APPEAL NO. 92580

This appeal arises under the Texas Workers' Compensation Act, TEX. REV. CIV. STAT. ANN. art. 8308-1.01 *et seq*. (Vernon Supp. 1992) (1989 Act). A contested case hearing was held by (hearing officer), hearing officer, in (city), Texas, on August 3, 1992, to resolve three disputed issues, to wit: (1) whether claimant reached maximum medical improvement (MMI) on June 4, 1991, or on May 1, 1992; (2) claimant's correct impairment rating; and, (3) whether claimant had disability after June 4, 1991 caused by his (date of injury) injury. The hearing officer determined that claimant reached MMI as of May 1, 1992 with a 9% impairment rating, and that he had disability within the meaning of Article 8308-1.03 (16) from June 4, 1991 to May 1, 1992. Appellant (carrier) challenges the pertinent findings and conclusions as being against the great weight of the evidence while respondent (claimant) urges our affirmance.

DECISION

Finding the evidence sufficient to support the challenged findings and conclusions, we affirm.

That claimant sustained a compensable injury on (date of injury), while employed as a supervisor for (employer) was not in dispute. According to his testimony and documentary evidence, on (date of injury), claimant, a thirteen year employee then aged 60, tripped and fell while walking through an office carrying a meter. He struck and injured his right shoulder and has not worked since that time. Claimant also said he began receiving unemployment compensation benefits in March 1991 and conceded that at the end of (month) employer gave him the choice of either terminating his employment or taking another position involving physical activity. His supervisory duties did not involve such activity. He felt employer took the action to force him to quit.

On March 1, 1991, claimant saw (Dr. S) by whom he had been previously treated for other medical problems. (Dr. S's) notes of that visit do not mention the shoulder injury but his March 13th notes indicate a "frozen right shoulder." (Dr. S) prescribed physical therapy (PT) and gave claimant some injections in March and April.

Claimant was referred to (Dr. R), an orthopedic surgeon, whose May 23rd report mentioned claimant's complaint of right shoulder and back pain since his injury; noted thoracic spine x-ray findings of a 35% compression fracture of the T8 level; and discussed certain areas of tenderness and some weakness in abducting the shoulder. (Dr. R) stated he thought claimant "does have a significant shoulder problem." He injected the shoulder and ordered an arthrogram and MRI. On claimant's June 4th follow-up visit, (Dr. R) stated his impression that most of claimant's pain was coming from his scapular thoracic area and not from the shoulder joint. The record went on to state: "I think this patient has reached maximum medical benefit from his treatment of his right shoulder and thoracic injury, although he may continue to symptomatically improve. I don't think I have any further treatment to offer him." (Dr. R) June 11, 1991 record described the T8 compression

fracture as an old one, and said that "based on weakness in his right shoulder due to subacromial bursitis, there is a 10% partial permanent impairment of the body and based on his thoracic spine injury there is an additional 10% partial permanent impairment for a total partial permanent impairment of 20%." (Dr. R) felt claimant could return to work with an overhead lifting restriction of 20 pounds. (Dr. R) signed a Report of Medical Evaluation (TWCC-69) to which he attached his 5/23/91 initial exam report and stated that claimant reached MMI on June 4, 1991 with a whole body impairment rating of 6%.

According to the medical records, claimant continued to see (Dr. S) throughout the summer and fall of (year) and into (month) 1992 for persistent shoulder pain, to receive medications, and to wear a brace. He also continued to receive periodic PT treatments through September 1991. He apparently resumed PT in January 1992 though the records do not reflect for how long. Claimant testified he received 80 PT treatments but had to discontinue them because the carrier breached an agreement to pay his travel expenses for such treatments.

