APPEAL NO. 980101

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 held on December 18, 1997. She (hearing officer) determined that (Dr. C) was not an agreed designated doctor and that the respondent (claimant) did not waive his right to dispute Dr. C's report of maximum medical improvement (MMI) and impairment rating (IR). The appellant (self-insured) appeals these determinations, alleging error of law in the decision and order of the hearing officer.[1] The appeals file contains no response from the claimant.

DECISION

Reversed and remanded.

The claimant, a fireman for the self-insured, sustained a compensable back injury on _____, and began treating with (Dr. F). By November 1993 Dr. F was of the opinion that the claimant had not yet reached MMI. The self-insured thereafter requested that the Texas Workers' Compensation Commission (Commission) appoint (Dr. S) to conduct an independent medical examination to assess a date of MMI and assign an IR. This request was approved by the Commission. The examination took place on January 26, 1994. Dr. S certified that the claimant was at MMI as of this date and had a six percent IR. In a letter of February 16, 1994, Dr. F disagreed with Dr. S's report because he still believed that the claimant was not yet at MMI. The Commission then appointed (Dr. L) the designated doctor in this case. In a Report of Medical Evaluation (TWCC-69) of an April 20, 1994, examination, Dr. L concluded that the claimant was not yet at MMI and did not provide an IR. Thereafter, on August 22, 1994, Dr. F completed a TWCC-69 in which he found that claimant reached MMI on that date and assigned a 27% IR. The parties represented at the CCH that they agree to this date of MMI. The claimant was next examined by Dr. C on October 18, 1994. As a result of this examination Dr. C completed a TWCC-69 in which he found the claimant reached MMI on June 24, 1994, and assigned a 12% IR.

Although no written agreement was introduced at the CCH, it was the self-insured's position that both parties agreed to the appointment of Dr. C as designated doctor and that he had the status of an agreed designated doctor under Section 408.125(d).[2] In support of this position, the self-insured introduced into evidence a letter of September 20, 1994, from the Commission to the claimant advising him of the dispute of MMI and IR and that a

[1] Concurrent with its appeal, the carrier made a motion to the hearing officer to re-open the CCH based on newly discovered evidence that, in effect, "countermands" the order of the hearing officer, specifically that the first designated doctor in this case is no longer a designated doctor.

[2] This section provides that if the designated doctor is chosen by the parties, the Commission "shall adopt the [IR] made by the designated doctor."

designated doctor would be appointed by the Commission in accordance with Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 130.6 (Rule 130.6) if the parties did not agree on a designated doctor within 10 days. On September 28, 1994, the self-insured wrote the Commission to advise that the parties agreed that Dr. C would be the designated doctor to "resolve the disputed issue of the [IR]." No mention was made of a dispute over MMI. By letter of October 6, 1994, the self-insured informed the claimant that Dr. C would examine him for an "Impairment evaluation only" and that this was the only dispute. On October 11, 1994, the Commission wrote the claimant that it had been notified by the self-insured that the parties "agreed" that he would be examined by Dr. C, a designated doctor, to resolve an IR dispute only. A computer note from the files of the adjuster working on this claim states that the claimant "agreed" to the evaluation by Dr. C. The claimant testified that he was generally unaware of the role and significance of a designated doctor and the effect of agreeing on a designated doctor. He further said that he thought he was being sent to Dr. C for "another IR." He admitted that the carrier asked him if he would see Dr. C, and he said "yes," but could recall no details of the conversation. It was his position that he agreed to see Dr. C, but not as a designated doctor.

Although the issue was defined both at the benefit review conference and CCH in terms of whether the parties agreed to the appointment of Dr. C as a designated doctor, the hearing officer made no express findings that an agreement to this effect did or did not exist. Instead, she redefined the issue as "whether the parties can agree to the appointment of a second designated doctor when a designated doctor has already been properly appointed." In her discussion of the evidence she refers to "the parties alleged agreement." Ultimately, the hearing officer resolved this issue as a matter of law, specifically, that the 1989 Act, as interpreted by the Appeals Panel, contemplates the appointment of only one designated doctor. Because it was not established, and neither party argued, that Dr. L was unable or unwilling to perform the role of designated doctor, *see* Texas Workers' Compensation Commission Appeal No. 93045, decided March 3, 1993, the hearing officer concluded he was not and could not be replaced even by agreement of the parties.

We note, initially, that the decisions relied on by the hearing officer deal with the appointment of a second designated doctor selected by the Commission, not, as in this case, whether the parties can agree to a second designated doctor after the Commission has already selected and appointed a designated doctor. *See* Texas Workers' Compensation Commission Appeal No. 950347, decided April 18, 1995, and cases cited therein. However, in Texas Workers' Compensation Commission Appeal No. 94742, decided July 13, 1994, the Commission appointed a designated doctor who issued a report of MMI and IR. For reasons unclear, the parties agreed to the appointment of a second designated doctor selected by the Commission, to address IR only. The hearing officer gave presumptive weight to the report of the first designated doctor. The Appeals Panel reversed and remanded with the comment that:

> However, once the second designated doctor was appointed by the Commission pursuant to the agreement of the parties, the report of the first designated doctor was no longer entitled to presumptive weight because there can by only one designated doctor at a time acting as the agent of the Commission to resolve a dispute over MMI and IR.

This decision supports the principle that the parties by agreement can determine which of a series of designated doctors is to be given presumptive weight under Section 409.122(c) and Section 409.125(e). *Compare* Texas Workers' Compensation Commission Appeal No. 970946, decided June 26, 1997, where a second designated doctor was selected and appointed, but without the agreement of parties. *See* Appeal No. 950347, *supra*, for the proposition that a second designated doctor may not be appointed to decide a pending issue for which a prior designated doctor was appointed and is able and willing to address.

