APPEAL NO. 92677

On November 12, 1992, a contested case hearing was held in (city), Texas, with (hearing officer) presiding as hearing officer. The hearing officer determined that the appellant, claimant herein, reached maximum medical improvement (MMI) on May 30, 1992 with a 10 percent impairment rating and ordered payment of benefits under the Texas Workers' Compensation Act, TEX. REV. CIV. STAT. ANN. art. 8308-1.01 *et seq*. (Vernon Supp. 1992) (1989 Act).

Claimant appeals contending that the hearing officer was not obligated to adopt the designated doctor's assessment of MMI and impairment and that the designated doctor's opinion was not based on an objective clinical or laboratory finding. Respondent, carrier herein, responds that the decision is supported by the evidence and requests that we affirm the decision.

DECISION

The decision of the hearing officer is affirmed.

The issues agreed to by the parties at the contested case hearing (CCH) were:

1.Has Claimant reached maximum medical improvement (MMI)?

2.Should (Dr. S's) impairment rating be adopted and, if so, what is that rating?

Claimant is a 29 year old male who testified he first injured his back in (month year) while working for (employer). Claimant returned to work for the same employer and injured his back in the same place on (date of injury) while lifting some pallets. The facts and circumstances surrounding the injury are not in dispute. Claimant was seen by (Dr. C) who referred claimant to (Dr. P).

(Dr. C) submitted two TWCC-64s, Specific and Subsequent Medical Reports. One TWCC-64, dated 6/14/92, gives a diagnosis of lumbar syndrome, "lumbar radiculopathy probably" and lumbosacral strain and suggests "possible back surgery" and referrals to (Dr. H) and (Dr. P). The other TWCC-64, dated 7/4/92, states the same diagnosis and notes claimant is "improved" and "patient declines surgery."

(Dr. P) has several reports, and gives a diagnosis of lumbar syndrome. In a letter dated March 24, 1992, (Dr. P) states claimant needs a five week inpatient spine and chronic pain program and that claimant will probably never be able to return to heavy labor with or without surgery. By note dated August 4, 1992, (Dr. P) states claimant "did not go to the Spinal and Chronic Pain Centre Program instead he got an epidural steroid injection . . ." The claimant at that point was still trying to avoid surgery. Claimant was also seen by (Dr. H) on a referral from (Dr. C). (Dr. H) administered an epidural steroid injection on June 9, 1992 and a follow-up note of June 25, 1992 indicates no improvement, suggests claimant

may reconsider his surgical options and suggests perhaps proceeding with three epidural steroid injections in the future.

Claimant, in February 1992, underwent an independent medical examination from (Dr. Si) as requested by the carrier. (Dr. Si) submitted a TWCC-69 showing MMI on 12/31/91 and a zero percent impairment rating.

It was stipulated that the parties agreed on (Dr. S) as a designated doctor for purposes of determining MMI and impairment rating. (Dr. S) submitted a comprehensive three page narrative report dated June 17, 1992 indicating he had used the "American Medical Association Guidelines" (AMA Guides) and that claimant "has reached maximum medical improvement" and assigned a 10 percent impairment rating explaining five percent corresponds to documented medical treatment for more than six months and "the other five percent corresponds to the presence of a central herniated disc (without any nerve root compression)." Both the testimony and medical reports indicate (Dr. S) considered other x-rays and medical records in making his ratings. In response to a letter from the carrier's adjustor, dated June 29, 1992, requesting the designated doctor separate his impairment rating for "old" Texas Workers' Compensation law and "new Texas WC," (Dr. S) submitted a Report of Medical Evaluation (TWCC-69) showing MMI on 5-30-92 and splitting the 10 percent whole body impairment into seven percent "injury 10-13-90" and three percent "[date of injury]." The TWCC-69 does refer to the June 17, 1992 narrative. The hearing officer, both at the CCH and in his decision, interpreted these reports as ". . . clear that (Dr. S's) intent was to assign a 10 percent impairment rating to Claimant's percentage of whole body impairment existing on the date of MMI and that the two injuries were to the same part of the body." The hearing officer attempted to obtain an agreement between the parties at the CCH regarding the designated doctor's ratings, but claimant raised the issue that the designated doctor "misapplied the AMA Guides" and that (Dr. S's) rating should be invalid. The hearing officer noted in his decision that claimant offered no evidence "of any impropriety by (Dr. S) in his application of the AMA Guides."

