APPEAL NO. 931069

On May 18, 1993, a contested case hearing was held in (city), Texas, with (hearing officer), presiding as the hearing officer. The hearing was held under the provisions of the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq*. (1989 Act) (formerly V.A.C.S., Article 8308-1.01 *et seq.*). The issues at the hearing were maximum medical improvement (MMI) and impairment rating. The hearing officer determined that the claimant reached statutory MMI on May 27, 1993, and that the claimant has a 37% impairment rating as reported by the designated doctor selected by the Texas Workers' Compensation Commission (Commission). The appellant (carrier) disagrees with the hearing officer's decision. The respondent (claimant) responds that the hearing officer's decision is supported by the evidence.

DECISION

The decision of the hearing officer is affirmed.

The unresolved issue from the benefit review conference was whether the claimant had reached MMI and evidence was taken at the hearing on that issue. After the hearing was closed, the parties agreed to reopen the record to consider the issue of the claimant's impairment rating.

The claimant is 65 years of age and, prior to May 1991, had worked for the employer, (employer) Company, for 26 years. For the last 24 years of her employment she was the executive secretary to the employer's president.

The claimant testified that she started suffering from allergies when she was 25 years old. She said she was allergic to pollen and a very few foods. In 1987 she was treated by (Dr. K), an allergist. Dr. K's records were not in evidence. The claimant said Dr. K advised her to remove certain cleansers from her home and to drink bottled water, which she did. In October 1990, the claimant began seeing (Dr. R), for treatment of her allergies. Records and reports from Dr. R were in evidence. The claimant said that Dr. R advised her to eat organic food and take vitamin C, which she did. The claimant said that prior to January 1991, she had never missed work because of what she described as her "lung problem."

The claimant testified that in December 1990 continuous remodeling work began in the executive suite where she worked and that the remodeling work was still progressing when she stopped working in May 1991. She said that other than the president of the employer, who was away on business trips a lot, she was the only employee who worked in the executive suite. The claimant testified that the remodeling work consisted of scraping old carpet off the floor which created a lot of dust, putting new carpet down which had an "odor," painting walls, sanding doors and cabinets and refinishing them with varnish, stripping paneling and bookcases with a "stripping chemical" and refinishing the paneling and bookcases with varnish, gluing baseboards with a "potent" glue, staining various items,

and replacing old furniture with new furniture.

During the remodeling period, the claimant continued to work every day except for three days in February 1991 when she had the flu. The claimant testified that during the remodeling period she got headaches, her lungs got "tight and heavy," she became short of breath, her heart started "pounding," her lungs started getting "a lot worse," her legs and body would "get heavy," she had "short term memory loses" and a "lack of thinking ability," she became allergic to "all foods," she became "extremely irritable," and she had "spells." However, she said she would be "perfectly allright" at home on the weekends. On (date of injury), the claimant said she had to make about 15 trips past an area that was being varnished and, as a result of the exposure to the varnish, she experienced breathing problems and started shaking all over and did not return to work after that day.
The claimant said that prior to the remodeling, she did not have the type of "tightening" and "heaviness" in her lungs that she experienced during the remodeling and after she left work.

The claimant indicated that she filed a claim for workers' compensation benefits in the fall of 1991. The claim form was not in evidence. The carrier admitted at the hearing that it had not contested compensability of the claim.

The claimant continued treatment with Dr. R. In a report dated October 15, 1991, Dr. R stated that the claimant was under his care for treatment of respiratory distress, chronic maxillary sinusitis, asthma, hypertension, cephalgia, and food, inhalant and chemical sensitivities. He further stated that the claimant has had numerous symptoms "due to the painting, varnishing, gluing and odors from the new carpet." He added that "[t]hese exposures have caused changes in her immune system." He also said that new skin testing was essential "due to her system being so overloaded with chemicals, as her lab reports show, from the remodeling at her office." In January 1992, (Dr. J), who works with Dr. R, diagnosed the claimant as having "chemical exposure" and
"chemical sensitivity" and stated that the claimant was "totally disabled." In a report dated April 8, 1992, Dr. R diagnosed the same conditions as had Dr. J.