On October 8, 1991, claimant was seen by (Dr. O) for a second opinion. The record of this examination stated a history of multiple surgical procedures for heart, hernia, gall bladder, and eye problems, and noted an old shrapnel wound in claimant's right elbow which resulted in chronic ulnar neuropathy. Incidentally, the carrier suggested that claimant's admitted failure to discuss this elbow wound with the designated doctor, (Dr. P), detracted from the credence of (Dr. P) opinions on MMI and impairment of the right shoulder. (Dr. O 's) record also indicated that earlier May 10th x-rays revealed apparent compression fractures of the T3-4 as well as the T8 segments of the thoracic spine, and his assessment included cervicothoracic pain which may be related to the thoracic compression fractures and resultant pain from postural deformities, and right rotator cuff tendinitis. He recommended ruling out possible cervical disc pathology, consideration of additional testing, and the institution of a home rehabilitation program through the physical therapist claimant had been seeing.

On April 14, 1992, carrier wrote (Dr. S) asking whether he agreed with (Dr. R) "6% whole body impairment rating" for claimant's right shoulder, and whether the compression fractures at T3-4 and T8 were related to his (date of injury) injury. (Dr. S) responded that (Dr. R) rating was consistent with claimant's degree of impairment, that he had no opinion as to whether the impairment is a result of the (date of injury) injury, and that while the T8 fracture had been present since at least June 14, 1979, the T3 and T4 fractures were not present in May 1990 but were manifest in May 1991, and "could have resulted from any of his accidents within that interval."

On May 1, 1992, claimant was examined by (Dr. P), the designated doctor. (Dr. P) signed a TWCC-69, which referenced an attached report, and which stated that claimant reached MMI on "05/01/92" with a whole body impairment rating of 9%. In his written report (Dr. P) stated his impressions as contusion about the right shoulder, degenerative disc disease about the cervical spine, and an old compression fracture at T8. (Dr. P) felt the

primary injury was a shoulder contusion while noting that the mild narrowing of the acromioclavicular joint could have been the etiology of claimant's symptoms after his fall. He saw no reason why claimant could not return to his former occupation without restrictions. On June 24, 1992, carrier wrote (Dr. P) asking if he disagreed that claimant reached MMI on June 11, 1991 (sic) as determined by (Dr. R), and whether it was possible claimant reached MMI prior to (Dr. P) May 1, 1992 exam. (Dr. P) responded that May 1st was his first opportunity to assess claimant and that it would be "presumptuous" to assume claimant had reached MMI before seeing him. (Dr. P) also said that while claimant may well have reached MMI as early as June 11, 1991, he had some difficulty giving an earlier date; and that if (Dr. R), who was caring for claimant felt he had reached that point in June 1991, that may be accurate.

In his decision the hearing officer states that the parties stipulated that (Dr. P) was designated by the Texas Workers' Compensation Commission (Commission) to determine if claimant reached MMI and to assign an impairment rating. The hearing record does not reflect such a stipulation. However, Hearing Officer Exhibit D is a Commission Order which orders claimant's examination on May 1, 1992 by (Dr. P), "a designated doctor chosen by the Commission," and which also orders the carrier to provide (Dr. P) with "all medical records."

Regarding (Dr. P) certification of the MMI date on his TWCC-69, carrier posits that the TWCC-69 form contains "an inherent defect" in that it instructs the person preparing the form to simply "give date" without clarifying the date being requested. Carrier suggested below and on appeal that this defect leads most doctors to simply write in the date they examine a claimant rather than the date the claimant actually reached MMI, and that it tends to keep them from writing in MMI dates earlier than the dates of their examinations. For this reason, asserts carrier, it wrote the June 24th letter to (Dr. P). Carrier then says that in his response to its letter (Dr. P) effectively impeached his own MMI date by the deference he paid to (Dr. R) opinion. Carrier's assertion of an inherent defect in the TWCC-69 form is creative, but without merit. Item 14 on the TWCC-69 form used by (Dr. P) first asks: "Has employee reached [MMI]?" and immediately following that question appear two blocks which can be checked. The first block is followed by the words, "NO, give estimated date;" and the second block by the words, "YES, give date and what, if any, is whole body impairment rating _____ %." We view Item 14 in its entirety as unambiguously asking the doctor to state the date MMI was reached. As for (Dr. P) report and subsequent comments about (Dr. R) MMI opinion, we note that the Commission's order required carrier to make available to (Dr. P) all claimant's records and, assuming that order was complied with, (Dr. P) had (Dr. R) records available and presumably took the latter's opinion into account. In fact, (Dr. P) report stated that claimant "has been treated by a multiplicity of physicians and exhaustive records are available to me today." We do not read (Dr. P) comments on (Dr. R) MMI opinion as an adoption thereof. Carrier argues that (Dr. P) opinion as to claimant's MMI date is contrary to the great weight of the other medical evidence. Article 8308-4.25(b) provides, in part, that the designated doctor's report shall have presumptive weight, and that the Commission shall base its determination as to whether claimant has reached MMI on

