APPEAL NO. 93269

This appeal arises under the Texas Workers' Compensation Act, TEX. REV. CIV. STAT. ANN. art. 8308-1.01 *et seq*. (Vernon Supp. 1993) (1989 Act). On March 4, 1993, a contested case hearing (CCH) was held in (city), Texas, with (Hearing officer) presiding as hearing officer. As stated in the Decision and Order of the hearing officer, the issues agreed upon as unresolved were:

1.Whether Claimant, Mr. S, has reached maximum medical impairment (sic) (MMI); and, if so,

2.What is Claimant's correct impairment rating.

The hearing officer determined that the designated doctor's report was entitled to presumptive weight, that claimant had reached MMI on June 3, 1992, with an impairment rating of 10 percent, and that the other medical evidence to the contrary did not overcome the statutory presumptive weight given to the designated doctor's report.

Appellant, claimant herein, contends she does not agree with the hearing officer's decision nor with two of the doctors' ratings. Claimant alleges she has still not reached MMI, submits additional medical reports and alleges that treatment for a thyroid condition and weight reduction were necessary before MMI could be ascertained. Respondent, carrier herein, responds that the decision is supported by the evidence and requests that we affirm the decision.

DECISION

Initially, we note that claimant, along with her request for review, submits medical reports from (Dr. C) dated December 14, 1991, and June 13, 1992; (Dr. N) dated December 23, 1991, February 6, 1992, March 5, 1992, June 17, 1992, July 30, 1992 and July 14, 1992; and (Dr. K) dated July 8, 1992 and October 20, 1992. Many of these reports were not offered at the CCH and it is unclear whether they were sent to carrier in that carrier does not comment on them in its response. In any event, we are limited in our review to the record developed at the CCH. Article 8308-6.42(a)(1). We further note that the reports are all dated 1991 or 1992, and there is no indication that the reports attached to the request for review were unknown or unavailable at the time of the hearing or that due diligence would not have brought them to light. *See* Texas Workers' Compensation Commission Appeal No. 91132, decided February 14, 1992. The reports submitted by claimant in her appeal will not be considered and we will base our review only on the reports, evidence and testimony submitted at the CCH.

The fact that claimant sustained a compensable injury is not in dispute. The medical records show claimant was a 28-year-old lady who worked for (employer) as a telephone representative and who, on (date of injury), slipped and fell at work on a waxed floor, landing in a "splits-type position." The medical records all mention that a portion of claimant's

problem is that at 5' 8" tall, she weighs well over 300 pounds. After claimant's fall, she apparently continued to work but subsequently developed back problems. Claimant has seen a number of doctors, but she testified she has continued to have back pain which now radiates down her legs, and that she is having difficulty with her hands and right arm. Claimant testified she is currently unable to work because of pain, and that she has not reached MMI.

This case was originally scheduled for a CCH on November 12, 1992, but was continued at the request of the claimant so that she could retain an attorney. At the rescheduled hearing on March 4, 1993, claimant's attorney requested and strongly urged another continuance with an order for the carrier to pay for another MRI which was requested by claimant's treating doctors. The carrier objected to another continuance, pointing out that claimant had already had two MRIs, that claimant was not a surgery candidate because of her weight and that the treating doctors appeared to be content to continue testing and prescribing medications indefinitely. The hearing officer denied claimant's motion for a second continuance and a third MRI. Denial of the continuance is not an issue on appeal.

Dr. N and Dr. K are claimant's principal treating doctors. In a letter dated November 4, 1992, Dr. N stated that he was seeing claimant for "lumbar disc herniation," that claimant "has had more persistent discomfort," and he further stated that Dr. K "has requested a repeat MRI of the thoracolumbar spine. The reason for this request is for the worsening of symptoms with more pain and symptomatology."

Claimant's other medical evidence consisted of a report by (Dr. F) dated February 3, 1992, which states that Dr. F told claimant: ". . . she might have a right L/1 radiculopathy. Myelogram and post-myelogram CT scans reveal a disc herniation at T11/T12 and T12/L1. In my opinion, [claimant] needs to have drastic weight reduction . . . ."

Dr. K, in an October 20, 1992, report, states claimant is ". . . unfortunately even heavier than she used to be. . . . I again stressed to her the need for weight loss because of the severity of her problem and . . . I have had some patients with a similar problem who came in paralyzed and never recovered second (sic) to worsening of their herniated disk."

Claimant was examined by (Dr. Wh), carrier's requested doctor. Dr. Wh, in a six page report dated February 10, 1992, and Report of Medical Evaluation (TWCC-69), finds a ". . . slight indentation of T11-T12 and T12-L1 around an old compressive type deformity." Dr. Wh certifies MMI on 2-10-92 with eight percent whole body impairment and states, in his opinion, that ". . . 4% of this 8% was clearly a pre-existing condition. It is not, in my opinion, possible that this lady's severe narrowed discs and posterior protrusions at T11-12 and T12-L1 are exclusively the result of the 9/19/91 incident."