In March of 1992, the carrier sent the claimant's medical records to (medical analysts company) for review. In April 1992, medical analysts company reported to the carrier that the claimant should have no long-term effects based on her described exposure. In June 1992, medical analysts company reported to the carrier that Dr. R "has practiced on the fringes of medicine since he has become involved in environmental health" and that "[h]is [Dr. R's] diagnoses are based on extremely subjective information." Medical analysts also said that Dr. R's diagnosis was invalid; that his work is entirely experimental; that the claimant did not suffer any long-term effects from exposure to "chemical moieties in the office setting," and that the claimant had had asthma and allergies for some time and had experienced an exacerbation of her asthma symptoms. In July 1992, the carrier asked medical analysts company when the claimant should have reached MMI due to the "exposure of October (sic) 1991," to which medical analysts responded that "once the

remodeling at her place of employment was completed, [claimant] could have safely returned to work." All of the reports of medical analysts are signed by a registered nurse who indicates in the reports that an unidentified "physician peer reviewer" reviewed the claimant's medical records and provided the opinions and comments contained in the reports.

At the request of the carrier, (Dr. C), saw the claimant on July 25, 1992, and reviewed her medical records. In a report dated August 4, 1992, Dr. C stated "[s]ince [claimant] does not complain of any illness or entity which would provide hard physical signs, the physical examination was deferred." Dr. C diagnosed the claimant as having hypochondriasis, hypertension, hypothyroidism, and allergy to grass, weeds, ragweed, mold, Candida albicans, and possibly trees. Dr. C said that all the diagnosed conditions were unrelated to the "alleged work exposure;" that the claimant did not appear to be "disabled" in any way; and that, while it was possible that the claimant may have had symptoms due to the alleged exposure at work at the time of the exposure and within a few days following the exposure, she "certainly must have reached maximum medical benefit (sic) by June 1, 1991." Dr. C said that at worst, the claimant's symptoms would be expected to continue "no more than 48 to 72 hours after the exposure." Dr. C also stated that the claimant "has no work-related disability or impairment at this time." Dr. C was highly critical of Dr. R, stating that Dr. R practices "clinical ecology;" that that field is based on unfounded assumptions, that Dr. R tends to practice on the "fringes of medicine;" and that the field of clinical ecology or environmental medicine is not recognized in the United States. Dr. C also stated that the diagnosis of "environmental illness" is not a diagnosis recognized by the medical community.

In a letter dated August 31, 1992, Dr. R responded to Dr. C's report. Basically, Dr. R said that Dr. C's report contained gross errors in relating the claimant's medical history; that Dr. C's criticism of clinical ecology was a smoke screen to divert attention from the claimant's on-the-job injury; that he, Dr. R, uses scientifically and clinically acceptable techniques that follow the guidelines of three "prestigious medical organizations;" that environmental medicine is recognized in the United States and is recognized by the medical community; that the claimant's symptoms were not subjective in that her blood toxic profile was positive and her SPECT brain scan was positive for neurotoxicity; that he, Dr. R, had not diagnosed "environmental illness" as suggested by Dr. C; that Dr. C's diagnosis of "hyperchondria" was "pathetic;" and that Dr. C's opinion was "unreliable, unprovable, and erroneous." Dr. R concluded his letter by stating that "[t]his patient was made ill by her work exposure and treatment was justified, and medically necessary."

In a letter to the carrier dated September 21, 1992, Dr. R stated that the claimant had not reached MMI. The Commission selected D.O. (Dr. CO), as the designated doctor. In a narrative report dated November 25, 1992, Dr. CO said that the purpose of his examination was to determine whether MMI had been reached and the percentage of impairment. Dr. CO performed a physical examination of the claimant, reviewed her medical history, and

diagnosed mixed solvent neurotoxicity, mild and chronic encephalopathy, residual multiple chemical sensitivity, and focal encephalopathy. Dr. CO further stated that the claimant had not reached MMI, and estimated that she had a 45% impairment rating.

At the request of the carrier, (Dr. S), a psychologist, reviewed the evaluations of Dr. CO and Dr. C, and opined in a report dated December 16, 1992, that "no link can be made between symptoms and the chemicals in the alleged exposure on the worksite," and further opined that "there is no objective evidence of an injury to [claimant]."

