APPEAL NO. 93124

This appeal arises under the Texas Workers' Compensation Act, TEX. REV. CIV. STAT. ANN. arts. 1.01-11.10 (Vernon Supp. 1993) (1989 Act). A contested case hearing was held in (city), Texas, on January 26, 1993, to determine the following issues:

1.Whether the claimant is entitled to a resumption of temporary income benefits (TIBS) based on her compensable injury of (date of injury);

2.Whether the claimant has reached maximum medical improvement (MMI) from that injury; and, if so,

3.What is claimant's correct impairment rating; and

4.Whether the carrier is entitled to contribution due to prior or subsequent injuries.

The claimant, who is the appellant in this action, appeals the determination of hearing officer (hearing officer) that she reached MMI on January 14, 1992, with a zero percent impairment rating and as such she is not entitled to resumption of TIBS. Specifically, the claimant contends the hearing officer erred in not accepting the opinion of the designated doctor appointed by the Texas Workers' Compensation Commission (Commission). The respondent, hereafter carrier, contends the hearing officer's determination should be affirmed. The hearing officer's determination that the carrier was not entitled to contribution for benefits from any other carrier was not appealed.

DECISION

The decision and order of the hearing officer are affirmed.

The claimant, who worked as a legal secretary for the law firm of (employer), testified that she injured her neck on (date of injury), when she slipped and fell on a wet floor at work. On (date), she was taken by ambulance to a hospital, and was seen by (Dr. R), her family doctor. Dr. R had treated her for various conditions since 1986, including a 1987 injury to her lumbar spine for which surgery was performed in February 1988 by (Dr. S). Claimant was in fact wearing a back brace at the time she fell. The claimant also said the fall exacerbated her lower back problems.

In addition to seeing Dr. R for her (date of injury) injury, claimant returned on June 10th to Dr. S, complaining of shoulder, back, and thigh pain. Dr. S ordered tests (including an EMG and MRIs of the cervical and lumbar spines), returned her to work, and completed a Report of Medical Evaluation (Form TWCC-69) finding the claimant reached MMI on July 2, 1991, with five percent impairment. In a subsequent TWCC-69 which purports to supersede the previous report, Dr. S found five percent impairment and an MMI date of July 8, 1991. That report also states that claimant's diagnostic testing was basically normal, showing degenerative lumbar spine disease which was aggravated by her fall on (date of injury). The impairment rating was assigned based on claimant's lumbar spine.

The medical evidence in the record shows that Dr. R referred claimant to (Dr. K), a neurosurgeon, for evaluation in July of 1991. In a July 9, 1991 letter to Dr. R, Dr. K summarized the various tests which had been performed, including the following: a June 11th MRI scan of the cervical spine, which revealed mild, extremely small bulges at the C5-6 and C6-7 levels; a June 11th MRI of the lumbosacral area showing evidence of a previous laminectomy at L5-S1, degenerative changes at the same level, and normal upper lumbar disks; and normal thoracic spine films performed on June 10th. He also reviewed tests performed in 1988 and 1989. He stated his impression as cervicolumbar strain, but said he did not feel the claimant needed surgery. He recommended rehabilitation, and said that daily exercise and improvement of posture could help the small bulging disks in her neck.

On Dr. R's referral and pursuant to Dr. K's suggestion, claimant was admitted to the Dallas Rehabilitation Institute on August 4, 1991, where she underwent physical therapy and pain management. On August 24th, (Dr. J) of the rehabilitation institute gave his assessment of claimant's condition as "stable," and said he told her she was "not disabled" and that she could return to work from the time she left the program. In a December 3, 1991 letter to the carrier Dr. J stated that at the time of claimant's release from the program, a date given variously as August 23rd and 24th, "it was identified that she had reached maximum medical improvement and she could return to a light work tolerance level . . . [a]lthough a disability rating was not given to her, it is my estimation that it would be less than 15%. At this time, I do not see a need for any further treatment or diagnostics." An undated TWCC-69 signed by Dr. J found MMI as of August 23, 1991, with a four percent whole body impairment. He also stated these conclusions in a deposition on written questions, saying that his opinion was based on the claimant's failure to significantly progress or deteriorate. The claimant stated at the hearing that Dr. J performed no tests on her and had none of her medical records.

An October 17, 1991 letter from Dr. R to the carrier stated in part, "you are correct in interpreting my reports of 8/2/91 and 8/27/91 as stating that this patient has never fully recovered from her lumbar spine injury which occurred in November 1987 . . . [t]hat situation does exist but it is only a relatively small portion of her total disability, 15% is my estimate . . . [y]ou are correct in assuming that my feeling is that she has probably reached a point of maximum medical improvement, however the fact remains that the patient is totally disabled. My diagnosis is that 85% of her total disability at this time is related to the cervical spine injury."

