APPEAL NO. 92433

This appeal arises under the Texas Workers' Compensation Act, TEX. REV. CIV. STAT. ANN. arts. 8308-1.01 *et seq*. (Vernon Supp. 1992) (1989 Act). On July 24, 1992, a contested case hearing was held in (city), Texas, (hearing officer) presiding. The issue was whether the claimant (appellant herein) was entitled to receive temporary income benefits from December 18, 1991, through April 1, 1992, inclusive. The hearing officer found that appellant's treating physician had certified maximum medical improvement on December 18, 1991, with a whole body impairment rating of zero percent and no objective evidence of neck problems resulting from a work-related injury. Accordingly, the hearing officer held that appellant was not entitled to receive temporary income benefits after December 18, 1991.

In her request for review, appellant contends that she suffered injuries to two separate parts of the body, which should not have been treated as a single claim. She alleges that she was entitled to a second medical opinion under the 1989 Act, Article 8308-4.64. She also disputes the hearing officer's statement that she did not present good cause to set aside her first doctor's determination of maximum medical improvement, stating that a re-injury suffered during physical therapy caused her to seek further medical treatment. She attaches to her pleading a number of documents, four of which were not part of the record below. Respondent (employer's workers' compensation insurance carrier) contends that the hearing officer's decision is supported by the evidence, and asks that this panel not consider evidence not offered at the hearing.

DECISION

Because it appears that the hearing officer did not consider the report of appellant's subsequent doctor, we reverse and remand.

Appellant, a rehab technician at (employer), was injured on (date of injury) when a patient she was lifting collapsed and grabbed her neck. She was off work and received temporary income benefits (TIBs) for the period February 24 through February 28, 1991. She was treated by (Dr. R), who recommended physical therapy. However, appellant, who testified she has a medical degree and had practiced medicine outside of this country, decided she did not need therapy because after she returned to work she did not have any more problems.

Beginning October 10, 1991, appellant was seen at Minor Emergency Centers on eight occasions for a recurrence of neck and shoulder pain. Appellant saw a (Dr. H) on her initial visit, and thereafter saw (Dr. C). Medical records show appellant was treated for neck and shoulder pain through January 2, 1992; diagnoses included both shoulder and cervical strain. Dr. H released appellant to light work on October 10th, and she was released to regular work by Dr. C on December 18th. At that time Dr. C recommended that appellant finish her physical therapy. Dr. C also filed a Report of Medical Evaluation (Form TWCC-69) certifying that appellant had reached maximum medical improvement (MMI) as of

December 18, with a zero whole body impairment. The report stated, in part, "I find no objective evidence of neck problems resulting from a work-related injury." However, because Dr. C did not file the TWCC-69 until January 10th, appellant continued receiving TIBs until January 15, 1992.

Appellant testified that she had no disagreement with Dr. C's certification of MMI for her shoulder, but she disputed that she had reached MMI with regard to her neck, because she said she continued to have neck problems. She said Dr. C did not treat her neck, and that the only tests he performed were an arthrogram and an x-ray of the shoulder. She also said a strength test the employer required her to take sometime after Dr. C's certification of MMI caused her to have neck problems. On January 15, 1992, she was seen by (Dr. M), who diagnosed cervical strain-rotator cuff injury. On January 30, 1992, Dr. M released appellant to modified duty with lifting restrictions, and recommended physical therapy for six weeks. On April 1, 1992, Dr. M filed a TWCC-69 certifying MMI as of that date, and zero whole body impairment. Appellant indicated that her neck problems prevented her from going back to work on December 18th.

We note at the outset much discussion in the record, and in appellant's request for review, concerning whether appellant's neck and shoulder problems constitute two separate injuries. The 1989 Act defines "injury" to include, in pertinent part, "damage or harm to the physical structure of the body and those diseases or infections naturally resulting" therefrom. Article 1.03(27). The record indicates that the respondent, which paid TIBs during two different periods, accepted liability for the initial injury and its later manifestations. Despite appellant's argument to the contrary, medical records show that Dr. C treated her for neck and shoulder pain. The issue for our consideration concerns appellant's disagreement with that doctor's certification.