such report unless the great weight of the medical evidence is to the contrary. The hearing officer found that (Dr. P) MMI determination was not against the great weight of the other medical evidence and we do not disagree. While (Dr. R) determined that claimant reached MMI on June 4, 1991, that conflicting opinion, alone, does not necessarily equate to the great weight of the other medical evidence. Neither (Dr. S) nor (Dr. O) rendered opinions on an MMI date. The evidence also shows that after June 4, 1991, claimant received a variety of treatment consisting of medications, injections, a neck brace, PT treatments, and a home rehabilitation program. As we have previously observed, "it is not just equally balancing evidence or a preponderance of evidence that can outweigh such [designated doctor's] report, but only the 'great weight' of other medical evidence that can overcome it." *See* Texas Workers' Compensation Commission Appeal No. 92412, decided September 28, 1992.

Carrier next contends that the hearing officer's use of the words "as of" in his Conclusion of Law No. 4 render it "meaningless" in terms of concluding the date MMI was achieved. That conclusion follows:

4.Because (Dr. P) (i) is a Commission designated doctor under Article 8308-4.25(b) who reported that [claimant] reached [MMI] on 1 May 1992, and (ii) (Dr. P) report is not contrary to the great weight of other medical evidence, under Article 8308-4.25(b) (Dr. P) determination that [claimant] had reached [MMI] is presumed to be correct, and therefore, as of 1 May 1992 [claimant] reached [MMI]. (Emphasis supplied.)

Carrier's notion here is that the hearing officer's stating the attainment of MMI "as of" a date is less precise, ambiguous, and not the same thing as stating MMI on a date certain. This contention is disingenuous at best and utterly without merit. A fair reading of Conclusion of Law No. 4 shows that the hearing officer concluded that since the designated doctor determined MMI had been reached on May 1, 1992, and since such determination was not contrary to the great weight of the other medical evidence, the hearing officer correspondingly gave it presumptive weight and concluded that May 1, 1992 was indeed the MMI date.

Carrier next contends that the hearing officer erred in stating, in both Finding of Fact No. 6 and Conclusion of Law No. 7, that (Dr. R) did not "certify" that claimant reached MMI. That finding and conclusion follow:

Finding 6.On or about 4 June 1991 (Dr. R) determined that [claimant] needed no further treatment for his right shoulder and back related to his (date of injury) injury. Medical evidence does not indicate that (Dr. R) had in fact certified that [claimant] had reached [MMI].

Conclusion 7.(Dr. R), on 4 June 1991, did not certify that claimant] reached [MMI], within the meaning of Article 8308-4.26(d) and Rule (sic) 130.1 and

130.3 [Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE §§ 130.1 and 130.3]."

