

## APPEAL NO. 93024

This appeal arises under the Texas Workers' Compensation Act of 1989 (1989 Act), TEX. REV. CIV. STAT. ANN. arts. 8308-1.01 through 11.10 (Vernon Supp. 1993). On December 9, 1992, a contested case hearing was held in (city), Texas, with (hearing officer) presiding, to determine the issues of whether the claimant, who is the respondent in this appeal, sustained a back injury on (date of injury), in the course and scope of his employment with Toyota Town (employer), as well as whether he had reached maximum medical improvement (MMI) and sustained permanent impairment, from an injury sustained on (date of injury).

The hearing officer determined that claimant had not sustained a back injury, but had reached MMI as to his compensable toe injury on September 28, 1992, with a zero percent impairment. The hearing officer, in arriving at his decision on MMI and impairment for the toe injury, used the report of the designated doctor, and found that the great weight of other medical evidence was not to the contrary of such report. The hearing officer ordered that carrier should "provide benefits to claimant in accordance with this decision, the Texas Workers' Compensation Act, and associated rules." The hearing officer was not asked to determine whether the claimant had disability as a result of his compensable injury.

The carrier appeals this determination, specifically arguing that it was error for the hearing officer to order payment of temporary income benefits (TIBS) from December 2, 1991 until the date MMI was achieved, because the claimant had no disability for that period. Further, the carrier argues that there was "no" evidence or insufficient evidence to support findings of the hearing officer based on the designated doctor's report. Finally, the carrier argues that it is entitled to recover an overpayment of TIBS because of evidence that claimant reached MMI on December 10, 1991, at a point earlier than reported by the designated doctor. The carrier attaches documents to its appeal that were not submitted at the hearing. No response was filed.

## DECISION

After reviewing the record of the case, we affirm the decision of the hearing officer.

At the outset, we note that evidence submitted for the first time on appeal, and not during the contested case hearing, is not part of the record and will not be considered. Article 8308-6.42 (a)(1); Texas Workers' Compensation Commission Appeal No. 92272, decided August 6, 1992.

The claimant testified for himself, and his former supervisor, (Mr. L), testified for the carrier. The claimant, a 29-year-old man, stated that he banged his foot on a post on (date of injury) while working in the employer's warehouse. Although he thought he could shake it off, it turned out he had a dislocated toe. Claimant was off work after the accident. He received physical therapy and wore a prescribed orthopedic device.

The claimant returned to full-time work for the employer at his previous job on December 2, 1991. Whether he returned to work with restrictions is disputed; however, he was paid the same wage as before the injury. According to Mr. L, the claimant was fired on December 6, 1991 for tardiness and related behavior about which he had been warned. Claimant testified that he performed some limited roofing work on a part-time basis in October 1992. He also said that he worked briefly in November 1992 doing inventory work for "Sports City." He denied that he worked at any other time from December 6, 1991 through the date of the hearing. The claimant applied for, but did not receive, unemployment benefits.

The claimant was treated by his doctor, (Dr. H), who completed a slip on December 10, 1991 releasing him to work effective January 2, 1992. Dr. H continued to treat the claimant's foot through March 1992 according to his bills in the record. The claimant was never treated for a back injury. However, claimant contended that he injured his back by favoring his injured foot while walking around. Mr. L stated that claimant never reported a back injury to the employer.

On May 12, 1992 the claimant was examined by a doctor for the carrier,(Dr. S). Dr. S examined him, reviewed his records, found his toe neither swollen nor red, and determined that claimant had reached MMI on December 10, 1991 with a zero percent impairment. His letter report was not completed until June 1, 1992.

A designated doctor, (Dr. W), was appointed to examine the claimant. His report indicates that he was aware of Dr. S's examination, although his report notes the erroneous impression that Dr. S examined the claimant in December 1991. Dr. W reported lumbar radicular syndrome he found in the claimant. Dr. W certified that claimant reached MMI effective September 28, 1992. He assessed a five percent whole body impairment. However, his report breaks down this rating and makes clear that he assigned zero percent for the toe and five percent for the back.

Apparently around the same time, the claimant's doctor, Dr. H, certified MMI effective September 22, 1992 with a one percent impairment for the toe. He did not make an assessment for a back injury.

The hearing officer determined that the claimant had not sustained a back injury in the course and scope of employment, and this was not appealed. He gave presumptive weight to the designated doctor's report by basing his determination of impairment on zero percent assessed for the toe only, and by concluding that MMI was reached effective September 28, 1992. He found that the great weight of other medical evidence was not to the contrary.

Although the carrier argues on appeal that the designated doctor would have certified

MMI based upon whatever his examination date was, the carrier offered nothing at the hearing to support this, nor did it submit much to establish a "great weight" of other medical evidence being contrary to the designated doctor's report.

I.

The Finding of Fact and Conclusion of Law which are appealed are:

**FINDING OF FACT**

5.[Dr. W] was a commission appointed designated doctor who certified that Claimant reached maximum medical improvement from his referenced toe injury on September 28, 1992, with a 0% impairment rating.