In that letter Dr. R also mentioned other of claimant's physical and emotional complaints such as stress, colitis, and carpal tunnel syndrome, and stated, "all of these were mentioned simply to point out that there is more involved here than just a simple cervical spine injury."

In January 1992 the claimant was seen by carrier's doctor, (Dr. C), who found MMI as of January 14, 1992, with zero percent impairment. He also stated the claimant could return to work without restrictions. The claimant said Dr. R disagreed with Dr. C's assessment, and, on April 8, 1992, referred the claimant to the (clinic) for evaluation. In a letter of that date to the carrier, Dr. R said the claimant had received an impairment rating of 17 percent from the rehabilitation center; however, he stated that, considering the pain claimant was experiencing on a daily basis, "the actual disability here would have to be at least double and perhaps triple that 17% figure . . . [j]ust to consider the physical disability alone, the chances of [claimant's] improving to the point of becoming pain-free and able to return to work is, in my opinion, nil." No documents from the Richardson Sports Rehabilitation Center were introduced into evidence.

On September 15, 1992, the Commission appointed (Dr. O) as the designated doctor to resolve a dispute only as to the percentage of claimant's impairment. On October 5th, Dr. O completed a TWCC-69 wherein he stated, "I do not believe [claimant] has reached maximum medical improvement, but I do think that she has at the present time a 22% impairment of function based on her limited motion." Dr. O's report also stated that the claimant had been told she had myofascitis and noted that she still had pain in her lumbosacral spine. The claimant said, however, that Dr. O's 22 percent impairment rating did not take these conditions into consideration.

On October 30th, Dr. R wrote he had seen Dr. O's report, noting that Dr. O's 22 percent impairment rating was higher than the 17 percent found by the Richardson Sports Rehabilitation Clinic to which he had referred claimant. He also said the claimant had at least five percent less range of motion than when he last examined her, although he found she had improved "some 5-10% since I last examined her," and he stated his conclusion that claimant still had not reached MMI.

Dr. R also mentioned two motor vehicle related incidents the claimant had been involved in, in December 1991 and May 1992. He stated that neither involved or aggravated her cervical area.

The claimant testified that her medical treatment since the (date of injury) injury was therapy and medication; that she has not been able to return to work; and that she received TIBS until February 1992, and received no further income benefits until October 1992, when Dr. O issued his report. (Apparently the carrier paid impairment income benefits pursuant to Dr. O's report.)

The hearing officer in his discussion said the great weight of the medical evidence in this case indicates that claimant's treating doctor and the other doctors to whom she was referred all indicated she had reached MMI a year or more before she was examined by the designated doctor. He also stated that the designated doctor's impairment rating was contrary to the great weight of other medical evidence, noting that Dr. J observed the

claimant during a three-week inpatient program and found four percent impairment, and that Drs. S and C found zero percent impairment.

The hearing officer further stated:

> In a case where the report of the designated doctor is contrary to the great weight of other medical evidence the Commission is not bound by that report with respect to whether MMI has been reached. With respect to
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> impairment rating, when the great weight of other medical evidence is contrary to the report of the designated doctor, the Commission is required to adopt the rating of one of the other doctors. There were several TWCC-69s certifying MMI and impairment rating offered into evidence. Other than the report of [Dr. O], however, the only TWCC-69 that was signed, complete, and not contradicted by the doctor's own subsequent opinion, was the report submitted by [Dr. C]. As a consequence, I have based my decision in this case on the report of [Dr. C].

In her appeal, the claimant contends that the carrier offered nothing to rebut the presumption in favor of the designated doctor's report, and that no error in Dr. O's evaluation was shown. Moreover, evidence including the subsequent evaluation of Dr. R, the treating doctor, supported Dr. O's determination. The claimant argues that Dr. C's "mere difference of opinion" is insufficient to overcome the designated doctor's report, especially in light of later, more objective opinions based on more extensive evaluation.

The 1989 Act provides that if a dispute exists as to whether an employee has reached MMI, of if an impairment rating is disputed, the Commission shall direct the employee to be examined by a designated doctor. If the parties are unable to agree on the designated doctor, the Commission is to select one. The designated doctor shall report to the Commission, and the designated doctor's report shall have presumptive weight unless the great weight of the other medical evidence is to the contrary. Articles 8308-4.25(b), 4.26(g).

