APPEAL NO. 92240

On May 4, 1992, a contested case hearing was held in (city), Texas, with (hearing officer) presiding, to consider whether respondent had reached maximum medical improvement (MMI) and whether she had a disability. With the parties in disagreement as to MMI at the benefit review conference (BRC) on February 19, 1992, the benefit review officer arranged for respondent's examination by (Dr. W), on February 28, 1992. (Dr. W) determined that respondent had not yet reached MMI; and she thereafter continued to see (Dr. W) for treatment. (Dr. W) released respondent to return to work as of April 30, 1992 but maintained she still had not reached MMI. The hearing officer concluded that, as of April 30, 1992, although respondent had not yet reached MMI, she no longer had disability and was, therefore, not entitled to payment of temporary income benefits (TIBS) after April 30th unless disability recurs. Appellant challenges the hearing officer's findings that respondent's disability continued up to April 30th, that she had not yet reached MMI, and that the Medical Evaluation Report of (Dr. Wh), who, on December 7, 1991, examined respondent at the request of appellant and determined that she had reached MMI, wasn't sent to respondent's treating doctor for comment in compliance with Tex. W. C. Comm'n, 28 TEX. ADMIN. CODE § 130.3 (Rule 130.3). Appellant further contends that the hearing officer erred in finding that (Dr. W) was designated by the Texas Workers' Compensation Commission (Commission) to examine respondent (which finding enabled the hearing officer to give presumptive weight to (Dr. W)'s report) because (Dr. W) became respondent's treating doctor and perforce lost his status as a designated doctor whose report was entitled to presumptive weight. In her response, the respondent asserts the correctness of the challenged findings and conclusions and argues that there is no provision in the Texas Workers' Compensation Act of 1989, TEX. REV. CIV. STAT. ANN. art. 8308-1.01 *et seq*. (Vernon Supp. 1992) (1989 Act), nor in the Commission's Rules, which prohibit a so-called "designated doctor" from thereafter continuing to treat an employee initially referred by the Commission for examination.

DECISION

Finding no reversible error and finding sufficient evidence to support the challenged findings and conclusions of the hearing officer, we affirm.

Respondent injured her lower back on (date of injury), a Saturday, while working as an assembler for (employer). Respondent's duties involved the assembling of metal "card cages" while sitting on a chair in front of a work station. Assembled cages weigh approximately 15 pounds and, on (date of injury) respondent hurt her back when she lifted several assembled cages and carried them a few feet to a cart. Although respondent had not had back problems prior to this employment, she began to experience back pain on April 1, 1991 and was off work a few days at that time. She contended in interrogatory responses that the (date of injury) lifting incident either reinjured or aggravated her back problem and resulted in greater pain which also radiated into her legs. The hearing officer's finding that respondent sustained a compensable injury on that date is not challenged.

According to employer's human resource specialist, respondent completed her (date of injury) shift and reported her back injury the following Monday morning, (date). Respondent was sent that day to the (Clinic), the medical facility to which employer referred injured employees, where she was seen by (Dr. P). His diagnosis was "muscular soreness right lower back" which he attributed to repeated bending and lifting. He apparently prescribed some medication and physical therapy and released respondent to return to work the following day, subject to a 20 pound lifting restriction.

According to employer's nurse, respondent continued to work at her job until May 30th when she stopped working due to her back pain. She resumed working for employer on April 30, 1992, after being released to work by (Dr. W), and in the meantime had periodically brought various doctors' reports to employer and otherwise informed employer of her status. Respondent testified she didn't work anywhere between May 30, 1991 and April 30, 1992, and could not have done so because of constant pain which prevented her from even performing her household duties. She said she still had pain in her lower back and legs.

After several visits to (Dr. P) and apparent dissatisfaction with the efficacy of the physical therapy (PT) and medications, respondent discussed seeing another doctor with employer's nurse. The nurse provided respondent with the name of (Dr. S) from a list of doctors employer maintained for employees through a preferred provider organization. The nurse insisted she did not refer respondent to (Dr. S) but simply provided his name since his office appeared closest to respondent's residence. Respondent visited (Dr. S) on June 3rd and he diagnosed "back strain, muscle spasm" and took her off work for one week until June 10th. However, respondent saw (Dr. S) several times in July, and he continued to keep her off work and on a course of physical therapy. A CT scan of respondent's lower lumbar spine on June 14, 1991, was normal. Respondent testified that sometime in August 1991, (Dr. S) released her for light duty but that her supervisor, (J F), advised that employer had no light duty position for her. She said (Dr. S) thought she had a "bulge" in her back and in August referred her to (Dr. A), an orthopedic surgeon.

