement and therefore were not in compliance with the statute.

3.[Dr. T] is not properly selected as the Commission designated doctor and his report does not have presumptive weight.

4.Because the designated doctor procedures were not properly initiated, the determination of maximum medical improvement and the impairment rating are not ripe for adjudication.

The hearing officer dismissed the disputed issues "without a decision on the merits" ordered the matter returned to the field office for further processing. We believe this was reversible error, as there was plainly a dispute over whether claimant reached MMI at the time the designated doctor was appointed. We do not believe this issue depends on whether Dr. CT issued a proper certification of MMI.

Regardless of how valid Dr. CT's opinion was as a "certification," Dr. C's disagreement with its assertions was a "dispute." The Appeals Panel has at least twice stated that a dispute over MMI is not triggered solely by issuance of a certification of MMI that is contested; a dispute can also result from a treating doctor's failure to opine that MMI has been reached. *See* Texas Workers' Compensation Commission Appeal No. 93479,

decided August 2, 1993; Texas Workers' Compensation Commission Appeal No. 93612, decided September 3, 1993. The 1989 Act, Art. 8308-4.25 (codified as TEX. LAB. CODE § 408.122(b)) contemplates an appointment of a designated doctor, not upon a report of MMI, but to resolve "a dispute . . . as to whether the employee has reached" MMI. A dispute may be triggered when medical records indicate essentially an unchanged condition, but the treating doctor has failed (or refused) to certify MMI. Frankly, the report of Dr. CT is a straw issue of sorts, since the carrier obviously disagreed with Dr. C's assertion that claimant was not at MMI. Thus, as the hearing officer determined there was no "dispute" solely on the basis that there was no existing certification of MMI that was then disputed, his basis for finding that the appointment of the designated doctor was improperly initiated prior to a dispute arose is erroneous.

We note also that it does not appear that the validity of Dr. T's appointment for this reason was raised as an issue at the BRC that could be considered by the hearing officer, as required under the 1989 Act, Section 410.151(b) (formerly Art. 8038-6.31(a)). The claimant argued that Dr. T had been appointed to evaluate impairment only, a point which appears to go to the weight of Dr. T's opinion on MMI, not the validity of his status as designated doctor. Indeed, the hearing officer's findings describe Dr. T as a "designated doctor," and the claimant did not appeal these findings.

Because the case is being remanded, it is useful to underscore that the report of a Commission-appointed designated doctor is given presumptive weight. Section 408.125(e) (formerly Art. 8308-4.26(g)). The amount of evidence needed to overcome the presumption, a "great weight," is more than a preponderance, which would be only greater than 50%. *See* Texas Workers' Compensation Commission Appeal No. 92412, decided September 28, 1992. Medical evidence, not lay testimony, is the evidence required to overcome the designated doctor's report. Texas Workers' Compensation Commission Appeal No. 92164, decided June 5, 1992. However, presumptive weight does not mean a "rubber stamp" where the hearing officer weighs the evidence and determines that the great weight of other medical evidence proves that the claimant is not at MMI, or that the percentage of impairment is not accurate. *See* Texas Workers' Compensation Commission Appeal No. 94053, decided February 23, 1994.

Because claimant's argument during the hearing indicated that he cannot be at MMI because he still requires medical treatment, we note that "maximum medical improvement" is defined as "the earliest date after which, based on reasonable medical probability, further material recovery from or lasting improvement to an injury can no longer reasonably be anticipated." Section 401.011(30)(A) (formerly Art. 8308-1.03(32)(A)). We have stated many times that the presence of some pain is not, in and of itself, an indication that an employee has not reached MMI; a person who is assessed to have lasting impairment may indeed continue to experience some pain as a result of an injury. *See* Texas Workers' Compensation Commission Appeal No. 93007, decided February 18, 1993. A claimant has a right to lifetime reasonable and necessary medical treatment not just to cure, but to relieve, the effects of the injury even after MMI is reached. Section 408.021(a)(1). An injured worker who has impairment may or may not require relief from pain in the future; the

fact that he or she does is not, standing alone, a litmus test of the existence or nonexistence of MMI.

The Appeals Panel has also said that the opinion of a designated doctor appointed only to evaluate impairment does not have presumptive weight on MMI. Texas Workers' Compensation Commission Appeal No. 93910, decided November 22, 1993 (although a hearing officer who accords presumptive weight to an impairment rating must also agree that the underlying assessment of non-statutory MMI is correct). The scope and extent of Dr. T's directive is a matter that should be cleared up on remand through evidence, not just allegation. It seems to us that the issue in this case was clearly whether claimant had even reached MMI, rather than just his percentage of impairment, and both parties knew it, regardless of how the appointment letter to claimant was worded.

Our remand of this case, and discussion of applicable law, in no way constitutes an evaluation, one way or the other, on the merits of this case. It is likely (and desirable with regard to the scope and occurrence of the injury itself) that additional evidence may be developed on remand. Because there was a dispute which a designated doctor appears to have been appointed to resolve, the hearing officer's decision runs afoul of Section 410.168, which requires a written decision which determines "whether benefits are due." *Compare* Texas Workers' Compensation Commission Appeal No. 93588, decided August 24, 1993. The issues relating to MMI and impairment should be decided in accordance with the evidence developed and applicable statutes and rules.

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.

Susan M. Kelley
Appeals Judge

CONCUR:

Joe Sebesta
Appeals Judge

Thomas A. Knapp
Appeals Judge