APPEAL NO. 92624

On October 9, 1992, a contested case hearing was held in (city), Texas, with (hearing officer) presiding as the hearing officer. The hearing officer determined that the claimant's deviated septum is causally related to her work-related injuries of (date of injury); that the claimant has not reached maximum medical improvement (MMI); and that because the claimant has not reached MMI, no impairment rating can be assessed. The hearing officer ordered the appellant, hereafter the carrier, to pay workers' compensation benefits consistent with the decision, the Texas Workers' Compensation Act, TEX. REV. CIV. STAT. ANN. art. 8308-1.01 *et seq.* (Vernon Supp. 1992) (1989 Act), and the Rules of the Texas Workers' Compensation Commission.

The carrier contends that certain findings of fact and conclusions of law are not supported by sufficient evidence and requests that we render a decision that the claimant's deviated septum was not caused by her work-related injury, and that the claimant did not timely dispute (Dr. N's) certification of MMI and assignment of a four percent impairment rating thereby making the certification of MMI and assignment of impairment rating final. In the alternative, should we determine that the claimant timely disputed (Dr. N's) certification of MMI and assignment of an impairment rating, then the carrier requests that we reverse the hearing officer's determination that the claimant has not reached MMI and remand the case for the appointment of a designated doctor to resolve the MMI and impairment rating disputes.

Respondent, hereafter the claimant, responds that the carrier's appeal is not timely; that the contested findings and conclusions are supported by sufficient evidence, and requests that the hearing officer's decision be affirmed.

DECISION

The decision of the hearing officer is affirmed.

The carrier's request for review, which was received by the Texas Workers' Compensation Commission (Commission) on November 19, 1992, was timely filed. Although the cover letter from the Division of Hearings and Review transmitting the decision to the parties is dated October 28, 1992, Commission records show that the decision was not mailed to the parties until November 4, 1992. Thus, the request was filed with the Commission within 15 days of receipt by the carrier as required by Article 8308-6.41(a).

The claimant testified that on (date of injury) while working for her employer at a client's store, she slipped and her "whole body" hit the floor. She said that she was unconscious for about five minutes. The claimant said that when she came to she was lying face down on the floor, her whole body hurt, her head was swollen on one side, her jaw was bruised, her arm was behind her head, she had a black eye, and she had difficulty breathing. She was immediately taken to a hospital emergency room where her dislocated right elbow was treated. On February 21, 1991, the claimant was examined by (Dr. N),

M.D., an orthopedic surgeon who specializes in hand surgery. His initial office visit report indicated that the claimant told him about her fall at work and complained to him of having pain in her right elbow, right knee, right ankle, and lower back. The claimant continued treatment with (Dr. N) until February 1992 when she moved from (city), Texas to (city), Texas. When the claimant moved to (city), she began treatment with (Dr. C). Since her fall, the claimant has seen about 30 doctors, most of whom were referrals from (Dr. N) or (Dr. C). In June 1991, (Dr. N) performed arthroscopic surgery on the claimant's right knee and right elbow. On February 18, 1992, (Dr. N) certified in a TWCC-69 (Report of Medical Evaluation) that the claimant had reached MMI and assigned her a four percent whole body impairment rating. In a narrative report of February 17, 1992, (Dr. N) stated that the four percent impairment rating was for impairment to the claimant's right knee and right elbow. In a letter to the carrier's claims adjustor dated February 26, 1992, (Dr. H), M.D., to whom (Dr. N) referred the claimant for pain management, wrote that he felt that the claimant "has reached her maximum medical improvement at this point."

Concerning the issue of whether the claimant's deviated septum is related to her injury of (date of injury), the claimant testified that she breathed normally before but not after her fall. The claimant's husband corroborated her testimony concerning the onset of breathing problems from the time of the fall. An MRI of the claimant's head performed in August 1991 revealed a slight bowing of the nasal septum convex to the right. In a September 1991 report, (Dr. K), M.D., reported that the claimant had been complaining of headaches and blockage of her nose since her fall in (month year), and after review of the MRI of the head, diagnosed the claimant as having a deviated nasal septum. In June of 1992, (Dr. W), M.D., diagnosed the claimant as having a "severe nasal obstruction with epistaxis" and performed an operation on the claimant's nose consisting of a "septoplasty with bilateral partial turbinectomies." Also in June of 1992, (Dr. G), M.D., who is associated with (Dr. W), wrote a letter in which he stated that "[i]t is our opinion that this lady [the claimant] suffered a nasal disorder secondary to an accident that occurred on (date of injury), which was confirmed by the employer." The carrier offered no medical opinion contradicting the medical opinion of (Dr. G). Having reviewed the record, we conclude that there is sufficient evidence to support the hearing officer's finding that after (date of injury), the claimant had trouble breathing due to a deviated septum that the claimant did not have prior to (date of injury), her conclusion (which is actually more in the nature of a finding of fact) that on (date of injury), the claimant fell on her face causing her to suffer, among other injuries, a deviated septum, and her decision that the claimant's deviated septum is causally related to her injuries of (date of injury). The carrier's insufficient evidence challenges to the referenced finding, conclusion, and decision are overruled.

