APPEAL NO. 92270

On May 15, 1992, a contested case hearing was held in (city), Texas, with (hearing officer) presiding. The hearing officer determined that the claimant, (claimant), the appellant herein, had achieved maximum medical improvement on April 28, 1992, and had zero impairment, based upon the report of the designated doctor that the parties had agreed upon. Further, the hearing officer determined that the appellant did not have disability from the period between December 12, 1991 (when the respondent had ceased payment of temporary income benefits) and April 28, 1992. The appellant had been injured in a fall on (date of injury), and received temporary income benefits up to December 12, 1991.

The appellant asks that the decision be reviewed and reversed, arguing that: a) the decision of the designated doctor is based upon a one-time-only examination; b) that appellant was not provided with a copy of the designated doctor's report prior to the hearing; c) that there is no showing made that the videotape used by the doctor is the same as that entered into evidence; d) that the designated doctor's report should have been excluded because it was admitted in violation of the Administrative Procedures and Texas Register Act (APTRA), Article 6252-13 §§14 and 14a as well as the discovery rules of the Texas Workers' Compensation Commission (Commission); e) that the great weight of medical evidence is contrary to the designated doctor's report; and, f) that the finding of no disability is against the uncontradicted testimony that appellant was disabled. The appellant asks that the determination that appellant has achieved maximum medical improvement be reversed, or, in the alternative, that an impairment rating assessed by the treating doctor or the carrier's doctor be adopted.

The respondent recites the evidence supportive of the hearing officer's decision in rebuttal of the points raised in appeal. In addition, the respondent files two cross points of appeal. However, these cross points are untimely and will not be considered. *See* Appeals Panel Decision No. 92109 (docket No. redacted) decided May 4, 1992.

DECISION

After reviewing the record, we affirm the determination of the hearing officer.

I

A brief discussion of pertinent provisions of the 1989 Act is as follows. Temporary income benefits may not be paid after an injured worker reaches "maximum medical improvement" (MMI). Article 8308-4.23(b). Because 104 weeks have not elapsed since the date of appellant's injury, the definition of MMI that is applicable is that stated in Article 8308-1.03 (32)(a) of the 1989 Act: "the point after which further material recovery from or lasting improvement to an injury can no longer reasonably be anticipated, based upon reasonable medical probability." MMI will not mean, in every case, that the worker is at that point free of pain or fully restored to the preinjury condition. After MMI is reached, impairment is assessed and impairment income benefits may be due. "Impairment" is

defined in Article 8308-1.03(24) as "any anatomical or functional abnormality or loss existing after maximum medical improvement that results from a compensable injury and is reasonably presumed to be permanent." Thus, not only must there be some loss existing after MMI, it must be judged likely to be permanent.

The 1989 Act has enacted an objective method for resolving disputes about MMI or impairment between the doctor for a claimant and the doctor for an insurance carrier through use of a "designated doctor." Article 8308-4.25, 4.26. If the parties cannot agree upon this doctor, the Commission will appoint one. The opinion of a designated doctor will carry presumptive weight on the achievement of MMI unless the great weight of medical evidence is to the contrary. Article 8308-4.25 (b). However, on the issue of impairment, a designated doctor's opinion binds the Commission if that doctor is selected by agreement of the parties. Article 8308-4.26(g).

Before an injured worker reaches MMI, he must also have "disability" from his compensable injury in order to be entitled to temporary income benefits. Disability is not the same as impairment, but means "the inability to obtain and retain employment at wages equivalent to the preinjury wage because of a compensable injury." Article 8308-1.03(16). There is no requirement that postinjury employment be precisely the same as that held prior to the injury. A claimant must be able to show a causal connection between his diminished wage and the compensable injury. It is possible for an injured worker to be back at work for wages equivalent to preinjury wages, and thus not have disability, but still recuperating such that achievement of MMI is yet in the future. A worker who returns to light duty at a wage less than equivalent to preinjury wage can still be considered to have a disability under the 1989 Act. *See* Appeals Panel Decision No. 92064 (Docket No. redacted) decided April 3, 1992.