The hearing officer adopted the designated doctor's ratings specifically finding and concluding:

Findings of Fact

3.Claimant and Carrier agreed that (Dr. S) would serve as designated doctor in this case.

4.On June 17, 1992, (Dr. S) reported that Claimant has reached maximum medical improvement from his (date of injury), compensable injury with a 10% impairment rating and that the date Claimant reached maximum medical improvement was May 30, 1992.

5.(Dr. S's) opinion that Claimant reached maximum medical improvement on May

30, 1992, was not contrary to the great weight of the other medical evidence.

6.In assigning an impairment rating in this case (Dr. S) properly applied the second printing, dated February 1989, of the Guides to the Evaluation of Permanent Impairment, third edition, published by the American Medical Association.

Conclusions of Law

2.(Dr. S's) opinion concerning maximum medical improvement and impairment rating must be adopted by the Commission.

Claimant argues that the Commission is not required under Article 8308-4.25(b) to adopt the designated doctor's assessment of MMI, that the other doctors have not agreed MMI has been reached, and "since (Dr. S's) opinion is not given presumptive weight in accordance with Article 8308-4.25(b), his assessment of MMI has been duly challenged." Article 8308-4.25(b) states:

(b) If a dispute exists as to whether the employee has reached maximum medical improvement, the commission shall direct the employee to be examined by a designated doctor selected by mutual agreement of the parties. . . The report of the designated doctor shall have presumptive weight, and the commission shall base its determination as to whether the employee has reached maximum medical improvement on that report unless the great weight of the other medical evidence is to the contrary.

It was stipulated that (Dr. S) was a mutually agreed upon designated doctor. As such, the designated doctor's opinion on MMI has presumptive weight unless the great weight of the other medical evidence is to the contrary. (Dr. C's) report of June 4, 1992 only indicated that claimant is receiving medications and injections, and later on July 4, 1992, notes claimant is improved. Claimant argues on appeal that (Dr. H) administered injections on June 9, 1992 and (Dr. P) notes in a May 21, 1992 report that claimant is receiving injections and trying to avoid surgery. In this regard we have previously held that MMI does not necessarily mean, in every case, that the worker is at that point free of pain or fully restored to the preinjury condition. *See* Texas Workers' Compensation Commission Appeal No. 92270, decided August 6, 1992. In Texas Workers' Compensation Commission Appeal No. 92670, decided February 1, 1993, we further held "[i]t has become clear that many claimants do not understand how they can reach maximum medical improvement when they still continue to hurt and suffer from an injury." When a doctor finds MMI and assesses an impairment rating he agrees, in effect, that the injured worker is as well as the worker is going to get and is likely to continue to have effects, and quite possibly pain, from the injury.

(Dr. Si), the carrier's examining doctor, states that MMI was reached on December 31, 1991. Based on the hearing officer's discussion it is clear that after evaluating all of the medical evidence he found in Finding of Fact No. 5 that the designated doctor's MMI date of May 30, 1992 was not contrary to the great weight of the other medical evidence. Contrary to the claimant's argument that the designated doctor's ". . . opinion is not given presumptive weight in accordance with Article 8308-4.25(b) . . ." we have held that both the date and the certification of MMI are entitled to presumptive weight under the Act. *See* Texas Workers' Compensation Commission Appeal No. 92648, decided January 20, 1993, and Texas Workers' Compensation Commission Appeal No. 92686, decided February 3, 1993. A fair reading of Article 8308-4.25(b), cited above, would lead to the same conclusion. Having decided that the designated doctor's opinion does have presumptive weight, the hearing officer found that the MMI was not contrary to the great weight of the other medical evidence. We have noted in the past the "unique position" the designated doctor's report occupies within the scheme of the 1989 Act, and the fact that such report cannot be outweighed by a mere balancing of the evidence or even a preponderance of the evidence. *See* Texas Workers' Compensation Commission Appeal No. 92412, decided September 28, 1992, and Texas Workers' Compensation Commission Appeal No. 92686, decided February 3, 1993. In that the claimant's other medical evidence is unclear as to MMI and notwithstanding that (Dr. Si) gave an earlier MMI date than does the designated doctor, we find there is sufficient evidence to support the hearing officer on this point.