This complaint has merit and we are at a loss to understand why the hearing officer felt (Dr. R) had not certified MMI in view of his signed TWCC-69 form which was completely filled out except for Item 13, the narrative history portion, which was supplied by the attached initial exam report of 5/23/91. No explanation of the perceived failure of (Dr. R) TWCC-69 as a certification of MMI is contained in the hearing officer's "Statement of Evidence" which merely recites, erroneously, that (Dr. R) saw claimant twice. (Dr. R) records show three visits on May 23, June 4, and June 11, 1991, respectively. (Dr. R) report of claimant's June 4th visit, standing alone, might well fail to qualify as a certification of MMI under Rule 130.1, and it may be that the hearing officer overlooked (Dr. R) TWCC-69 with attached report, notwithstanding it is cited as a carrier exhibit in the hearing officer's Decision and Order. In any event, we view such misstatement as harmless error because not only was there no requirement that (Dr. R) "certify" to claimant's having reached MMI, but the balance of the findings and conclusions show the hearing officer's awareness and application of the evidentiary test to be applied to (Dr. P) report vis-a-vis the other medical evidence. The hearing officer specifically found that (Dr. P) determination that claimant reached MMI was not against the great weight of other medical evidence, and, as above noted, the hearing officer's decision specifically cites (Dr. R) TWCC-69 as one of the carrier's exhibits. There is no indication the hearing officer disregarded (Dr. R) records and report as other medical evidence to be considered simply because he did not believe (Dr. R) had accomplished a technical certification of MMI under the applicable rules.

Carrier's contention that the hearing officer erred in determining that claimant had a 9% whole body impairment rating is not well founded. Carrier asserts that the hearing officer should have accepted (Dr. R) 6% rating. In his TWCC-69 (Dr. R) listed the specific body part and rating therefor as "right shoulder" and "10%," whereas (Dr. P) TWCC-69 reflected that information as "permanent physical impairment and loss of function to the right upper extremity" and "15%." Carrier asserts that (Dr. P) did not know of claimant's old Korean war shrapnel wound to his right elbow and speculates that such could account for the 3% difference in ratings. The hearing officer, specifically finding that (Dr. P) determination of 9% was not against the great weight of other medical evidence, gave it presumptive weight and, again, we do not disagree.

Finally, carrier asserts that the hearing officer's determination that claimant had disability from June 4, 1991 until May 1, 1992, was against the great weight of the evidence. Article 8308-1.03(16) defines disability as "the inability to obtain and retain employment at wages equivalent to the preinjury wage because of a compensable injury." Carrier points out that during that period claimant adduced no evidence of an effort to obtain employment, received disability payments from the Veteran's Administration, received Texas unemployment compensation benefits, and grossly exaggerated his injury to obtain workers' compensation benefits. Whether claimant indeed had disability after June 4, 1991, was a fact question for the hearing officer to decide as the trier of fact. Article 8308-6.34(e) vests

in the hearing officer the sole responsibility for judging not only the relevance and materiality of the evidence, but also the weight and credibility it is to be given. The hearing officer found that the preponderance of the credible evidence indicated claimant's (date of injury) injury caused him to be unable to obtain employment at his preinjury wages from June 4, 1991 until May 1, 1992, and concluded he had disability during that period. While, aside from the medical evidence, there was a paucity of evidence adduced on this issue by the claimant, we find sufficient evidence to support the hearing officer's determination. Both (Drs. R and P) found him to have a permanent impairment from his right shoulder injury and the medical records established he was right shoulder dominant. Claimant said he had not worked since his injury; and that in order to remain employed with employer, he would have had to work at a position entailing more strenuous physical activities and better hearing than that required in his supervisory job. His medical records show his persistent complaints of pain to various doctors throughout the period of his disability, including anecdotal evidence of his not even being able to ride a lawn mower for more than 15 minutes without have to stop because of pain. He was followed and treated by (Dr. S), and for a time by (Dr. O), with medications, trigger point injections in the shoulder, a neck brace, PT, and a home rehabilitation program to at least through February 1992. Claimant testified to some 80 PT sessions. Against the backdrop of his age and substantial medical history, we find the evidence and reasonable inferences therefrom sufficient to support the hearing officer's determination that claimant met his burden on this issue.

The challenged findings and conclusions are not so against the great weight and preponderance of the evidence as to be manifestly unjust. In re King's Estate, 150 Tex. 662, 244 S.W.2d 660 (1951); Pool v. Ford Motor Co., 715 S.W.2d 629, 635 (Tex. 1986).

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Philip F. O'Neill
Appeals Judge

CONCUR:

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Lynda H. Nesenholtz
Appeals Judge

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Thomas A. Knapp
Appeals Judge