II

The appellant, who is a journeyman pipefitter, was injured in a fall from a scaffold on (date of injury) while employed as a foreman of pipefitters by (employer). He stated he struck his lower back and incurred injury to his knee for which he had arthroscopic surgery in August 1991. He struck his head as well but was wearing a hardhat at the time. At the time, he stated he earned "around" $15.00 per hour plus benefits, and he had been employed for three weeks. The hours and days worked were not developed. Appellant did agree, however, that the physical requirements of acting as foreman were lighter than those of a rank-and-file journeyman pipefitter, and that a foreman did "not really" do physical labor, but analyzed the tasks that need to be done and directed others. His past work experience, which varied in the extent of time worked for any given employer, involved both pipefitting and foreman positions. Work as a pipefitter could involve climbing high towers, and involved lifting. Appellant stated that he was unemployable as a pipefitter given the restrictions his doctor imposed, which he stated were not to do heavy lifting or squatting and bending at long periods of time. Appellant stated that he had gone back to work in 1992 for approximately seven weeks for two different companies. He worked what he described

as lighter duty for (employer), at $14.96 per hour plus benefits, five days a week, eight to ten hours a day. He worked for (employer), an electrical company, for a period from one to two weeks, at the same rate of pay, but stated that he was laid off a week before the contested case hearing when unable to perform climbing and heavy duty work. Documents in the record indicate that appellant was employed at (employer) at the time of the benefit review conference (February 27, 1992), at the time his treating doctor, (Dr. D) examined him on April 14, 1992, and on April 28, 1992, the date of the designated doctor's examination. Appellant stated that work in his line of expertise was dependent to some extent on the economy. He stated that he was actively looking for work, within his restrictions, but that a number of companies contacted were not hiring.

Arthroscopic surgery was conducted on appellant's knee August 16, 1991. As of September 3, 1991, Dr. D records a diagnosis, based on lumbar magnetic resonance imaging (MRI) exam, of degenerative disc disease L2-3 and L5-S1 with posterior bulge at L5-S1. With regard to forward flex from the lumbar spine, Dr. D records a 50 degree ability (10-04-91), considerable absence of motion with 45 degree forward motion (11-05-91), and 110 degrees on March 10, 1992. The carrier's doctor, (Dr. W), records that at an examination on November 21, 1991, appellant was able to flex his trunk forward "only some 15 degrees". Dr. W certified MMI and a four percent whole body impairment. Dr. D initially recommended back surgery but withdrew this recommendation March 10, 1992. The designated doctor, (Dr. C), notes his review of the diagnostic studies, comments on the degenerative disease and the bulging noted by other doctors, and indicates that they are not "terribly significant." All doctors note that appellant complains of back pain and, in some cases, neck pain.

Appellant testified that both Dr. W and Dr. C spent five or six minutes examining him. However, the 6-page single-spaced narrative report of Dr. W records numerous observations of appellant in various positions, indicates that he removed some clothing with his wife's assistance, and indicates an interview about the history of the injury.

When it was clear at the benefit review conference that a dispute existed over the existence of MMI and the level of impairment, the parties thereafter agreed upon Dr. C as the designated doctor after their first choice declined to serve. By letter dated April 13, 1992, the adjuster for respondent confirmed an appointment for April 28th, and purports to forward a video highlight tape of appellant. Two letters and a TWCC-69 constitute the designated doctor's report. Appellant objected that the May 14th letter and TWCC-69 should not be admitted because he did not have time to prepare because he had not received the report until the morning of the hearing. The adjuster for the respondent confirmed that the TWCC-69 form had been faxed back to him the afternoon of May 14th, but that the accompanying narrative was not faxed until 10:30 the morning of the hearing. Both respondent's and appellant's attorney were subsequently provided with copies. The hearing officer determined that there was good cause for the failure to exchange the report within 15 days after the benefit review conference, and admitted it. Appellant did not ask for a continuance.

