APPEAL NO. 92244

This appeal arises under the Texas Workers' Compensation Act, TEX. REV. CIV. STAT. ANN. art. 8308-1.01 *et seq*. (Vernon Supp. 1992) (1989 Act). A contested case hearing was held in (city), Texas, on March 4, April 6, April 21, and May 7, 1992, with (hearing officer) presiding as hearing officer. Evidence was adduced by the parties on two disputed issues at the hearing, to wit: whether respondent (claimant below) had reached maximum medical improvement (MMI), and whether respondent's disability continued after September 16, 1991. The hearing officer resolved both issues in favor of respondent and appellant requests our review. Appellant asserts first that the hearing officer erred in considering and deciding the issue of MMI after having advised the parties at the last hearing session he no longer regarded MMI as a disputed issue. Appellant's second appealed issue asserts that the hearing officer erroneously equated MMI with disability. Respondent did not respond.

DECISION

Finding the evidence sufficient to support the hearing officer's findings and conclusions, we affirm the decision.

From the sparse evidence adduced at the hearing, it appears that respondent was employed by (employer) when, on (date of injury), she slipped and fell to the floor striking her back. She apparently began to be treated by (Dr. S), although no records of (Dr. S) were in evidence at the hearing. Respondent's testimony at the hearing, through a translator, was minimal in providing information about her duties with employer, her injury, her subsequent medical treatment, and her subsequent work history. According to the report of the Benefit Review Conference (BRC) of January 7, 1992, in evidence at the behest of the hearing officer, medical reports of (Dr. S) were adduced at the BRC and respondent there stated that (Dr. S) had released her to return to work on September 16, 1991. She also there stated that she telephoned her supervisor to advise about her release to work; that she could not return to work because of her pain; and that she was incapable of performing her duties as a physical laborer including the repeated lifting of boxes weighing approximately 16 pounds from the floor to a conveyor belt. According to the BRC report, respondent then visited (Dr. G) on September 25th and he took her off work and prescribed physical therapy (PT) and medication. (Dr. G's) Initial Medical Report of October 9, 1991 contained a diagnosis of lumbar radiculopathy and a treatment plan including PT, a lumbar corset, medication, and remaining off work. In his Specific and Subsequent Medical Report of December 12, 1991, (Dr. G) indicated respondent complained of chronic low back pain increasing on activity, and an inability to sit or stand for long periods. He stated she had a poor range of motion, required a myelogram, and he continued her medications and kept her off work.

On January 15, 1992 respondent was examined by (Dr. T). The parties asserted at the hearing that they had made an oral agreement for this examination, apparently on the initiative of appellant, for the purpose of determining whether respondent had reached MMI.

However, the parties differed at the hearing on whether they had agreed to be bound by the results of (Dr. T's) examination and opinion on MMI. Most of the information surrounding the selection of (Dr. T) and the nature of the parties' agreement came from statements of counsel. Respondent's counsel insisted that while respondent had agreed to the examination, she had not agreed to be bound by his determination about MMI. Appellant's counsel insisted to the contrary and said that after (Dr. T) certified on January 15, 1992 that respondent would reach MMI effective February 1, 1992, appellant then paid respondent temporary income benefits (TIBS) for the period of September 16, 1991 to February 1, 1992. Respondent did not take issue with this assertion. The parties also stipulated that respondent was entitled to TIBS to February 1, 1992.

(Dr. T's) Report of Medical Examination (TWCC-69) was later amended to include his assignment of a whole body impairment rating of 0%, and the additional comment that "after reviewing lumbar myelogram & post-myelogram CT Scan, I would not change the above MMI or rating." A lumbar myelogram performed for (Dr. G) on January 28, 1992 was normal, as was a post-myelogram CT Scan of that date except for a "small midline disc bulge at L5-S1." (Dr. G), who was continuing the treatment of respondent, also obtained an electromyography study and nerve conduction studies on February 18, 1992, the latter study being "suggestive of lumbar fifth radiculopathy on left side." Attached to (Dr. T's) TWCC-69 was a report which recited respondent's history including the fact that she was 31 years of age, had not worked since her injury, and had been treated exhaustively with PT and antiinflammatory medicines. (Dr. T) conducted a clinical examination and stated that respondent's x-rays and MRI scan were within normal limits. The magnetic resonance scan (MRI) of June 19, 1991 indicated a mild ligamentum flavum hypertrophy at L4-L5 and an otherwise unremarkable lumbar spine. His report summed up as follows:

> The patient does not have on clinical examination a significant orthopedic injury. She has now been out of work since (date). I think as of about 2-1-92 she will have probably reached her maximum medical recovery. I would not assign any partial permanent disability associated with this injury. I think she may, however, have difficulty returning to a job that requires repetitive or heavy lifting.

