APPEAL NO. 010481

This appeal arises pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act). A contested case hearing was held on December 12, 2000, the record closed on February 14, 2001. The issues were the impairment rating (IR) of the respondent/cross-appellant (claimant); claimant's date of maximum medical improvement (MMI); and the average weekly wage (AWW). The AWW issue was resolved by agreement at the hearing. The hearing officer determined that: (1) the record indicated irregularities in the designated doctor's examination of claimant; (2) the designated doctor's report did not give adequate information; (3) the great weight of the other medical evidence is contrary to the designated doctor's report regarding the IR only; and (4) presumptive weight is given to the designated doctor's MMI date, but not to the IR. Appellant/cross-respondent (carrier) appealed, contending that: (1) claimant waited too long to raise the problems with the designated doctor's report; and (2) the hearing officer erred in failing to give presumptive weight to the designated doctor's report. Claimant responded that the hearing officer did not err in rejecting the designated doctor's report, but that he should have adopted the IR of another doctor. Claimant filed a cross-appeal asserting that: (1) the hearing officer erred in giving presumptive weight to the designated doctor's MMI date; (2) the hearing officer should not have ordered that a second designated doctor be selected; and (3) the hearing officer erred in failing to find that claimant's MMI date was the statutory MMI date. Claimant also asked the Appeals Panel for an order for payment of benefits and for the removal of the designated doctor from the designated doctor list used by the Texas Workers' Compensation Commission (Commission). Carrier responded that the MMI date found by the hearing officer was correct.

DECISION

We affirm in part and reverse and remand in part.

Claimant sustained a compensable neck injury on _____. On September 8, 1997, the Commission-selected designated doctor, Dr. B, certified that claimant reached MMI on January 23, 1997, with an IR of nine percent. Claimant testified that the designated doctor did not examine her and that he sent her into a room for range of motion (ROM) testing performed by three men. She said the men did not use an inclinometer and did not touch her or use instruments to measure her movements. The hearing officer expressed skepticism regarding whether claimant was properly examined, noting that the ROM measurements were exactly the same for all three measurements, on all movements. The hearing officer also stated that it appeared that no inclinometer was used to measure claimant's ROM. The hearing officer wrote letters to the designated doctor to inquire about this issue, but received no response.

At the hearing, carrier complained that claimant had waited too long to raise any concerns with the designated doctor's report. Claimant testified that she hired an attorney in January 1999 because she sought to dispute the designated doctor's report. She

indicated that she had difficulties with her attorney, but Commission Dispute Resolution Information System notes show that claimant had contacted the Commission to dispute the designated doctor's report by August 1999. Claimant's actual dispute was noted about one year and eleven months after the designated doctor's report.

Regarding carrier's assertion that claimant waited too long to raise the concerns with the designated doctor's report, we note that there was no express issue raised regarding any possible waiver. *See* Texas Workers' Compensation Commission Appeal No. 990479, decided April 12, 1999 (Unpublished). The hearing officer made an implied finding that claimant did not wait too long to dispute the designated doctor's report. We perceive no reversible error.

Carrier contends that the hearing officer erred in failing to accord presumptive weight to the designated doctor's report as a whole. Claimant asserts that the hearing officer should not have determined that she reached MMI on the date found by the designated doctor. The hearing officer discussed whether the designated doctor complied with the Guides to the Evaluation of Permanent Impairment, third edition, second printing, dated February 1989, published by the American Medical Association (AMA Guides) and the 1989 Act. When the hearing officer sought clarification from the designated doctor in this regard, the designated doctor did not respond. This is an appropriate reason for obtaining a second designated doctor. *See* Texas Workers' Compensation Commission Appeal No. 001789, decided September 18, 2000. We perceive no error in the hearing officer's determination that the designated doctor's report should not be given presumptive weight regarding the IR. We conclude that the hearing officer erred in according presumptive weight to the designated doctor's report regarding MMI. MMI was a disputed issue and a designated doctor was selected to determine both the IR and the MMI date. The parties were entitled to have the MMI issue resolved by a designated doctor. We reverse the hearing officer's determination that the designated doctor's MMI date is entitled to presumptive weight and that claimant reached MMI on January 23, 1997. We remand the MMI issue to the hearing officer so that it may be determined by the new designated doctor, along with the IR issue.

Claimant contends that the hearing officer should have selected the IR of another doctor, Dr. BU. However, because of the designated doctor's failure to cooperate, we perceive no error in the hearing officer's determination that another designated doctor should be selected. *See* Texas Workers' Compensation Commission Appeal No. 992902, decided February 3, 2000. Regarding the complained-of failure of the hearing officer to detail the evidence contrary to the designated doctor's report, we note that the actual problem with the designated doctor's report was the failure to cooperate and the perceived failure to comply with the 1989 Act and AMA Guides. Therefore, the hearing officer need not have detailed the "contrary evidence." We perceive no reversible error in this regard.

Regarding claimant's request for an order for payment of benefits and for the removal of the designated doctor from the Commission's designated doctor list, we will not

address issues not raised at the benefit review conference. We perceive no reversible error in this regard on the part of the hearing officer.

We affirm that part of the hearing officer's decision and order that determines that claimant's IR is still in dispute and an alternate designated doctor must be appointed to resolve the dispute. We reverse that part of the hearing officer's decision that determines that the great weight of the other medical evidence is not contrary to the designated doctor's report regarding MMI and that the designated doctor's MMI date is given presumptive weight. We remand the MMI issue to the hearing officer for further action consistent with this decision. 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.

Judy L. S. Barnes
Appeals Judge

CONCUR:

Michael B. McShane
Appeals Judge

Philip F. O'Neill
Appeals Judge