APPEAL NO. 92439

On June 10, 1992, a contested case hearing was held in (city), Texas, with (hearing officer) presiding, to consider the two issues of whether the claimant, (Ms. H), the respondent herein, had disability and whether temporary income benefits had been properly suspended by the benefit review officer in accordance with Texas W. C. Comm'n, 28 TEXAS ADMIN. CODE § 130.4 (because of abandonment of medical care without good cause). There was no dispute that the respondent had sustained a compensable injury on (date of injury), while employed as a cashier by (employer). The hearing officer determined that benefits had been properly suspended by the benefit review officer because the respondent had abandoned medical treatment at that point without good cause, and, further, that as of May 30, 1992, the respondent no longer had disability (as that term is defined in the Texas Workers' Compensation Act, TEX. REV. CIV. STAT. ANN. art. 8308-1.03(16) (Vernon's Supp. 1992) (1989 Act)) as a result of her compensable injury.

Appellant complains that there is insufficient evidence supporting the hearing officer's conclusion of law that, as of May 30, 1992, the respondent no longer had disability. The first point in appellant's argument is that the hearing officer failed to establish a date that maximum medical improvement (MMI) was reached. The appellant argues that its own doctor was a "designated doctor" and that his opinion carries presumptive weight. The second substantive argument is that, because the respondent slipped and fell in a non-compensable injury that occurred February 18, 1992, all subsequent medical treatment and inability to obtain and retain employment stem from that injury, and not from the compensable injury of (date of injury). The appellant asks this panel to find that respondent's disability ended on February 18, 1992, that she reached MMI, and that no benefits are due and owing. Further requested relief is that the decision that respondent is eligible for temporary income benefits if disability recurs before the respondent reaches maximum medical improvement be set aside as against the greater weight of medical evidence. No response has been filed.

DECISION

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

Because the determination that the respondent abandoned medical treatment without good cause has not been appealed by either party, we will limit recitation of the facts to the matters bearing on the disability finding. On (date of injury), the respondent fell from a high stool that was not firmly set on the floor of the employer's outlet where she worked, and she hurt her back and head. She also had numbness and pain in her leg from the day of the accident. Respondent first sought medical treatment from K-Clinic on September 17, 1991. An x-ray of the lumbar and thoracic spine taken that day was normal. An initial medical report for this visit completed by (Dr. M) states a diagnosis of sprain/strain throughout the neck and spinal regions. Respondent received sporadic medical treatment for her condition, going for two months (October and November) essentially without treatment because she stated her income benefits were mailed to the wrong address and

she otherwise did not have the means or money to get to the clinic. On December 20, 1991, she returned to the K-Clinic and saw (Dr. G), whose medical report records the same diagnoses of strain/sprain. On December 26, 1991, respondent had an EMG, CT scan, and nerve conduction test, pursuant to Dr. G's orders, which were normal. On January 15, 1992, Dr. G prescribed a TENS unit for respondent. At the request of her attorney at the time, respondent in February 1992 saw (Dr. H) for a second medical opinion. He notes that MRIs were performed but not reported, and recommended that respondent retrieve her MRI examinations; respondent did not return to him. At some date after April 6, 1992, Dr. G was apparently asked to assess whether respondent had reached MMI and his statement on the TWCC-69 declines to arrive at a finding of MMI or impairment; he indicates that this would be premature without an MRI.

On February 18, 1992, respondent stated that she was in the restroom of a (J/O) store and her leg gave away under her. She stated that although there was water on the floor, she did not slip, but was suffering the effects of her work-related injury when her leg gave away. Respondent stated that, although encouraged by her attorney to view this as a separate personal injury action, she was not inclined to do so because she did not feel that her fall at Jewel was their fault. She stated that she resumed treatment at the K-Clinic in April 1992, which she assumed was related to her work-related injury because her income benefits resumed at the same time. Respondent said she discovered at a benefit review conference that the K-Clinic had opened a second file on her fall at the store. On April 9 and April 16, 1992, x-rays were taken as ordered by Dr. M, which indicated "anterior angulation of the distal coccyx." Records from the K-Clinic and Dr. M for April 1992 indicate that she was treated by them relating to a "slip and fall" at the store. Lumbar strain was the diagnosis shown for this.

The evidence indicates that respondent agreed to be examined by the appellant's doctor, (Dr. W), on March 30, 1992. She stated that she did not keep that appointment because the battery of her driver's car went dead and the doctor's office would not postpone her appointment more than 30 minutes beyond the appointed time. The benefit review conference upon which the contested case hearing was based was convened at the appellant's request due to respondent's failure to be examined by Dr. W. An interlocutory order was issued suspending payment of temporary income benefits effective April 28, 1992.

Respondent was examined by Dr. W on May 30, 1992. He determined that she had reached MMI by that date (although his narrative says he believes she "probably" had achieved MMI on February 29, 1992) and assigned zero percent impairment. The TWCC-69 was not provided to the appellant until June 5, 1992, but thereafter forwarded to respondent, prior to the contested case hearing. Dr. W indicates that respondent can return to work with no restrictions.

We cannot agree that the hearing officer has erred by declining to find a date that MMI was achieved. This was not an issue brought before the hearing officer or the benefit review officer for resolution. Dr. W, contrary to the appellant's assertions, was not a

designated doctor appointed to resolve a dispute over MMI or impairment in accordance with Art. 8308-4.25 or 4.26. He was a doctor who examined the respondent for the carrier, in accordance with an agreed medical examination order under Art. 8308-4.16. As such, his opinion is not given presumptive weight. See also Rule 126.6(f). His certification of MMI (TWCC Form 69) was not rendered and received by the parties until a matter of days before the contested case hearing. There is an indication on the face of the certification that the report was sent to the treating doctor (Dr. G) for response, as required by Rule 130.3, but there is no indication of a response at the time of the contested case hearing. Thus, by June 10, 1992, there was no matured dispute over MMI that would call for appointment by the commission of a designated doctor to resolve such dispute, in accordance with Rule 130.6.

Aside from this, there was no MMI issue before the contested case hearing officer to resolve, either out of the benefit review conference, or by agreement, and there is therefore no error in his omission of any findings on MMI. *See* Art. 8308-6.31(a). His decision, that benefits be paid if disability resumes before MMI is reached, is merely an accurate statement of the law. Appellant is not precluded from going through an MMI dispute resolution process, if needed, as provided under the 1989 Act and applicable rules, and the hearing officer's decision in this hearing would allow the termination of TIBs upon resolution of MMI in any other proceeding.

Regarding the hearing officer's determination on the issue of disability, 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. 1989 Act, Art. 8308-6.34(e). His decision will not be set aside, when there is probative evidence to support it, because different inferences and conclusions could be drawn upon review. Garza v. Commercial Insurance Co. of Newark, N.J., 508 S.W.2d 701 (Tex. Civ. App.-Amarillo 1974, no writ). 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.). Objective medical findings are not a prerequisite to a determination that a claimant has disability, for purposes of payment of the temporary income benefit. Texas Workers' Compensation Commission Appeal No. 92083 (Docket No. redacted) decided April 16, 1992. In this case, the hearing officer apparently determined that it was primarily the effects of the compensable injury of (date of injury), and not the intervening fall of February 18, 1992, that caused the inability of the respondent to obtain and retain employment at wages equivalent to her pre-injury wage.

There being sufficient evidence to support the decision of the hearing officer, we affirm.

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Susan M. Kelley
Appeals Judge

CONCUR:

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Stark O. Sanders, Jr.
Chief Appeals Judge

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Robert W. Potts
Appeals Judge