In this case the designated doctor, although appointed by the Commission to determine impairment only, also made a finding that the claimant had not reached MMI. That the designated doctor addressed the issue of MMI was not improper or untoward, as this panel has previously held that ". . . the American Medical Association Guides to the Evaluation of Permanent Impairment (Article 8308-4.24, 1989 Act) . . . provide in pertinent part that `[i]mpairment evaluation should be performed when a person's condition has become static and well stabilized following completion of all necessary . . . treatment'" and that "[t]herefore it would seem prudent, if not essential, that a designated doctor would himself have to be satisfied that MMI had been reached before attempting to assess an impairment rating." Texas Workers' Compensation Commission Appeal No. 92517,

decided November 12, 1992. We have also held that, absent MMI by operation of law at the expiration of 104 weeks (*see* Article 8308-1.03(32)), the two issues of MMI and impairment may become "somewhat inextricably tied together," Texas Workers' Compensation Commission Appeal No. 92366, decided September 10, 1992, and that the existence of MMI cannot be "neatly severed" from the assessment of an impairment rating, Texas Workers' Compensation Commission Appeal No. 92394, decided September 17, 1992.

At the same time, in addressing cases where the designated doctor has been appointed only to assess an impairment rating, this panel has queried whether that doctor's determination of MMI is entitled to presumptive weight under the 1989 Act. *See* Appeal No. 92517, *supra*, in which the Appeals Panel found the hearing officer could give "appropriate weight" to the designated doctor's opinion on MMI, based on all the medical evidence. In this case the hearing officer determined that the great weight of the medical evidence indicated the claimant reached MMI long before she was examined by the designated doctor. The record indicates that Dr. S, who had performed claimant's prior back surgery, found her to have reached MMI on July 8, 1991. Drs. J and C found MMI on August 23, 1991 and January 14, 1992, respectively. Also in the record were her treating doctor's October 17, 1991 statement (later recanted) that claimant "has probably reached a point of maximum medical improvement," and Dr. K's July 9, 1991 letter finding no need for surgery and recommending therapy, daily exercise, and improvement in posture. While the latter two documents are not certifications of MMI under the 1989 Act, they nevertheless constitute medical evidence the hearing officer could consider in reaching a decision. *See* Texas Workers' Compensation Commission Appeal No. 92412, decided September 28, 1992. We thus find supported by probative evidence the hearing officer's determination on the issue of MMI.

The hearing officer also found that Dr. O's impairment rating was contrary to the great weight of other medical evidence. We note at the outset that, based upon the relationship between MMI and impairment as discussed above, Dr. O's finding of no MMI casts doubt on his 22 percent impairment rating. (Dr. O's TWCC-69 states the claimant has a 22 percent impairment "at the present time," which may indicate he was assigning impairment on a less than final basis, subject to change when the claimant reached a point of medical stability.) The hearing officer examined the other medical evidence, noting that Dr. J found four percent impairment after a three-week inpatient program, and Drs. S and C did not believe the claimant had any impairment based on cervical problems. Evidence to the contrary included Dr. R's finding of 85 percent impairment although, as mentioned earlier, this was not based upon any certification of MMI. Upon review of the record in this case and the hearing officer's clearly articulated reasoning (*see* Texas Workers' Compensation Commission Appeal No. 92522, decided November 9, 1992), we find that the hearing officer's evaluation goes beyond a mere balancing of the evidence, as we have held is required in order to overcome the presumptive weight uniquely accorded to the designated

doctor's opinion. Appeal No. 92412, *supra*. We therefore affirm his determination that the report of Dr. O, both with respect to MMI and impairment, is contrary to the great weight of the other medical evidence.

We agree with the hearing officer that, upon such a determination, he is next required to examine the other medical evidence in the case to resolve the issues. Resolution of these issue requires a fact-based determination. In this case, the hearing officer, for the reasons stated, found most credible the report of Dr. C. The hearing officer is the sole judge of the relevance and the materiality of the evidence, and of its weight and credibility. Article 8308-6.34(e). He is entitled to weigh and resolve conflicts in medical evidence, Texas Employers Insurance Association v. Campos, 666 S.W.2d 286 (Tex. Civ. App.-Houston [14th Dist.] 1984, no writ). We will not set aside his decision where, as here, it is supported by probative evidence, and where it is not against the great weight and preponderance of the evidence as to be manifestly unjust and unfair. Pool v. Ford Motor Company, 715 S.W.2d 629 (Tex. 1986).

The decision and order of the hearing officer are affirmed.

Lynda H. Nesenholtz
Appeals Judge

CONCUR:

Stark O. Sanders, Jr.
Chief Appeals Judge

Thomas A. Knapp
Appeals Judge