(Dr. A)'s impression was "lumbo-sacral strain with right sciatic radiculopathy" and with degenerated or herniated disc to be ruled out. He scheduled an MRI exam to confirm whether respondent's discs were normal as shown on the CT scan, saw her periodically during the remainder of 1991, and kept her off work. She was apparently receiving PT throughout this period. An MRI exam revealed a "mild annular disc bulging at L5-S1." (Dr. A) wrote appellant on January 6, 1992, to advise that after an office visit on December 31st, respondent was released to return to work but had not yet returned and was still complaining of low back pain. He indicated that a prolonged PT program had not succeeded in relieving her pain and that it was his impression that she had "a chronic lumbo-sacral strain with myositis syndrome." (Dr. A) further stated that although respondent had not changed significantly since October, he felt she had no clinical evidence of a herniated disc or of nerve root impingement. He recommended a position at work not requiring lifting over 10 to 15 pounds nor repeated bending, and also recommended against further testing or x-rays

at that time. Respondent testified that (Dr. A) never told her she had reached MMI and that employer had no restricted duty position available for her.

On December 7, 1991, respondent was examined and her tests and some medical records were reviewed by (Dr. Wh) at the request of appellant. His diagnostic impression included postural neck and low back pain, aerobic deconditioning, and exogenous obesity. He stated respondent could return to her prior job with no further restrictions and he signed a Report of Medical Evaluation (TWCC-69) which stated that respondent had reached MMI on December 7, 1991, with a whole body impairment rating of 0%.

Respondent was examined by (Dr. W), an orthopedic surgeon, on February 28, 1992 at the request of the Commission. On February 28th, (Dr. W) issued both a Medical Evaluation Report (TWCC-69) and a three page report to appellant which recited the history of respondent's present illness, (Dr. W's) physical examination, and his review of the radiographs. His assessment was "lower back pain of undefined etiology." He took respondent off work and recommended a three week course of PT, back school, and a subsequent visit. His TWCC-69 stated that respondent had not reached MMI and that he could not at that time give an estimated date for MMI. Among (Dr. W)'s findings were a quite limited range of motion in any plane and localized tenderness over respondent's proximal sacrum. He subsequently started respondent on a course of PT and obtained a CT scan as well as nerve conduction studies and an EMG. He also provided some Colchicine therapy and administered an epidural block on April 23rd. On April 29th (Dr. W) signed a form releasing respondent to return to work without restriction. In a letter dated May 1, 1992, (Dr. W) stated that respondent had not reached MMI and was returned to work on a trial basis for three months after which she was to return for reevaluation.

Article 8308-4.25(b) provides as follows:

> If a dispute exists as to whether the employee has reached [MMI], the commission shall direct the employee to be examined by a designated doctor selected by mutual agreement of the parties. If the parties are unable to agree on a designated doctor, the commission shall direct the employee to be examined by a designated doctor selected by the commission. The report of the designated doctor shall have presumptive weight, and the commission shall base its determination as to whether the employee has reached [MMI] on that report unless the great weight of the other medical evidence is to the contrary.

Article 8308-1.03(15) defines designated doctor as "a doctor who is appointed by mutual agreement of the parties or by the commission to recommend a resolution of a dispute as to the medical condition of an injured employee."

Rule 130.6 provides that the designated doctor shall complete and file the medical evaluation report in accordance with Rule 130.1. Rule 130.1 provides that a doctor who is required to certify whether an employee has reached MMI shall complete and file a medical

evaluation report as required by that rule, and provides further that all reports under the rule shall be on a form prescribed by the Commission and shall contain certain specific information. (Dr. W)'s February 28, 1992 report of medical evaluation is on a TWCC-69 (2/91) form, is signed, and appears to have the information required by Rule 130.1. Appellant has not challenged the compliance of (Dr. W)'s report with the requirements of Rule 130.1. Appellant does contend, however, that from the time of (Dr. W's) examination of respondent on February 28th he went beyond the role of objectively reviewing the differing medical opinions of (Drs. A) and (Wh) and objectively evaluating respondent's condition, and instead began to contemplate his provision of treatment for her thus losing his objectivity and acquiring a stake in the outcome of the decision on MMI. In its closing argument at the hearing, appellant contended that (Dr. W) wasn't the designated doctor just because he was agreed to at the BRC; that he doesn't understand the definition of MMI; that from the outset, (Dr. W) maintained he had to evaluate a back problem and not just decide MMI; that (Dr. W) finally ended up where (Dr. Wh) had already gotten to on December 7, 1991; that appellant shouldn't have to pay twice for the work-ups and tests to enable (Dr. W) to eventually reach the diagnosis of chronic back strain already reached by (Dr. Wh); and, that if the designated doctor says "I can't resolve the issue," then he is no longer a designated doctor and another must be selected.