The video highlight tape, to which appellant posed objections, was an edited version of 38 video tapes taken by appellant's sister, (Ms. E). Appellant testified that he had seen the tapes and the highlight tape. He disputed that the dates were accurate, although he did not identify which were inaccurate, and stipulated on cross-examination that some of the dates would be after the (date of injury) accident. Ms. E testified for the respondent and agreed with her brother that there was animosity between the two. Ms. E stated that she lived in a house adjoining appellant's residence, and took the videotapes for purposes unrelated to the compensation claim over a period of months. She stated that the dates shown on the video were accurate. She stated that she observed, or taped, appellant engaged in the following activities: chopping down trees, climbing a ladder, using a chain saw, building a fence, picking up cross ties, pulling on tree stumps, moving lumber, raking leaves, carrying plywood sheets, using a hammer, bending wire, sawing lumber, playing football, picking up a cow trailer, loading a boat trailer onto a truck, picking up one end of a telephone pole to put on a low-boy trailer, working on his truck, working on his boat, swinging an ax, carrying propane bottles, operating a Ditchwitch, hauling groceries, and working in his garden. The highlight tape depicts many of these activities from a period beginning April 30th and concluding November 3rd of 1991. On May 30th, at the end of the sequence where appellant was squatting down working with some plants, appellant reaches back to his lower back. In the two weeks following his knee surgery, appellant can be seen favoring his knee or limping, with such motions decreasing and gone by September. On a sequence dated September 5th, appellant appears to be wearing something around his lower back which may be a brace. Other than this, the tape depicts appellant doing a full range of outdoor work, bending forward frequently from the waist in various degrees all the way to the ground, squatting, kneeling, climbing a ladder, lifting a small trailer and his boat trailer onto a hitch on a pickup truck, riding a 3-wheel recreational vehicle in November in a maneuver involving lifting the front wheel into the air, rolling a very large tree stump sideways with a young boy and woman, lifting the end of at least three telephone poles and loading them onto a low truck, and polishing his boat on the sides and from underneath.

The times recorded on the highlight tape indicate that such actions spanned times from a few minutes to two hours. Appellant stated that he felt the tape was a distortion to the extent that it would indicate he spent the entire day performing such activities. He stated that his doctors urged him to be active, that he was not the kind of person to sit around all day, and that he performed such actions during one to two hour time spans at most, not continuously, and with resort to heating pad during and after such activities. Appellant declined the opportunity offered by the hearing officer to hold open the record for appellant to provide additional footage, from the 38 videotapes, that was not on the highlight tape that he nevertheless felt should be considered.

III

As noted above, Article 8308-4.26(g) binds the hearing officer to accept the impairment rating of the agreed designated doctor. With regard to MMI, his opinion was

presumptive and it was incumbent upon the trier of fact to determine whether the great weight of other medical evidence was to the contrary. There is sufficient evidence in this record, including records of the treating doctor which indicate achievement of a stable medical condition, to support her determination to adopt the designated doctor's opinion that MMI, as defined in the 1989 Act, has been reached.

With regard to appellant's points about the violation of APTRA, we would note that the provisions cited by him do not apply to benefit contested case hearing conducted by the Commission, which has elected to apply only §14(n) of that Act. *See* Article 8308-1.02 (a)(1) ["except as otherwise provided"]; 8308-6.32; and Texas W.C. Comm'n, 28 TEX. ADMIN. CODE §142.1. We cannot find that the hearing officer abused her discretion by admitting the report of the designated doctor at the hearing upon a finding of good cause. Article 8308-6.33(e); *see also* Rule 142.13 (c)(2) & (c)(3). At hearing, the appellant did not object that the designated doctor may have been furnished with a different videotape than the one in the record. In any case, the doctor's description of events in his report correlates to the events and dates depicted on the tape, indicating that he viewed a copy of the tape in this record.

With regard to her finding that no disability existed in the time span from the ending of temporary income benefits until the date MMI was reached, we find the evidence sufficient to support this determination. The appellant testified to working in 1992 at a wage that the hearing officer could deem "equivalent to" the wages before his injury. The evidence indicates that this period may well have been for longer than the seven weeks he estimated. Clearly, disability during these time periods as defined in the Act would not exist. There is also sufficient evidence from which the hearing officer could conclude that periods of unemployment after December 12th were not due to the compensable injury.

The hearing officer is the sole judge of the relevance and materiality, the weight and credibility, of the evidence offered in a contested case hearing. Article 8308-6.34(e). In reviewing a point of "insufficient evidence," if the record considered as a whole reflects probative evidence supporting the decision of the trier of fact, we will overrule a point of error based upon insufficiency of evidence. Highlands Insurance Co. v. Youngblood, 820 S.W.2d 242 (Tex. App.-Beaumont 1991, writ denied). The decision of the hearing officer will be set aside only if the evidence supporting the hearing officer's determination is so

weak or against the overwhelming weight of the evidence as to be clearly wrong or manifestly unjust. Atlantic Mutual Insurance Co. v. Middleman, 661 S.W.2d 182 (Tex. App.-San Antonio 1983, writ ref'd n.r.e.).

The hearing officer's decision is affirmed.

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Susan M. Kelley
Appeals Judge

CONCUR:

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Robert W. Potts
Appeals Judge

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Lynda Nesenholtz
Appeals Judge