On May 7, 1992, the date of the fourth session of the hearing below, respondent adduced a report of that date from (Dr. G) which noted, *inter alia*, that the MRI (dated 6/19/91) revealed hypertrophy of a mild ligamentum flavum, the CT Scan revealed a disc bulging at L5-S1, and the EMG suggested L5 radiculopathy on the left side. (Dr. G) stated that "I do not feel that this patient has reached [MMI] and an estimation as to this date is presently undetermined." He said he could not then assign an impairment rating because respondent required more diagnostic procedures. He also stated he had advised respondent to continue to be off work.

According to the BRC report, one issue was there resolved, namely, that respondent had exercised her second choice of a treating doctor in selecting (Dr. G). Apparently she

had first been seen by (Dr. R) who had referred her to (Dr. S). The second and unresolved disputed issue was framed thusly in the BRC report:

Whether [respondent] continues to suffer a disability after 9-16-91, when released to work by (Dr. S), a referral from claimant's treating doctor.

During the hearing below, the parties insisted that in addition to the disputed issue unresolved at the BRC they were agreed that a second issue was in dispute and needed resolution by the hearing officer; that is, whether respondent had reached MMI. The parties conceded the MMI issue had not first been considered at a benefit review conference but nevertheless urged that it be considered. Prior to the final session of the hearing, the hearing officer had indicated that both issues were before him for resolution. At the final session, however, the hearing officer advised the parties that because the MMI issue had not first been considered at a BRC, he did not consider it ripe for resolution at the hearing and that only the issue on disability remained. At that point in the hearing, however, neither party had further evidence to present on either issue, and they had repeatedly urged their respective positions on both issues throughout the hearing.

With regard to the issue unresolved at the BRC, continued disability, the hearing officer found that respondent was unable to obtain or retain employment at her preinjury wage, was currently unemployed as a result of her compensable injury, and concluded that she suffers disability within the meaning of Article 8308-1.03(16) (1989 Act). Appellant does not directly challenge these findings on appeal but somewhat obliquely approaches the disability issue with the assertion that the hearing officer "appeared to equate disability with failure to reach MMI." However, we find the hearing officer's findings and conclusions on the two issues clear, distinct, and free of confusion. The foregoing statute defines "disability" as "the inability to obtain and retain employment at wages equivalent to the preinjury wage because of a compensable injury." That issue presented the hearing officer with a fact question to decide and we are satisfied there was sufficient evidence in the record to support his findings and conclusion on that issue. Article 8308-6.34(e) provides that the hearing officer is the sole judge, not only of the materiality and relevance of the evidence, but of the weight and credibility it is to be given. Respondent apparently advised her employer in September 1991, after first being released to return to work by a doctor to whom she had been referred by her first treating doctor, that she could not perform her preinjury job, which involved repeated lifting of 16 pound boxes from the floor to a conveyor, because of her pain. (Dr. G) has had her off work since September 25, 1991, and on the last day of the hearing continued to advise respondent to remain off work. Even (Dr. T's) report expressed his concern that she may have difficulty returning to a job requiring heavy or repetitive lifting. Whatever the nature of the work release issued by (Dr. S) to respondent in September 1991 may have been, it was not in evidence, nor was there evidence that respondent was ever subsequently released to work, even subject to restrictions. *See generally* Texas Workers' Compensation Commission Appeal No. 91045 (Docket No. redacted) decided November 21, 1991.