On appeal, the carrier asserts that (Dr. N's) certification of MMI and assignment of impairment rating became final due to the lack of a timely dispute by the claimant. At the hearing, the carrier waited until closing argument to urge the finality of (Dr. N's) findings, which helps to explain the paucity of the evidence on this matter. Pursuant to Tex. W. C. Comm'n, 28 TEX. ADMIN CODE § 130.5(e), the first impairment rating assigned to an employee is considered final if the rating is not disputed within 90 days after the rating is assigned. From the documentary evidence, it appears that (Dr. N) was the first, and only,

doctor to assign the claimant an impairment rating and he did this on February 17 or 18, 1992. In Texas Workers' Compensation Commission Appeal No. 92542, decided November 30, 1992, the Appeals Panel stated in a discussion of Rule 130.5(e) that whether a claimant had actually disputed an impairment rating under the rule would be a fact-specific determination in each case. The Appeals Panel also stated that "we agree that it would require some stretch of the imagination to find that claimant could dispute a doctor's report before he was aware that it was rendered." In the present case, the claimant testified that she last saw (Dr. N) in January 1992, although she went to his office in February 1992 and said she was refused treatment; that she moved from (city), where (Dr. N) is located, to (city) in February 1992, and that the first time she saw (Dr. N's) impairment rating was in May of 1992. The claimant's husband testified that their house in (city) was sold the week of February 10th and they moved to (city). (Dr. N's) narrative report dated February 17, 1992 in which he stated that the claimant's impairment rating is four percent, indicated that a copy of the narrative report was sent to the claimant at her address in (city), Texas, and that a copy was sent to attorney (WW), who is not the attorney representing the claimant in her workers' compensation claim. A benefit review conference (BRC) was held on August 5, 1992. The BRC report indicates that the claimant's position in regard to the impairment rating dispute was that she never saw the impairment rating until she went to the first BRC on April 15, 1992, and disputed it at that time. No report from an April 15, 1992, BRC was in evidence. If the claimant did dispute the February 18th impairment rating on April 15, 1992, it was well within the 90-day provided in Rule 130.5(e).

Based on the claimant's testimony, the hearing officer found that the claimant did not know that (Dr. N) had determined that she had reached MMI and assessed an impairment rating until sometime in May, 1992. The hearing officer is the sole judge of the relevance and materiality of the evidence offered and of the weight and credibility to be given the evidence. Article 8308-6.34(e). In view of the claimant's testimony that she first saw (Dr. N's) impairment rating in May 1992, and her testimony and her husband's testimony that they moved to (city) in February of 1992--which could explain why she did not receive a copy of (Dr. N's) narrative report of February 1992 which, if sent, was mailed to her (city) address--we conclude that there was sufficient evidence to support the finding that the claimant did not know of (Dr. N's) findings until May 1992. The carrier's insufficient evidence challenge to that finding is overruled. We also conclude that the hearing officer did not err in failing to find that the claimant did not timely dispute (Dr. N's) assigned impairment rating. The report from the BRC of August 5, 1992 showed that the claimant was disputing the impairment rating. Considering the time limitations for setting a BRC (within 40 days of request unless expedited then 20 days), and for giving notice of the setting (at least 30 days unless expedited then 10 days), it could reasonably be concluded that the claimant disputed (Dr. N's) impairment rating, for which the BRC was set, well before the August 5, 1992 BRC and within 90 days of when the claimant learned of the impairment rating in May of 1992.

The carrier contends that there is insufficient evidence to support the hearing officer's finding that (Dr. N's) evaluation does not consider the claimant's "full range of injury," her conclusion that the claimant has not reached MMI, and her conclusion that because the

claimant has not reached MMI, no impairment rating can be assessed. We note that (Dr. N's) findings as to MMI and impairment rating are not accorded presumptive weight because he is not a designated doctor under Articles 8308-4.25 or 8308-4.26. We conclude that there is sufficient evidence to support the hearing officer's finding concerning (Dr. N's) evaluation. In particular, although (Dr. N's) records reflected that he was informed by another doctor's office in September 1991 that the claimant had a deviated septum, there is no indication in his records that he treated the claimant for that injury nor that he considered it as part of the claimant's work-related injury. His narrative report of February 17, 1992, in which he stated that he felt the claimant had reached a degree of MMI and in which he assigned an impairment rating of four percent, does not mention her diagnosed deviated septum, but instead concentrated on the claimant's progress with regard to her right knee and right elbow. The record supports a finding that (Dr. N) did not take into consideration the claimant's deviated septum in certifying MMI and assigning an impairment rating.

