APPEAL NO. 92500

On May 20, 1992, a contested case hearing was held in (city), Texas, before (hearing officer). The hearing officer held that the respondent, hereinafter claimant, had not reached maximum medical improvement (MMI) pursuant to the Texas Workers' Compensation Insurance Act, TEX. REV. CIV. STAT. ANN. Article 8308-1.03(33) (Vernon Supp. 1992) (1989 Act), and that the preponderance of the evidence adduced established that the claimant has disability in that he is unable to obtain or retain employment at wages equivalent to the pre-injury wage because of a compensable injury, pursuant to Article 8308-1.03(16). This panel affirmed the hearing officer on the issue of MMI and reversed and remanded for reconsideration of the issue of disability in light of the return to work releases signed by doctors other than claimant's treating doctor. *See* Texas Workers' Compensation Appeal No. 92257, decided August 3, 1992. On August 24, 1992, the hearing officer reviewed the evidence and issued a Decision and Order on Remand From Appeals Panel No. 20. On remand, the hearing officer again held that the claimant has disability.

Appellant, the employer's workers' compensation insurance carrier (hereinafter carrier) argues that (Dr. A), who examined claimant by order of the Texas Workers' Compensation Commission (Commission), was a designated doctor whose opinion on MMI and impairment should be given presumptive weight. In addition, carrier argues that the opinions of medical doctors should be given greater weight than that of a osteopath (Dr. B), claimant's treating doctor) and a chiropractor (Dr. L), to whom claimant was referred by (Dr. B)).

DECISION

We affirm the decision and order of the hearing officer.

The facts of this case were set out in Appeal No. 92257, *supra*, and will not be repeated here except where necessary.

"Disability" is defined in the 1989 Act as "the inability to obtain and retain employment at wages equivalent to the pre-injury wage because of a compensable injury." Article 8308-1.03(16). Our opinion in Appeal No. 92257 cited an earlier Appeals Panel decision, Appeal No. 92259, decided July 31, 1992, which stated that the hearing officer is to weigh all the evidence, including all the medical evidence and the testimony of the claimant, in determining whether disability has ended. Because the hearing officer's decision gave rise to the inference that only the opinion of claimant's treating doctor was considered, we remanded for reconsideration.

In a decision and order issued on August 24, 1992, the hearing officer considered the reports of the treating doctor (an osteopath) and a chiropractor, who only released the claimant to light-duty work, and the reports of three other medical doctors, who stated he should be able to return to full duty work as a carpet installer without lifting limitations. She

also considered claimant's own testimony about his condition. The hearing officer found as fact that the employer did not have light duty work available commensurate with any of the claimant's releases to light duty work by his treating doctor. Upon review of the record evidence, the hearing officer said that claimant's testimony and the reports of his treating physician, who has had the opportunity to examine him a number of times, led to the conclusion that the claimant could not work as a carpet installer, and that no light duty work was available. She thus made the conclusion of law that a preponderance of the evidence adduced establishes that the claimant has disability in that he is unable to obtain or retain employment at wages equivalent to the pre-injury wage because of a compensable injury, pursuant to Article 8308-1.03(16).

The carrier renews its argument that Dr. A's opinion on MMI must be given presumptive weight under Article 8308-4.25(b). The hearing officer determined in her first decision that Dr. A's opinion was not a proper certification of MMI. We would add, as we did in our earlier opinion, that the record does not show Dr. A was appointed a designated doctor pursuant to Article 8308-4.25(b). The Request for Medical Examination Order signed by a representative of the Commission was made pursuant to Article 8308-4.16. Although that section of the statute says the Commission may require an employee to submit to medical examinations to resolve any question about the appropriateness of the employee's health care, including the issues of MMI and impairment, an order signed by the appointed doctor is not given the same presumption as a designated doctor's order pursuant to Article 8308-4.25. (*See also* Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE §126.6 (Rule 126.6), which states, "A doctor who conducts an examination solely under the authority of an order issued according to this rule shall not be considered a designated doctor under the Act, §4.25(b) or §4.25(g).) It is true that the order in this case states the purpose as "Disability Dispute Designated Doctor." While this language no doubt is the source of confusion in this case over the issues of MMI and disability, the order clearly recited that it was a medical examination order under Article 8308-4.16, and not an order appointing a designated doctor. Nevertheless, the hearing officer properly took Dr. A's opinion into consideration in reaching her determination on disability.

The opinion evidence of expert medical witnesses is but evidentiary, and is never binding on the trier of fact. Hood v. Texas Indemnity Ins. Co., 209 S.W.2d 345 (Tex. 1948). To the extent that there was conflicting expert testimony, that was a matter for the trier of fact to weigh. Atkinson v. U.S. Fidelity & Guaranty Co., 235 S.W.2d 509 (Tex. App.-San Antonio 1950, writ ref'd n.r.e.). With regard to the background and training of the various doctors, the fact finder in judging the accuracy of a medical witness's testimony and the weight to be given it, may consider, among other things, the type and thoroughness of the examination, the doctor's degree of attention to the matter, and his skill and experience. Houston General Ins. Co. v. Pegues, 514 S.W.2d 492 (Tex. Civ. App.-Texarkana 1974, writ ref'd n.r.e.). In addition, lay testimony even if contradicted by medical experts can be the basis for a finding of disability. Dir. State Employees Workers' Comp. v. Wade, 788 S.W.2d 131 (Tex. App.-Beaumont 1990, writ dismissed). In this case the hearing officer, as trier of fact, was the sole judge of the relevance and materiality of the evidence offered, and of its

weight and credibility. Article 8308-6.34(e). As such, she was entitled to give one opinion greater weight than another. We find that her decision is sufficiently supported by the evidence, and we accordingly affirm.

The decision and order of the hearing officer are affirmed.

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Lynda H. Nesenholtz
Appeals Judge

CONCUR:

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Robert W. Potts
Appeals Judge

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Susan M. Kelley
Appeals Judge