APPEAL NO. 961902
FILED NOVEMBER 13, 1996

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 (CCH) was held on July 24, 1996. He held the record open so that additional medical records could be obtained and offered into evidence. The hearing officer determined that the respondent (claimant) had not reached maximum medical improvement (MMI) and that therefore the claimant's impairment rating (IR) could not be determined. The appellant (carrier) requested review, urging that the report of the designated doctor is entitled to presumptive weight, that the great weight of the other medical evidence is not contrary to the report of the designated doctor, and that the claimant reached MMI on June 21, 1995, and that the claimant's IR is 10% as certified by the designated doctor. A response from the claimant has not been received.

DECISION

We reverse and remand.

At the CCH, Carrier's Exhibit No. 6, a letter from the Texas Workers' Compensation Commission (Commission) dated August 29, 1995, appointing Dr. B as the designated doctor to determine IR only; Carrier's Exhibit No. 7, report from Dr. S dated January 23, 1995; and Carrier's Exhibit No. 8, a letter from (employer), dated January 31, 1995, were admitted into evidence, are contained in the record sent to the Appeals Panel, but are not listed as exhibits in the Decision and Order of the hearing officer. We reform the decision and order to show that Carrier's Exhibits Nos. 6, 7, and 8 were admitted into evidence. Some of the exhibits in the record are difficult to read and care should be exercised to obtain legible copies of documents to be offered into evidence. In addition, the record was held open at the CCH session on July 24, 1996; the carrier sent medical records to the hearing officer and a copy to the claimant; there is no record of the hearing officer asking the claimant for comments; and the hearing officer took official notice of the medical records. If documents are offered after a session of a CCH, the other party should be provided a copy by the hearing officer, the party should be provided the opportunity to respond, and the documents should be either admitted or not admitted into evidence. The handling of exhibits has not been appealed; however, care should be exercised to comply with procedural matters, fully develop the facts, and preserve the rights of the parties.

The claimant sustained a compensable injury to her left knee on _____. The claimant was first treated by Dr. E, a chiropractor. An MRI was performed on January 23, 1995, and Dr. S reported that there was a tear of the posterior horn of the medial meniscus and that the collateral and cruciate ligaments had a normal appearance. Dr. E referred the claimant to Dr. W who performed diagnostic arthroscopic surgery and a partial arthroscopic medial meniscectomy on February 9, 1995. Dr. W reported that a tear of the meniscus was removed, that the patellofemoral joint was clean, that the cartilage was in excellent condition, and the meniscus was

feathered so that it would be mobile and not lock. He also reported that the cruciate ligament and the lateral joint surface were intact. In a reported dated March 27, 1995, Dr. W stated that the claimant had marked atrophy of the quadriceps muscle mechanism and that she had pain in the peripatellar region secondary to chondromalacia patella maltracking secondary to atrophy of her quadriceps. He reported that the claimant had moderate effusion in the knee, that it was aspirated, and that she was given anti-inflammatory medication to reduce tenderness so that she could perform quadriceps rehabilitative exercises without so much discomfort. On June 19, 1995, Dr. W reported that the claimant was starting to get good quadriceps control and that she was able to use the stair stepper and ride a bicycle. In a report dated August 16, 1995, Dr. W recorded that the claimant was exceedingly weak in her quadriceps mechanism, that she was having significant problems with patellofemoral symptoms, that anti-inflammatory medication was still prescribed, and that the exercises she was to do were discussed.

In a Report of Medical Evaluation (TWCC-69) dated July 13, 1995, Dr. E reported that the claimant reached MMI on June 21, 1995, with a three percent IR. A narrative is not attached to the TWCC-69, four diagnostic codes appear on the TWCC-69, and it is not clear for what impairment the IR was assigned. In a TWCC-69 dated September 25, 1995, Dr. B reported that he was not requested to provide the date the claimant reached MMI and that the claimant's IR is 10%. In an attachment to the TWCC-69, Dr. B stated that there were photostatic copies of the MRI of the knee that were extremely difficult to interpret due to the quality of the copies, that he observed scars from left knee surgery, that he did not have operative reports involving surgical intervention, that there is minimal effusion, that there was ligament laxity of the cruciate ligaments with patellar allotment, that Apply's compression test was negative, and that there was palpable pain on the medial joint line. Dr. B stated that since he did not have an operative report he used the MRI to make a diagnostic conclusion, assigned a 10% impairment for the medial meniscus tear under Table 36 of the Guides to the Evaluation of Permanent Impairment, third edition, second printing, dated February 1989, published by the American Medical Association (AMA Guides) and combined that with the impairment for loss of range of motion (ROM) of the knee to determine a 26% impairment of the lower extremity that resulted in a 10% whole body impairment. In a letter dated October 10, 1995, Dr. B advised the Commission that he would be taking an educational sabbatical in another state and would return to his practice at the end of January 1996. Dr. A became the claimant's treating doctor, based on physical examination diagnosed an anterior cruciate ligament tear, and performed orthoscopic reconstruction of the claimant's anterior cruciate ligament on February 5, 1996.