Dr. N, one of claimant's treating doctors, sent claimant to (Dr. O) for evaluation. Dr. O, at the Dallas Impairment and Disability Evaluation Center, in a 26 page report dated August 21, 1992 and TWCC-69, certified MMI on 6/3/90 (sic means '92) and a 10 percent whole body impairment. One page of the report documents how claimant exaggerates her symptoms and states the literature ". . . has coined the term `symptom magnification' for these patients."

Because of the differences in opinion, (Dr. We) was appointed as a Texas Workers' Compensation Commission (Commission) selected designated doctor to evaluate the claimant. In a narrative report dated 6-03-92 and TWCC-69, Dr. We certified MMI on 6/3/92 with a 10 percent whole body impairment. Dr. We finds "[e]vidence of herniated disc T12-L1 and T11-12 by MRI and myelogram" and states claimant "[h]as a 10% disability on the basis of a herniated disc at L5-S1, 7% and T11-12 in the thoracic spine of 3%, combined for 10%. This patient exhibits multi-level degenerative changes and the question is how much of this is pre-existing."

Dr. O's report and evaluation were sent back to Dr. N, the treating doctor. Dr. N, in a Specific and Subsequent Medical Report (TWCC-64) dated 1-26-93 commented as follows: "[t]he patient has been seen by [Dr. O] who agrees that she tends to exaggerate her symptoms. He also agrees with the [MMI] that [Dr. We, the designated doctor] has given her. I will see her in the next two months."

The hearing officer gave presumptive weight to the designated doctor's report and determined claimant reached MMI on June 3, 1992, with an impairment rating of 10 percent. Claimant alleges this is "bias, and very unfair," that Dr. K says she needs to lose weight, that she still has pain and she can't understand why the doctors believe she has reached MMI.

MMI is defined in Article 8308-1.03(32) as the earlier of 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 or the expiration of 104 weeks. The expiration of 104 weeks is not applicable in this case. Chief Appeals Judge Sanders, in Texas Workers' Compensation Commission Appeal No. 93105, decided March 26, 1993, comprehensively discussed the designated doctor system. Using that decision, we will go into some detail to explain the system. First of all, we would note that MMI does not, in every case, amount to pain-free recovery. *See* Texas Workers' Compensation Commission Appeal No. 93007, decided February 18, 1993, and Texas Workers' Compensation Commission Appeal No. 92670, decided February 1, 1993. While MMI may appear to mean complete recovery to the lay person, that is not necessarily what it means for purposes of workers' compensation benefits. Appeal No. 93007, *supra*. When the doctor finds MMI and assesses an impairment rating, the doctor has determined, based upon medical judgment, that there will likely be no further material recovery from the injury. In this case, the doctors appear to be saying there will likely be no material recovery unless

or until claimant has accomplished a significant weight loss.

Regarding the issue of impairment rating, the 1989 Act provides that if there is a dispute and the parties are unable to agree on a designated doctor, the Commission will select a designated doctor to examine the claimant. In such case, "the report of the designated doctor shall have presumptive weight and the Commission shall base the impairment rating on that report unless the great weight of other medical evidence is to the contrary. . . ." Article 8308-4.26(g). We have repeatedly emphasized the unique position occupied by the designated doctor under the 1989 Act. *See* Texas Workers' Compensation Commission Appeal No. 92555, decided December 2, 1992; Texas Workers' Compensation Commission Appeal No. 92412, decided September 28, 1992. In Appeal 92412, we went on to point out that to outweigh the report of a designated doctor requires more than a mere balancing of the medical evidence or a preponderance of medical evidence; rather, such other medical evidence must be determined to be the "great weight" of the medical evidence contrary to the report. In Texas Workers' Compensation Commission Appeal No. 92366, decided September 10, 1992, we have similarly held that no other doctor's report, including a report of a treating doctor, has the special presumptive weight of the designated doctor's report. We would further observe that, in this case, even Dr. N, one of the treating doctors, does not disagree with the MMI certified by the designated doctor as evidenced by Dr. N's 1-26-93 TWCC-64.

We find that there is sufficient evidence to support the hearing officer's determination which accorded presumptive weight to the designated doctor's report and found that the great weight of the other medical evidence was not contrary thereto. The decision is affirmed.

Thomas A. Knapp
Appeals Judge

CONCUR:

Philip F. O'Neill
Appeals Judge

Gary L. Kilgore
Appeals Judge