The 1989 Act provides that an employee who has disability and who has not attained MMI is entitled to TIBs, and that TIBs continue until an employee has reached MMI or no longer has disability. Article 8308-4.23(a),(b). MMI is defined, in pertinent part with regard to the present case, as the point after which further material recovery from or lasting improvement to an injury can no longer reasonably be anticipated, based on reasonable medical probability. Article 8308-1.03(32). This panel has held that a finding of MMI will not, in every case, mean that the injured worker is completely free of pain, nor that the injured worker is able to return to the prior occupation. Texas Workers' Compensation Commission Appeal No. 92394 (Docket No. redacted), decided September 17, 1992. However, lay testimony will 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.

The Act further provides that "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 . . ." Article 8308-4.25(b). The implementing rule of the Commission, Tex. W. C. Comm'n, 28 TEX. ADMIN. CODE §130.6 (Rule 130.6) provides that if the Commission

receives a notice from the employee or the insurance carrier that disputes either MMI or an assigned impairment rating, the Commission shall notify the employee and the insurance carrier that a designated doctor will be directed to examine the employee. No form or manner of notice is specified. We have previously held that the raising of a dispute over MMI (as distinguished from prevailing over such a dispute) may be accomplished by lay testimony, and that "[a] claimant may attack a finding of [MMI] by seeking another evaluation or, for example, pointing out defects in a certification of MMI." Texas Workers' Compensation Commission Appeal No. 92392 (Docket No. redacted), decided September 21, 1992. We find it axiomatic, however, that resolution of an MMI dispute by a designated doctor requires prior notice to the Commission.

The record in this case reflects that on January 15, 1992, appellant sought a second medical opinion from Dr. M. Appellant's testimony indicates, variously, that this treatment was sought because she did not agree with Dr. C's MMI certification with regard to her neck, and because she had suffered a re-injury in the course of physical therapy. The record does not disclose that she notified either the Commission or the respondent when making this change. Article 8303-4.62 provides that the employee is entitled to his or her initial choice of a doctor, and that the employee may change doctors once on submission to the Commission in writing of the reasons. A third or subsequent doctor selected by the employee is subject to the approval of the carrier or the Commission. Article 8303-4.64 provides that a second or subsequent opinion only on the appropriateness of the diagnosis or treatment does not constitute the selection of an alternate doctor for purposes of Section 4.62 of the Act. Article 8308-4.65 allows an insurance carrier to be relieved of liability for health care furnished by a provider or any person selected in a manner inconsistent with the requirements of Chapter C of the Act. Under the circumstances of this case appellant may or may not have been entitled to seek another opinion; her selection of a second doctor was not made an issue.

In this case, the hearing officer's statement of evidence said: "[w]ith respect to the receipt of income benefits, a claimant may not shop for a second opinion after receiving an opinion with which she is unhappy. The claimant did not present any good cause to set aside the TWCC-69 signed by [Dr. C] on December 18, 1991, in which he certified that she had reached [MMI] and allowed her to return to work without restrictions. Accordingly, the claimant was no longer entitled to receive [TIBs] after December 18, 1991." We find, based on our discussion above, that this misstates the law. In the absence of a designated doctor, a hearing officer is not required to give one medical opinion presumptive weight over another. However, he is required to at least consider all the relevant medical evidence in the record before rendering a decision. We cannot tell from the hearing officer's decision that he did not inappropriately discard some evidence without due consideration. We therefore reverse the decision of the hearing officer and remand for his consideration of the report and findings of both Dr. C and Dr. M. We note that the hearing officer as sole judge of the relevance and materiality of the evidence, as well as its weight and credibility, Article 8308-6.34(e), may give one doctor's findings more weight than the other's.

Finally, we decline to consider any evidence not offered at the hearing below, as the

1989 Act requires this panel to limit its consideration of evidentiary matters to the record developed a the contested case hearing. Article 8308-6.42(a)(1). There is nothing to indicate that the records appellant offers for the first time on appeal constituted evidence that was unknown or unavailable at the time of the hearing or that due diligence would not have disclosed. *See* Texas Workers' Compensation Commission Appeal No. 91132 (Docket No. redacted) decided February 14, 1992.

The hearing officer's decision and order are reversed and remanded for an expedited hearing consistent with our opinion herein. Pending resolution of the remand, a final decision has not been made in this case.

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Lynda H. Nesenholtz
Appeals Judge

CONCUR:

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Stark O. Sanders, Jr.
Chief Appeals Judge

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Joe Sebesta
Appeals Judge