**CONCLUSION OF LAW**

4.On September 28, 1992, Claimant reached maximum medical improvement from his compensable toe injury of November 12, 1992, with a 0% impairment rating.

II.

**WHETHER THE HEARING OFFICER ERRED IN BASING HIS DECISION ON THE DESIGNATED DOCTOR'S REPORT**

The designated doctor under the 1989 Act is an impartial doctor who is used to finally resolve disputes over MMI and impairment rating. To achieve this end, the report of a Commission appointed designated doctor is given presumptive weight. Art. 8308-4.26(g). Only the great weight of other medical evidence can rebut such presumptive weight. As the Appeals Panel has stated before, a finding of great weight requires more than a mere balancing or preponderance of the evidence. Texas Workers' Compensation Commission Appeal No. 92412, decided September 28, 1992. The hearing officer is the sole judge of the weight and credibility to be given to the evidence in the record. Article 8308-6.34(e). The achievement of MMI is different from the issue of whether disability, as defined in Article 8308-1.03(16), exists. Texas Workers' Compensation Commission Appeal No. 91060, decided December 12, 1991.

The carrier's "no evidence" point of error can be dispensed with summarily: the evidence supporting the disputed finding and conclusion is the report of the designated doctor. We also do not agree that the determination is against the great weight and preponderance of other evidence. For example, the hearing officer could believe that the

fact that claimant continued to receive treatment for his toe after December 10, 1991 outweighed the conclusion of the carrier's doctor that MMI had been reached on that date. Nonmedical evidence relating to disability would be properly disregarded as weighing against Dr. W's report.

The carrier argues, although it is not developed in the record, that the Texas Workers' Compensation Commission (Commission) delayed in appointing a designated doctor and that the carrier was thus "penalized." Setting aside the obvious point that carrier was more greatly "penalized" by its own delay in seeking examination of claimant by a doctor of its choice, we respond by noting that such argument falls short of a legal basis on which to set aside the presumptive weight accorded a designated doctor's report by the 1989 Act. The carrier's points of error are overruled.

### III.

#### WHETHER THE HEARING OFFICER ERRED BY ORDERING PAYMENT OF BENEFITS IF CLAIMANT HAD NO DISABILITY, AS DEFINED IN THE 1989 ACT.

The carrier argues mightily that the hearing officer's award of benefits flies in the face of evidence indicating that claimant's disability had ceased. However, the carrier never raised the existence (or nonexistence) of disability as an issue at the benefit review conference or the contested case hearing. A review of applicable law makes clear that issues not raised at a benefit review conference may not be considered by the hearing officer except by the consent of the parties or unless the Commission makes a determination of good cause. Article 8308-6.31(a); Tex. W.C. Comm'n Rules, 28 TEXAS ADMIN. CODE § 142.7 (Rule 142.7).

Neither step was followed in this case. At the hearing, the carrier's attorney argued zealously for inclusion of an issue on timely notice of a back injury. No similar argument was made to add an issue on disability, although much of carrier's cross-examination of the claimant was devoted to whether the injury resulted in the inability to obtain and retain employment at wages equivalent to that earned before the injury. Given the arguments and evidence that the carrier apparently could have advanced on the issue of disability, the omission of the issue from the adjudication process is somewhat inexplicable. Nevertheless, the hearing officer was not asked to adjudicate a disability issue and we do not therefore find error in the omission of specific findings and conclusions on the issue. Therefore, the carrier's position before the Appeals Panel is analogous to its inclusion with its appeal of evidence not submitted at the contested case hearing. We will not consider the omitted issue or the omitted evidence.

We also note that the hearing officer did not issue his order in the specific terms of which carrier complains. The hearing officer ordered the carrier "to provide benefits to

claimant in accordance with this decision, the Texas Workers' Compensation Act, and associated rules." The order is broad enough to allow the carrier to raise issues relating to disability in another proceeding or to compute the amount of the payment, taking into account any post-injury earnings. See Article 8308-4.23(c).

IV.

WHETHER THE CARRIER IS DUE A CREDIT FOR OVERPAYMENT OF TEMPORARY INCOME BENEFITS

The carrier asked for credit of overpayment of TIBS from December 2, 1991 through September 28, 1992, or at least for amounts it was ordered to pay under interlocutory order of the benefit review officer for the period from July 15, 1992 through September 28, 1992.

There has been no established "overpayment" of benefits in this case. Even if there were, the Appeals Panel has held that when an overpayment does not occur because of a claimant's fraud, but through the mistake of the carrier, recoupment from the claimant is not authorized by the statute or rules of the Commission. Texas Workers' Compensation Commission Appeal No. 92291, decided August 17, 1992; see *also* Article 8308-10.04(a) & (b).

The hearing officer's decision in this case is sufficiently supported by the record, and by applicable statutes, and is affirmed.

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Susan M. Kelley  
Appeals Judge

CONCUR:

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Philip F. O'Neill  
Appeals Judge

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Thomas A. Knapp  
Appeals Judge