The 1989 Act sets forth a mechanism to help resolve conflicts concerning MMI and IR by according presumptive weight to the report of a doctor referred to as the designated doctor. Texas Workers' Compensation Commission Appeal No. 92495, decided October 28, 1992. If the Commission selects the designated doctor as was done in this case, the Commission shall base its determination of whether the claimant has reached MMI and the claimant's IR on the report of the designated doctor unless

the great weight of the other medical evidence is to the contrary. Section 408.122(c) and Section 408.125(e). 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 report of the designated doctor. Texas Workers' Compensation Commission Appeal No. 92412, decided September 28, 1992. No other doctor's report is accorded the special presumptive status given to the report of the designated doctor. Texas Workers' Compensation Commission Appeal No. 92366 decided September 10, 1992. The hearing officer resolves conflicts in expert evidence and assesses the weight to be given to expert evidence. Texas Employers Insurance Association v. Campos, 666 S.W.2d 286 (Tex. App.-Houston [14th Dist.] 1984, no writ).

The hearing officer determined that the designated doctor did not have all of the appropriate medical records when he examined the claimant, that there was a clear misdiagnosis of the claimant at the time that the designated doctor examined the claimant, and that the great weight of the other medical evidence is contrary to the report of the designated doctor. The hearing officer did not specifically detail how the contrary medical evidence outweighs the report of the designated doctor as required by Texas Workers' Compensation Commission Appeal No. 94210, decided March 31, 1994. He did make a finding of fact that there was a clear misdiagnosis of the claimant's injury at the time the designated doctor saw her. The clear misdiagnosis test applies to cases involving Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE §130.5(e) (Rule 130.5(e)), but not to reports of designated doctors. In Texas Workers' Compensation Commission Appeal No. 960936, decided July 3, 1996, the second designated doctor included an impairment for loss of cervical range of motion (ROM), another doctor did not, and the Appeals Panel stated that whether are not to include a rating for a loss of ROM represented a difference of medical opinion and that the 1989 Act gives presumptive weight to the designated doctor's resolution of such differences. In his narrative report, Dr. B stated that there was laxity of the of the cruciate ligaments, that he did not have the operative report of Dr. W, that the photostatic copies of the MRI were difficult to interpret, and that he used the MRI to make diagnostic conclusions. As a result, he did not assign an impairment for the anterior cruciate ligament under Table 36 of the AMA Guides. Dr. B made a medical decision that normally would have been entitled to presumptive weight, but in this case he made his report on the claimant's IR without having all of the medical reports that he should have had to make his decision on the claimant's IR. After the Commission reviewed the report of Dr. B, the better practice would have been to send to him the operative report of Dr. W and any other medical reports that Dr. B did not have at the time he wrote his report and to request that he review all of the medical reports and render a new report. However, that may not have been sufficient to resolve the issues before the hearing officer because of the surgery performed by Dr. A on February 5, 1996. In Texas Workers' Compensation Commission Appeal No. 941227, decided October 26, 1994, the designated doctor assigned a 10% IR on April 8, 1994; the claimant had surgery on his left knee on June 15, 1994, and surgery was planned for the right knee; the hearing officer determined that the claimant's IR was 10% as assigned by the designated doctor; and the Appeals Panel reversed and remanded for the hearing officer to have the designated doctor

consider additional medical evidence and determine whether he changed his opinion on MMI and IR because of the surgery. In the case before us, the claimant had a second knee surgery after Dr. B rendered his report. However, surgery after a designated doctor renders a report on MMI and IR does not necessarily result in a change in the date the claimant reached MMI or result in a different IR. Texas Workers' Compensation Commission Appeal No. 94421, decided May 25, 1994.

We reverse the decision of the hearing officer and remand for him to provide Dr. B with the all medical records pertaining to the claimant's injury, including the operative reports of Dr. W and Dr. A; to have the designated doctor review the reports, again examine the claimant, and indicate whether he changes his opinion concerning the claimant's IR; and to render another decision concerning the date the claimant reached MMI and the claimant's IR. We note that Dr. B was asked only to provide an opinion on the claimant's IR. It appears to be appropriate to also ask Dr. B to provide an opinion on the date that the claimant reached MMI. If Dr. B is not available, another designated doctor may be appointed.

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 the request for review not later than 15 days after the date on which such new decision is received from the Texas Workers' Compensation Commission division of hearings, pursuant to Section 410.202. *See* Texas Workers' Compensation Commission Appeal No. 92642, decided January 20, 1993.

Tommy W. Lueders
Appeals Judge

CONCUR:

Elaine M. Chaney
Appeals Judge

Judy L. Stephens
Appeals Judge