The claimant argues that the hearing officer's Conclusion of Law No. 2, cited above, is in error because it ". . . states the Commission must adopt (Dr. S's) assessment of MMI." Conceding that Article 8308-4.25(b) only gives presumptive weight to an agreed designated doctor's assessment of MMI, we note that Article 8308-4.26(g) requires that "the commission shall adopt the impairment rating made by the designated doctor." Article 8308-4.26(d) requires that MMI be certified before impairment can be assessed. Therefore it would follow the mandatory adoption of the impairment rating would also require the adoption of the MMI, which must precede the assessment of impairment. While the conclusion of law, as stated, is technically in error because the MMI rating only has presumptive weight whereas the impairment rating of the agreed designated doctor must be adopted, the hearing officer clearly distinguished the weight to be given the ratings in his findings of fact. We therefore reform the language of Conclusion of Law No. 2, to reflect the findings of fact, to state:

> (Dr. S's) opinion concerning maximum medical improvement, as having presumptive weight and not being contrary to the great weight of other medical evidence, is determined to be correct and the impairment rating is adopted by the Commission.

Claimant's other argument is that the designated doctor's impairment rating ". . . was not based on an objective clinical or laboratory finding" as required by Article 8308-4.25(a) because the rating appears to have been changed in response to the adjustor's letter.

Initially, we note that the 10 percent impairment rating in the designated doctor's June 17, 1992 narrative report is the impairment rating adopted by the hearing officer. Secondly, we note that this issue was first raised on appeal. At the CCH, claimant raised the issue that there was an improper use of the AMA Guides; however, no evidence was offered as to how the designated doctor's impairment rating did not comply with the AMA Guides, or specifically that the impairment rating was not based on objective clinical or laboratory findings. Furthermore, a fair reading of (Dr. S's) June 17, 1992 narrative discusses x-rays, the MRI done on claimant and other objective measurements reviewed by the designated doctor. We have held in Texas Workers' Compensation Commission Appeal No. 92335, decided August 28, 1992, and Texas Workers' Compensation Commission Appeal No. 92650, decided January 20, 1993, that while impairment cannot be based solely on a subjective complaint, it does not mean that subjectivity can play no part in the determination or measurement of impairment. We find that the claimant's contention is without merit.

We would also note that there was no contention that (Dr. S's) narrative report dated June 17, 1992 and his TWCC-69, when read together, did not contain all the elements required by law or rule for a designated doctor's report. *See* Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 130.1, 130.3 (Rules 130.1, 130.3). The fact that the TWCC-69 was completed some time after the narrative does not mean that the two cannot be read as a single report, especially where the TWCC-69 references and adopts the June 17th narrative. *Also see* Appeal No. 92686, *supra*.

Although not necessary for the resolution of this case, we note that Article 8308-4.61 entitles an injured employee to all health care reasonably required by the nature of the compensable injury as and when needed. An insurance carrier's liability for such medical benefits may not be limited or terminated by agreement or settlement. Consequently, nothing in this decision would preclude claimant from seeking further health care and/or surgery for the injury arising out of this particular accident.

We affirm the hearing officer's decision that the claimant attained MMI on May 30, 1992 with an impairment rating of 10 percent.

Thomas A. Knapp
Appeals Judge

CONCUR:

Robert W. Potts
Appeals Judge

Philip F. O'Neill
Appeals Judge