At the request of Dr. CO, the claimant was examined by (Dr. D), a psychologist, who reported on December 26, 1992, that the claimant suffers from "toxic brain syndrome."

The hearing officer states in his decision that after the hearing was closed, the carrier brought to his attention that the claimant had reached statutory MMI (the expiration of 104 weeks from the date on which income benefits begin to accrue, Section 401.011(30)(b)) on or about the date the hearing had closed. The hearing officer then states that "[a]ccordingly, the record was reopened by agreement to consider an additional issue: What is the claimant's impairment rating?"

In a letter to Dr. CO dated July 16, 1993, with copies to all parties, the hearing officer asked Dr. CO to assume that the claimant had reached MMI "by law" on May 27, 1993, and to give an opinion on the claimant's impairment. The hearing officer advised Dr. CO that he could give an opinion on an earlier date of MMI if the medical evidence warranted it. In a letter to the parties dated July 30, 1993, the hearing officer advised the parties that Dr. CO wanted to re-examine the claimant and that such was authorized by the hearing officer.

On September 9, 1993, Dr. CO re-examined the claimant and in a Report of Medical Evaluation (TWCC-69) dated September 20, 1993, assigned the claimant a 37% impairment rating. In a narrative report dated September 9, 1993, which is attached to the TWCC-69, Dr. CO stated that "[w]e understand that May 27th by law the MMI was reached. We will make an approximation of her maximum medical improvement at that time." Dr. CO further stated that, according to the Guides to the Evaluation of Permanent Impairment, third edition, second printing dated February 1989 (AMA Guides), the claimant has a 30% impairment under Chapter 4 of the AMA Guides relating to the nervous system and a 10% impairment under "DSM-III R," which gave a combined impairment rating of 37%. Dr. CO gave a detailed explanation of how he arrived at the impairment rating and stated that the 10% component of the impairment rating came from Chapter 14 of the AMA Guides which relates to mental and behavioral disorders. Chapter 14 of the AMA Guides states that the Diagnostic and Statistical Manual of Mental Disorders (ed. 3, revised in 1987), commonly known as DSM III R, is a widely accepted classification system for mental disorders.

On September 28, 1993, the hearing officer sent the parties a copy of Dr. CO's TWCC-69, narrative report dated September 9, 1993, and attachments, and advised the

parties that they had until October 8, 1993, to respond to Dr. CO's report and/or request additional time to develop additional medical evidence. The hearing officer also advised the parties that absent requests for additional time the record would be closed on October 8, 1993. In his decision, the hearing officer states that no response was received by the parties other than a letter from the carrier dated October 7, 1993, wherein the carrier indicated that it intended to rely on the evidence already presented.

On appeal, the carrier challenges the following findings of fact and conclusions of law:

FINDINGS OF FACT

13.By his report of December 16, 1992, [Dr. S] critiqued [Dr. CO's] report, but made no determination regarding MMI or impairment.

14.On May 18, 1993, the hearing was held in this matter; the only issue taken up was the claimant's date of MMI. [Note: in Finding of Fact No. 16, which is not challenged on appeal, the hearing officer found that while the decision in this matter was still pending the record was reopened by agreement in order to develop evidence on the claimant's impairment.]

15.The claimant reached statutory MMI on May 27, 1993.

17.[Dr. CO] subsequently re-examined the claimant and by his RME (Report of Medical Evaluation) of September 20, 1993, concluded the claimant had reached MMI no earlier than the statutory date with an assigned impairment rating of 37% of the whole person.

CONCLUSIONS OF LAW

2.The claimant reached MMI on May 27, 1993.

3.The great weight of other medical evidence in this case is not contrary to either [Dr. CO's] RME of November 25, 1992, or his RME of September 20, 1993.

4.The claimant's correct IR [impairment rating] is 37% of the whole person.

In disputing Finding of Fact No. 13, the carrier states that "[a]lthough [Dr. S] does not specifically refer to MMI or impairment, it is clear that he concludes that the Plaintiff has reached MMI and that she has no impairment as a result of the alleged injury." We disagree. Basically, Dr. S opined that the claimant was not injured at work. Thus, he gave no opinion on MMI or impairment.