As for the MMI issue, the hearing officer stated in his Decision and Order that the parties had unanimously agreed that the unresolved issues included whether respondent had reached MMI. Such agreement was made abundantly clear throughout the hearing by the parties' counsel. Article 8308-6.31(a) provides that issues not raised at the BRC may not be considered at the contested case hearing except by consent of the parties, or unless the Texas Workers' Compensation Commission (Commission) determines that good cause existed for not raising such issues at the earlier proceedings. Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 142.7(d) (TWCC Rules) provides that the "[p]arties may, by unanimous consent, submit for inclusion in the statement of disputes one or more disputes not identified as unresolved in the benefit review officer's report." That rule goes on to require that such additional dispute be in writing, identify the dispute, explain the parties' positions, be signed by the parties, be sent to the Texas Workers' Compensation Commission (Commission) no later than 10 days before the hearing, and explain why the issue was not earlier raised. The parties repeatedly stated their consent and agreement to the MMI issue being considered at the hearing. The only writing evidencing the additional issue was an exhibit proffered by appellant entitled "Benefit Review Conference Agreement," dated February 27, 1992, and signed by appellant's adjustor, (Y J), who testified at the hearing. According to this exhibit, the parties agreed that the remaining disputed issue included the MMI issue. The exhibit went on to recite that owing to a medical dispute between (Drs. G), (S), and (R), that (Dr. T) "was mutually agreed upon" by (Ms. J) and claimant's attorney (through his secretary); that after (Dr. T) stated that respondent had reached MMI as of February 1, 1992, appellant paid respondent TIBS for the period September 25, 1991 to February 1, 1992; that appellant sent (Dr. T's) report "and request on work limitations/continuing treatment" to (Dr. G) and later called his office in an effort to get his response. The hearing officer observed in his Decision and Order that the manner in which the MMI issue became an additional issue at the hearing substantially complied with Rule 142.7(d) and (e). While we do not see the applicability of subsection (e) of that rule in these circumstances, we not are not called upon to decide whether the parties' sufficiently complied with the rule's requirements for including an additional disputed issue by unanimous consent. Appellant's complaint on appeal is not that the MMI issue was erroneously considered but rather that the hearing officer "changed the issues" during the hearing by first indicating that MMI would be considered and later indicating it would not. The Article 8308-6.31(a) requirement for consent of the parties to add a disputed issue is abundantly clear on the record.

We have already noted the disagreement of the parties as to the nature of their oral agreement concerning the selection of (Dr. T) to examine respondent. At no time did either party make reference to (Dr. T's) having been selected to examine respondent pursuant to the provisions of either Article 8308-4.16(a) or Article 8308-4.25(b). Nor did the parties indicate an awareness of the existence of and distinctions between these two statutory methods for obtaining the examination of an injured employee by a doctor agreed upon by the employee and the carrier. Article 8308-4.16, entitled "Required Medical Examinations," provides a mechanism for an insurance carrier to request the Commission to require the examination of an employee after first attempting and failing to obtain the permission and concurrence of the employee. Such examination can be requested to resolve certain

medical issues, including MMI. *And see* TWCC Rule 126.5: Procedure for Requesting Required Medical Examinations. Neither that statute nor rule provide that the report of a doctor selected thereunder is to be given presumptive weight. Article 8308-4.25(b) provides a mechanism for the selection of a designated doctor to resolve a dispute over MMI. *And see* Rule 130.6: Designated Doctor: General Provisions. The parties contended simply that (Dr. T) was a "mutually agreed upon" doctor engaged to examine respondent to determine whether she had reached MMI. Appellant contended the agreement encompassed the parties being bound by (Dr. T's) determination and said that is why appellant paid additional TIBS to February 1, 1992 after receiving (Dr. T's) report. Respondent said the agreement did not include being bound by (Dr. T's) determination. The record was devoid of evidence to indicate that either of the procedures in Rule 126.5 and Rule 130.6 were followed. Thus, the hearing officer's finding that there was no "designated doctor" [Article 8308-4.25(b)] agreed to by the parties or selected by the Commission was supported by the evidence. It follows then that (Dr. T's) determination of MMI as of February 1, 1992 was not entitled to the presumptive weight accorded by Article 8308-4.25(b) which provides, in part, that "[t]he 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." It was for the hearing officer, as the finder of fact, to resolve the conflicting medical evidence as to whether respondent reached MMI as of February 1, 1992. Highlands Underwriters Insurance Co. v. Carabajal, 503 S.W.2d 336,339 (Tex. Civ. App.-Corpus Christi 1973, no writ). We will not substitute our judgment for that of the hearing officer where, as here, there is some evidence of a substantial and probative character to support them. Commercial Union Assurance Company v. Foster, 379 S.W.2d 320, 320-323 (Tex. 1964). We observe that the record suggests the hearing officer had before him an MMI dispute ripe for determination by a designated doctor. Rather than going on to resolve the MMI issue in view of such dispute, the hearing officer might well have continued the hearing and directed respondent to be examined by a designated doctor as provided for in Article 8308-4.25(b).

We are satisfied from our close review of the record that the hearing officer neither equated disability with failure to reach MMI, nor prejudicially erred in first advising the parties that MMI would be included as an additional disputed issue as they had agreed, then advising to the contrary at the final session of the hearing when the evidence was closed, and nevertheless proceeding to resolve such issue with findings and conclusions. The hearing officer's findings are not 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 (1950); Pool v. Ford Motor Co., 715 S.W.2d 629, 635 (Tex. 1986).

The decision of the hearing officer is affirmed.

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Philip F. O'Neill

Appeals Judge

CONCUR:

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Stark O. Sanders, Jr.
Chief Appeals Judge

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Joe Sebesta
Appeals Judge