(Dr. W) stated on his TWCC-69 of February 28th that "patient [was] referred by TWCC for evaluation of lower back pain," that respondent had not reached MMI, and that he could not assign an estimated MMI date at that time. According to his February 28th report to appellant, (Dr. W) not only conducted a physical examination of respondent but reviewed (Dr. Wh's) radiographs of December 7th, repeated them himself on February 28th, and reviewed CT scans (June 14, 1991) and MRI studies (August 29, 1991). His assessment was: "[p]atient with lower back pain of undefined etiology. A three week course in physical therapy and back school format in this clinic is recommended and the patient be reseen subsequently." (Dr. W) conducted the examination of respondent and prepared his report consistent with the foregoing statutes and rules. We are aware of no provision, nor are we cited to any, which would prohibit a designated doctor from continuing to provide treatment to an employee originally referred by the Commission for examination pursuant to Article 8308-4.25(b). Thus we find that (Dr. W) was a designated doctor and that his report was entitled to presumptive weight.

Having reviewed the evidence we are persuaded that there is sufficient evidence to support the challenged findings and conclusions with the possible exception of Finding of Fact No. 9 to the effect that (Dr. Wh's) TWCC-69 did not comply with Rule 130.3 in that it was not sent to the "treating doctor" for comment. Appellant fears the hearing officer may have devalued the weight he gave (Dr. Wh's) report since he found it was not sent to the "treating doctor." This finding does not identify, nor does appellant, the "treating doctor" to whom (Dr. Wh's) TWCC-69 report should have been sent. It appears that respondent was being treated by (Dr. A) until she was referred to (Dr. W) who then began to treat her. Respondent testified that she didn't select (Dr. S) to be her treating doctor nor did she select (Dr. A) to whom she was referred by (Dr. S). She was given (Dr. S's) name by employer's

nurse. Although she was seen by (Dr. A) after her December 7th examination by (Dr. Wh), respondent said she decided to have (Dr. W) treat her after her February 28th visit because he explained things better, she liked him better, and he had treatment recommendations. She said she improved under his care which included PT, back school, Colchicine infusions, and an epidural block. The record does not appear to indicate whether (Dr. Wh's) TWCC-69 report was sent to (Dr. A) although we can surmise it was sent to (Dr. W) as the designated doctor. In any event, even if Finding of Fact No. 9 is unsupported by evidence of record, it may be disregarded since (Dr. Wh's) compliance with Rule 130.3 was not an issue at the hearing. *See* Texas Workers' Compensation Commission Appeal No. 91109 (Docket No. redacted) decided January 21, 1992.

We are satisfied that sufficient evidence exists to support the hearing officer's findings and conclusion to the effect that respondent had disability until April 30, 1992, the date (Dr. W) released her to return to work without restriction. Disability is defined as "the inability to obtain and retain employment at wages equivalent to the preinjury wage because of a compensable injury." Article 8308-1.03(16). As we noted in Texas Workers' Compensation Commission Appeal No. 91045 (Docket No. redacted) decided November 21, 1991, while determining the end of disability can be a difficult and imprecise matter, it is less likely to be so where the injured employee remains in the employment of the preinjury employer. The evidence was uncontroverted that when (Drs. S) and (A) released respondent to return to her employment with lifting restrictions, she was told by her supervisor that no light duty was available for her.

Similarly, we are satisfied the evidence supports the hearing officer's conclusion that respondent has not reached MMI. He found that none of respondent's treating doctors had certified that she had reached MMI, that (Dr. Wh) determined to the contrary on December 7, 1991, and that (Dr. W), the designated doctor, concluded on February 28, 1992, that she had not reached MMI. The 1989 Act makes the hearing officer the sole judge of the relevance, materiality, weight and credibility of the evidence. Article 8308-6.34(e). Appellant asks us to speculate that the hearing officer erroneously gave presumptive weight to (Dr. W)'s report and just as erroneously devalued the credibility of (Dr. Wh's) report. This we decline to do. Appellant asserts that because the hearing officer found (Dr. W) to be a designated doctor, he must have given presumptive weight to (Dr. W)'s report. Assuming the hearing officer gave presumptive weight to (Dr. W)'s report, as provided for in Article 8308-4.25(b), we cannot say that the great weight of the other medical evidence was to the contrary. After a careful review of the record we are satisfied that no reversible error was committed by the hearing officer and that the findings were not based upon insufficient evidence nor were they so against the great weight and preponderance of the evidence as to be manifestly unjust. In re King's Estate, 150 Tex. 662, 244 S.W.2d 660, 662 (1951); Pool v. Ford Motor Co., 715 S.W.2d 629, 635 (Tex. 1986).

Finding no error, the decision and order of the hearing officer are affirmed.

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Philip F. O'Neill
Appeals Judge

CONCUR:

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Joe Sebesta
Appeals Judge

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Lynda H. Nesenholtz
Appeals Judge