That part of the definition of MMI which pertains to this case is 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)(A). In February 1992 when (Dr. N) certified MMI, and (Dr. H) stated in a letter that the claimant had reached MMI, the claimant had been diagnosed as having a deviated septum, but she did not have surgery on her nose to improve that condition, which the hearing officer found to be part of her work-related injury, until four months later, which supports the hearing officer's determination that the claimant had not reached MMI as certified in (Dr. N's) report or as stated in (Dr. H's) letter, especially in view of the fact that (Dr. N) did not take into consideration the claimant's deviated septum in certifying MMI and (Dr. H's) letter and records gave no indication that he took into consideration the claimant's work-related deviated septum when he opined on MMI.

Under the 1989 Act, "impairment" means any anatomic or functional abnormality or loss existing after MMI that results from a compensable injury and is reasonably presumed to be permanent. Article 8308-1.03(24). Consequently, the hearing officer's conclusion that because the claimant has not reached MMI, no impairment rating can be assessed is correct. Having reviewed the record, we conclude that there is sufficient evidence to support the hearing officer's finding of fact concerning (Dr. N's) evaluation, her conclusion that the claimant has not reached MMI, and her conclusion that because the claimant has not reached MMI, no impairment rating can be assessed. We overrule the carrier's insufficient evidence challenges to the aforementioned finding and conclusions. We would note, although it does not change our decision here, that the failure of a treating doctor to mail his report of medical evaluation within seven days of the examination does not, in and of itself, cause the certification of MMI to be invalid. *See* Texas Workers' Compensation Commission Appeal No. 92511, decided November 12, 1992.

The carrier contends that the hearing officer should have had a designated doctor appointed to resolve the issues of MMI and impairment rating, rather than finding that the claimant has not reached MMI, when the hearing officer failed to find in its favor regarding the finality of (Dr. N's) findings on MMI and impairment rating. Articles 8308-4.25 and

8308-4.26 do contemplate the appointment of a designated doctor to resolve disputes on MMI and impairment rating. However, in this case, no doctor has taken into consideration the claimant's work-related injury to her nose when expressing an opinion on MMI or impairment rating. At this juncture, instead of selecting a designated doctor, it would seem to be more appropriate to have the claimant's current treating doctor evaluate the claimant taking into consideration the injury to her nose as well as any other injuries resulting from her work-related accident of (date of injury), and if there is a dispute concerning the treating doctor's opinion as to MMI or impairment rating, the carrier may wish to have the claimant examined by a doctor selected by the carrier under Article 8308-4.16. If a dispute still exists as to MMI or impairment rating, the parties and the Commission would proceed under the appropriate provisions of Articles 8308-4.25 and 8308-4.26 relating to the selection of a designated doctor.

The carrier also contends that there is insufficient evidence to support the hearing officer's findings that (Dr. N's) primary concern was the claimant's right arm; that (Dr. N) referred the claimant to other doctors for some, but not all of her complaints; and that the claimant continues to have problems, some of which have gone undiagnosed or untreated, with her left knee, both ankles, back and jaw. While there is some evidence in the record to support each of these findings, we conclude that they were not necessary for the decision as the decision is supported by the other challenged findings and conclusions which we have held to be supported by sufficient evidence.

While admitting that disability was not an issue stated by the parties to be a disputed issue at the beginning of the hearing, the carrier nevertheless contends that the issue of disability was tried by consent and requests that the Appeals Panel make a determination on the claimant's disability. We disagree with the carrier's assertion that disability was tried by consent. When the carrier began questioning the claimant in regard to her ability to work, the claimant's attorney objected on the ground of relevancy. Such objection runs counter to the concept of consent. We conclude that the carrier's point on appeal concerning disability is without merit and is overruled.

Lastly, the carrier contends that "the deviated septum is an ordinary disease of life." And that "[t]here was insufficient evidence to support the contention that this was caused by the incident in question." We have already concluded that there was sufficient evidence to connect the claimant's deviated septum to her work-related injury of (date of injury). The carrier does not give any indication as to what facts or authority it relies on for its assertion that the claimant's deviated septum is an ordinary disease of life. At the hearing, the carrier offered no medical evidence contradicting (Dr. G') opinion which connected the deviated septum to the claimant's work-related injury. Finding that the carrier's contention is without support in the record, it is overruled.

The decision of the hearing officer is affirmed.

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Robert W. Potts
Appeals Judge

CONCUR:

_____
Susan M. Kelley
Appeals Judge

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Philip F. O'Neill
Appeals Judge