More directly on point, we believe, is our decision in Texas Workers' Compensation Commission Appeal No. 941685, decided January 30, 1995. In this case, the Commission selected a designated doctor. Before a report was issued by this doctor, the parties agreed that another doctor would serve as an agreed designated doctor. (DR J S) considered it a "very important factor, that the parties elected to agree to a designated doctor before a report was known to them by the Commission-selected designated doctor." The agreement to give effect to the report of the second designated doctor was found not to violate Commission policy or the 1989 Act. We consider this case controlling in the present dispute. In particular, although Dr. L's report was known to the parties before the "agreement" on the appointment of Dr. C, Dr. L had not yet determined that the claimant was at MMI and did not assign an IR. This is tantamount to the situation in Appeal No. 941685 where the parties did not know what the report of the designated doctor contained. Thus, we conclude that the premise on which the hearing officer decided this case was error as a matter of law. For this reason, we reverse the determination of the hearing officer that Dr. C was not a designated doctor and remand this issue for further proceedings and a determination of whether or not the parties agreed that Dr. C was to be the designated doctor in this case.

With regard to the second issue in this case, that is, whether the claimant waived his right to dispute Dr. C's report by waiting until 1997 to express his disagreement with it after accepting impairment income benefits (IIBS) calculated on Dr. C's 12% IR, the hearing officer reached the following Conclusion of Law:

CONCLUSION OF LAW

> 4. Claimant has not waived his right to dispute [Dr. C's] report of [MMI] and [IR].

The only findings of fact, both unappealed, related to this conclusion of law are a finding that Dr. C certified MMI and an IR on June 24, 1994 (Finding of Fact No. 7), and that following surgery in 1997, claimant disputed the report of Dr. C (Finding of Fact No. 8). In her discussion of the evidence, the hearing officer stated that:

there is no persuasive authority for the proposition the Claimant had to dispute this report within a limited time. There are numerous cases wherein a Claimant may dispute MMI/IR following surgery, even after statutory MMI. While those disputes are not routinely successful, the disputes themselves are not barred.

We have in the past noted the importance of an expeditious challenge to an IR. *See, e.g.,* Texas Workers' Compensation Commission Appeal No. 962071, decided December 4, 1996. Consistent with this notion, we have recognized an "element of estoppel" when a party fails to protest the appointment of a designated doctor at the time of the appointment, but awaits the result of an examination by a designated doctor before raising a challenge to the appointment if the results are not to the party's liking. Texas Workers' Compensation Commission Appeal No. 94740, decided July 12 1994. *See also* Texas Workers' Compensation Commission Appeal No. 960352, decided April 8, 1996; Texas Workers' Compensation Commission Appeal No. 941671, decided January 30, 1995; and Texas Workers' Compensation Commission Appeal No. 941242, decided October 27, 1994.

In the case we now consider, the hearing officer appears to recognize that the concept of waiver exists. She then analyzes a possible waiver solely in terms of the later surgery and concludes, in effect, that the fact of later surgery always permits a dispute of a prior MMI/IR certification no matter how much time has elapsed. The end result is that she resolved the waiver issue not in terms of whether this individual claimant by his actions or inactions over a given period of time after receiving Dr. C's report and accepting benefits based on that report is estopped from later disputing the report, but simply as jurisdictional matter. For this reason, we reverse the determination that the claimant did not waive the right to dispute Dr. C's certification of MMI and IR and remand this issue for further findings regarding the claimant's conduct during the two and one-half years from Dr. C's report to the dispute of it by the claimant which in her opinion support a finding of either waiver or nonwaiver of the right to dispute.

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 Commission's Division of Hearings, pursuant to Section 410.202. *See* Texas Workers' Compensation Commission Appeal No. 92642, decided January 20, 1993.

Alan C. Ernst
Appeals Judge

CONCUR:

Philip F. O'Neill
Appeals Judge

CONCURRING OPINION:

I agree that the decision must be remanded to decide the issue that was before the hearing officer, whether Dr. C was an agreed designated doctor, but I cannot agree with the extent to which the majority opinion has opined about the Commission's authority to appoint a "second designated doctor." There was no "second designated doctor" in this case because the first dispute, over MMI, had been resolved by the appointment of Dr. L for that purpose. Although he was instructed to assign an IR in the event he certified MMI, he found instead that MMI had not been reached. The dispute passed. Dr. L fulfilled completely his role as designated doctor, which, in this case, included no opinion on IR as it would have been premature. The statute clearly envisions that there can be separate controversies, and designated doctor appointments, over issues of the existence of MMI, and the amount of impairment. When a second dispute arose over the amount of IR, after the treating doctor certified MMI as he had not originally done, there was a need to appoint a designated doctor. Now, the Commission or the parties could have gone back to the doctor who had once served on this case, but I find no statutory or rule requirement that they do so. The basis on which the Appeals Panel has earlier advised against appointing "second" designated doctors, including the decision cited by the hearing officer, is that we should not have a situation where the Commission has to decide between the opinions of two doctors that appear to have presumptive weight. That fact situation does not exist in this case. The hearing officer will not be faced with weighing Dr. L's earlier "no MMI opinion" against Dr. C's opinion on IR. The two are apples and oranges in this case.

Be that as it may, the hearing officer was clearly acting in error by deflecting the fact determination before her on a concept that Dr. L had some form of continuing jurisdiction *ad infinitum* which the parties were powerless to abrogate by agreement, and I concur in the reversal and remand.

Susan M. Kelley
Appeals Judge