APPEAL NO. 92392

A contested case hearing was held in (city), Texas, on June 23, 1992, (hearing officer) presiding as hearing officer. He determined that the respondent had not reached maximum medical improvement (MMI) as of April 8, 1992, that the impairment ratings assessed by two doctors had not become final and that even though the respondent's treating doctor had certified MMI, the respondent was entitled to dispute his certification of MMI and to utilize the designated doctor procedures. Appellant urges error in the hearing officer's conclusion that the respondent was entitled to dispute the certification of MMI by the treating doctor and thereby invoke the designated doctor procedures, and in "the implicit reliance" by the hearing officer upon the report of the designated doctor because the great weight of the other medical evidence is to the contrary. Respondent urges that the hearing officer did not err in his determinations and asks that we affirm. Respondent also ask that we consider documents attached to her response and find that MMI has now been reached with a specified impairment rating and for other benefits and relief.

DECISION

Finding the evidence sufficient to support the decision of the hearing officer and not finding any reversible error or misapplication of law, we affirm.

The facts in this case are basically not in dispute nor is there an issue concerning the respondent having suffered an injury in the course and scope of her employment. The appellant and respondent stipulated and agreed to the following facts:

An injury to (respondent's) knee was sustained on (date of injury). Thereafter, (respondent) was operated on by (Dr. S) who performed arthroscopic surgery. Following surgery, (Dr. S) treated (respondent) twice. (Dr. S) forwarded a TWCC Form-69 on December 9, 1991, indicating maximum medical improvement was reached on September 15, 1991 with a 2% whole body impairment.

Because (respondent) disagreed with (Dr. S's) assessment, (respondent) requested another doctor and it was agreed between Carrier and (respondent), with TWCC concurrence, that (Dr. O) would provide a second opinion. It was also agreed that if (Dr. O) did not concur with (Dr. S) there would be a Benefit Review Conference to resolve any dispute.

(Dr. O) saw (respondent) on November 20, 1991, and stated that she reached maximum medical improvement on November 20, 1991, with a 10% impairment of her left lower extremity.

At a Benefit Review Conference held on May 12, 1992, it was agreed that (Dr. P) would become the designated doctor to resolve any dispute. (Respondent), however, had been diagnosed as having reflex sympathetic dystrophy and it

was learned later that (Dr. P) did not take reflex sympathetic dystrophy cases. For that reason (Dr. H) was appointed by the commission as designated doctor.

The respondent testified concerning the termination of her treatment with Dr. S. She testified that the reason she stopped seeing Dr. S was because his assistant called her and stated that Dr. S wanted her to get another doctor and that he could not help her any longer.

In essence, the appellant's position in this case is that the Texas Workers' Compensation Act, TEX. REV. CIV. STAT. ANN., art 8308-1.01 *et seq*. (Vernon Supp. 1992) (1989 Act) does not permit respondent to dispute the rating of her treating doctor.

Initially, we reject the request of the respondent that we decide issues not previously addressed in this case and her request that we consider new documents submitted with her response and render a decision establishing an MMI date and impairment rating based on those documents heretofore not considered or otherwise a part of the record in this case. Texas Workers' Compensation Commission Appeal No. 92147 (Docket No. redacted) decided May 29, 1992; Texas Workers' Compensation Commission Appeal No. 92332 (Docket No. redacted) decided August 20, 1992; and Article 8308-6.42(a) 1989 Act. We do note that one document attached to the respondent's response is a report from Dr. H, the designated doctor dated July 8, 1992 indicating MMI has been reached and assigning an impairment rating.

As indicated, the primary issue in this case focuses on the matter of whether an injured employee can dispute the certification of MMI by the treating doctor and invoke the designated doctor procedures. As appellant correctly notes, appeals panels have observed that under the 1989 Act the matter of reaching MMI is based upon "a reasonable medical probability," and that lay testimony would not suffice as probative evidence of "reasonable medical probability" in determining when MMI is reached as a matter of fact. *See* Texas Workers' Compensation Commission Appeal No. 92077 (Docket No. redacted) decided April 13, 1992; Texas Workers' Compensation Commission Appeal No. 92031 (Docket No. redacted) decided March 13, 1992; and Article 8308-1.03(32). However, Article 8308-4.25(b) provides that "if a dispute exists as to whether the employee has reached maximum medical improvement, the Commission shall direct the employee to be examined by a designated doctor . . ." There is no provision or requirement that there must be "reasonable medical probability" evidence to raise a dispute on MMI, by either party, as is required for the ultimate determination of MMI. As was stated by Appeals Panel 9 in Texas Workers' Compensation Commission Appeal No. 92394 (Docket No. redacted) decided September 17, 1992, "[h]owever, the raising of a `dispute' over MMI (as distinguished from prevailing on a dispute that has been developed) does not carry a similar requirement for medical evidence." That opinion goes on to observe that under TWCC Rule 130.6(a) (Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 130-6(a)) either party can dispute MMI or impairment, and to raise such issue does not require that the disputing party have medical expertise. Texas Workers' Compensation Commission Appeal No. 92395

(Docket No. redacted) decided September 16, 1992 points out that neither Article 8308-4.25 of the 1989 Act or TWCC Rule 130.6 limits the raising or disputing of an issue on MMI to having medical training or evidence. That decision also cited the following language of Texas Workers' Compensation Commission Appeal No. 92164 (Docket No. redacted) decided June 5, 1992:

> A claimant may attack a finding of maximum medical improvement by seeking another evaluation or for example, by pointing out defects in a certification of maximum medical improvement. His testimony alone, however, cannot support a determination of maximum medical improvement as it can findings of injury and disability.

We affirm the hearing officer's decision in this case that the respondent can dispute the certification of MMI by her treating doctor and invoke the designated doctor procedures.

We now turn to the appellant's complaint concerning the hearing officer's "implicit reliance" on the designated doctor's report and that the great weight of other medical evidence was contrary to the designated doctor's report. The report of Dr. S, who was the treating doctor until he terminated treatment of the respondent, before us in this record does not indicate his basis for determining either MMI or an impairment rating. Nor does the report indicate any consideration of reflex sympathetic dystrophy which the designated doctor describes as "severe" in correspondence dated March 25, 1992 which was admitted into evidence. We also note that there was evidence that the treating doctor elected to terminate treatment of the respondent. Considering the state of the conflicting medical opinions, the lack of the underlying basis for the opinion as to MMI and impairment rating of the treating doctor and no indication that the treating doctor considered related physical conditions of the respondent, we cannot determine, contrary to the hearing officer, that the great weight of other medical evidence was contrary to the medical evidence of the designated doctor. *See* Texas Workers' Compensation Commission Appeal No. 92275 (Docket No. redacted) decided August 11, 1992, and Texas Workers' Compensation Commission Appeal No. 92255 (Docket No. redacted) decided July 27, 1992; *compare* Texas Workers' Compensation Commission Appeal No. 92374 (Docket No. redacted) decided August 28, 1992. As indicated above, we note the designated doctor has now issued a follow-on report addressing MMI and impairment rating which would appear ripe for further consideration in the dispute resolution process.

The decision of the hearing officer is affirmed.

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Stark O. Sanders, Jr.
Chief Appeals Judge

CONCUR:

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Robert W. Potts
Appeals Judge

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Philip F. O'Neill
Appeals Judge