In disputing Finding of Fact No. 14, the carrier states that it is its contention that the claimant did not receive an on-the-job injury on (date of injury), and references Dr. S's report. From our review of the record, we conclude that injury in the course and scope of employment was not an issue at the hearing. MMI was the initial issue, and, by agreement of the parties, impairment rating was added as an issue. The carrier acknowledged at the hearing that it had not contested compensability of the claimant's claim and the hearing officer made a specific finding that the carrier did not contest compensability of the claimant's injury, which finding has not been appealed. Under Section 409.021(c), a carrier who fails to contest the compensability of an injury on or before the 60th day after the date on which the carrier is notified of the injury waives its right to contest compensability. It is simply too late in the day to contend that the claimant was not injured at work.

The carrier disputes Finding of Fact No. 15, that the claimant reached statutory MMI on May 27, 1993, on the basis that Dr. S said there was no work-related injury and Dr. C said that the claimant reached MMI by June 1, 1991. Dr. S's opinion of no work-related injury is of little value given that the compensability of the claimant's injury was not contested. In his November 25, 1992, report Dr. CO, the designated doctor selected by the Commission, determined that the claimant had not reached MMI. The 1989 Act provides that where a designated doctor is chosen by the Commission, the report of that doctor shall have presumptive weight, and the Commission shall base the determination of MMI and the impairment rating on that report unless the great weight of the medical evidence is to the contrary. Sections 408.122(b) and 408.125(e). We have commented many times upon the "unique position" and "special presumptive weight" the designated doctor's report is accorded under the 1989 Act, and the fact that no other doctor's report is entitled to such deference. Texas Workers' Compensation Commission Appeal No. 92412, decided September 28, 1992; Texas Workers' Compensation Commission Appeal No. 92366, decided September 10, 1992. To overcome the presumptive weight accorded to the report of the designated doctor requires more than a preponderance of the medical evidence; it requires the great weight of the other medical evidence to be contrary to the report. Appeal No. 92412, *supra*. In the instant case, not only did the designated doctor opine that the claimant had not reached MMI as of November 25, 1992, the treating doctor, Dr. R, also opined that the claimant had not reached MMI in his report of September 21, 1992. Having reviewed the record, we cannot conclude that the hearing officer erred in determining that the great weight of the medical evidence was not contrary to Dr. CO's opinion that the claimant had not reached MMI.

Since the claimant had not reached MMI as defined in Section 401.011(30)(a) (the earliest date after which, based on reasonable medical probability, further material recovery from or lasting improvement to an injury can no longer reasonably be anticipated), it was appropriate for the hearing officer to consider statutory MMI under Section 401.011(30)(b) (the expiration of 104 weeks from the date on which income benefits begin to accrue), and to find that the claimant reached statutory MMI on May 27, 1993. (Neither party objects to the calculation of the statutory MMI date; the carrier simply asserts that MMI was reached

no later than June 1, 1991 as reported by Dr. C). We conclude that the hearing officer's finding that the claimant reached statutory MMI on May 27, 1993, is supported by sufficient evidence and is not against the great weight and preponderance of the evidence.

The carrier disputes Finding of Fact No. 17, regarding Dr. CO's findings on re-examination of the claimant, on the grounds that Dr. CO referenced "DSM III R" in his report and that that reference shows that he did not follow the AMA Guides. We find no merit in this contention. As previously mentioned, Chapter 14 of the AMA Guides references DSM III R in regard to judging the degree of impairment for mental and behavioral disorders. Dr. CO explained in his report that he was basing part of the impairment on Chapter 14 of the AMA Guides.

The carrier contends that the hearing officer's conclusion that the claimant reached MMI on May 27, 1993, is not supported by the evidence. We hold that it is.

The carrier also contends that no credible evidence supports the hearing officer's conclusion that the great weight of the medical evidence is not contrary to Dr. CO's reports of November 25, 1992 (no MMI), and his report of September 20, 1993 (37 percent impairment). We disagree. In this case, the carrier had the burden to show that the great weight of the medical evidence was contrary to the report of the designated doctor. The hearing officer is the judge of the weight and credibility to be given to the evidence. Section 410.165(a). The hearing officer determined that the great weight of the medical evidence was not contrary to the reports of the designated doctor and that the reports were entitled to presumptive weight in accordance with Sections 408.122(b) and 408.125(e). While the carrier may well be right in speculating that a different designated doctor with a different view of clinical ecology may have given opinions different than Dr. CO in regard to MMI and impairment rating, that speculation provides no basis for disturbing the hearing officer's decision in this case.

Finally, the carrier contends that no credible evidence supports the hearing officer's conclusion that the claimant's correct impairment rating is 37%. We disagree. Dr. CO's reports of September 9 and 20, 1993, provide evidence supporting the conclusion and Dr. CO's impairment rating is entitled to presumptive weight unless the great weight of the medical evidence is contrary to his opinion. The carrier again points to Dr. S's opinion that the claimant did not suffer a work-related injury. As previously noted, that opinion does not help the carrier's case inasmuch as it did not contest compensability of the claimant's injury. Dr. C, who did not physically examine the claimant, did opine that the claimant does not have any impairment, but we cannot conclude that his opinion constitutes the "great weight" of the medical evidence contrary to the report of the designated doctor. The carrier also asserts that Dr. R assigned the claimant an impairment rating of 15% in a report dated August 27, 1993. No such report was in evidence and thus cannot be considered on appeal. The hearing officer gave the carrier an opportunity to present additional evidence up to October 8, 1993, but, according to the hearing officer, the carrier declined to present

additional evidence. The carrier also states in its appeal that it "presented extensive literature at the contested case hearing, calling into question the legitimacy of the entire field of `clinical ecology' practiced by [Dr. CO]." While it is true that the carrier offered such literature into evidence, it was excluded for failure to exchange it with the claimant, and no error is assigned on appeal regarding the hearing officer's evidentiary ruling. Having reviewed the record, we conclude that the hearing officer's conclusion that the claimant has a 37% impairment rating is supported by sufficient evidence and is not so against the great weight and preponderance of the evidence as to be clearly wrong and manifestly unjust.

The decision of the hearing officer is affirmed.

Robert W. Potts
Appeals Judge

CONCURRING OPINION:

In my opinion, the decision in this case should be limited to the particular facts and circumstances present. The medical evidence before the hearing officer was certainly in conflict and there is sharp disagreement between the disciplines represented in the various reports. Given the claimant's history of allergy-related problems it becomes difficult to filter out with any degree of certainty the impact of the work-related conditions (remodeling and refurbishing) on the claimant's continuing health problems. On the one hand, it is not entirely clear how a temporary condition in the work place could result in such a significant level of permanent impairment, given the prior medical history of the claimant. On the other hand, there is probative evidence that the claimant sustained some injury from the conditions at work. The hearing officer had to resolve the issues of MMI and IR based upon all the medical evidence presented to him. Although clearly other inferences might just as reasonably have been drawn from the evidence, we have repeatedly stated that such is not a sound or sufficient basis to reverse where there is evidence to support the hearing officer and his decision is not so against the great weight or preponderance of the evidence as to be clearly wrong or manifestly unjust. *See* Garza v. Commercial Insurance Company of Newark, N.J., 508 S.W.2d 701 (Tex. Civ. App.-Amarillo 1974, no writ); In re King's Estate, 244 S.W.2d 660 (Tex. 1951); Texas Workers' Compensation Commission Appeal No. 931031, decided December 22, 1993; Texas Workers' Compensation Commission Appeal No. 92253, decided July 27, 1992; Texas Workers' Compensation Commission Appeal No. 92158, decided June 5, 1992. Accordingly, I concur in the author judge's opinion and would limit the decision to the particular facts and circumstances of the case.

Stark O. Sanders, Jr.
Chief Appeals Judge

CONCURRING OPINION:

Concur. Review of this case was significantly affected by the disputed issues at the hearing--MMI and, later, amount of the impairment rating; there was no issue as to compensability or extent of the compensable injury. The unavailability of certain medical evidence because of its inadmissibility then assured that the designated doctor's opinion as to impairment would be given presumptive weight as set forth by the 1989 Act. Within the limits of his ability to act, the hearing officer did not err in his decision. Similarly, I concur in the action taken by Judge Potts.

Joe Sebesta
Appeals Judge