APPEAL NO. 93341

At a contested case hearing on April 5, 1993, in (city), Texas, (hearing officer), the hearing officer, giving presumptive weight to the report of the designated doctor, concluded that the respondent (claimant) reached maximum medical improvement (MMI) on January 25, 1993, with a whole body impairment rating of 17%. Appellant (carrier) asserts error by the hearing officer in giving presumptive weight to the designated doctor's report because the MMI date was not based on reasonable medical probability and was not the true date of MMI but was merely the date that doctor examined claimant; because the impairment rating included ratings for parts of claimant's body not injured in the accident; and because there was no timely dispute by either party, pursuant to Texas Workers' Compensation Commission (Commission) Rule 130.5(e), Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 130.5(e), of the first assigned impairment rating, and thus the parties were bound by the December 11, 1991, MMI date and 15% rating assigned by the carrier's doctor. The carrier further asserts error in the admission over objection of a record of the treating doctor, and in the ordering of carrier to pay benefits based on the designated doctor's report because there remains an outstanding issue as to whether the first impairment rating assigned was disputed within 90 days under Rule 130.5(e). No response was filed by the claimant.

DECISION

Finding no reversible error and sufficient evidence to support the hearing officer's findings and conclusions, we affirm.

The parties agreed at the contested case hearing (CCH) that the two disputed issues were the correct MMI date and the correct impairment rating. At the benefit review conference (BRC), the carrier's position was that the December 11, 1991, MMI date and 15% impairment rating determined by the carrier's doctor, (Dr. E), were correct, while claimant's position was that the January 25, 1993, MMI date and 17% impairment rating of the designated doctor, (Dr. O), were correct. No issue was raised at the BRC regarding whether Dr. E's MMI date and impairment rating were disputed by either party within the 90-day period provided for in Rule 130.5(e) nor was such issue added pursuant to the provisions of Rule 142.7. Accordingly, we find no merit to carrier's assertions of error relating to there being an outstanding Rule 130.5(e) issue.

The parties stipulated that on (date of injury), claimant sustained a compensable injury. Claimant, the sole witness, testified he tripped over a hose at work and fell. As for his injuries, he said he fractured his left ankle which was casted for two months and is now better. He also hurt his left knee which in September 1991 required surgery followed by physical therapy (PT). He said that knee still hurts and is not better. As for his right knee, he said he still has pain in that knee, which he had before his accident, and attributes it to the PT bending exercises which he said "hurt him very badly." Claimant also hurt his right shoulder which "still hurts." As for his left shoulder, it had been hurt on a prior job, was hurt "a little" in the fall, and still hurts sometimes. Claimant, who said he was 64 years of age, acknowledged having been told he had arthritis in both shoulders and knees which began

approximately six years earlier.

The carrier introduced claimant's PT records of December 3 and 10, 1991, reporting no increase in pain or complications. Carrier also introduced four follow-up visit reports of (Dr. P), claimant's treating doctor, for the period from December 20, 1991, through February 4, 1992. According to these reports, while claimant's ankle bothered him only rarely, he reported continued trouble with his left knee in January 1992 so Dr. P referred him to (Dr. B) for a second opinion. Dr. B's January 21, 1992, report stated claimant was "rehabed, however he continues to have pain in his knee." Dr. B stated that "[a]t this point in time I think [claimant] has recovered nicely," and recommended a strengthening program and a Functional Capacity Evaluation (FCE). Dr. P felt the FCE should be accomplished followed by a determination on PT and the type of work to recommend. Dr. P's February 4, 1992, report indicated the results of claimant's FCE were "quite good," that no medicine was being supplied, and that claimant should be able to do most of his prior work activities, but since he had been off work for a year, he should gradually build up his work level over a period of several weeks. Claimant was referred by Dr. P to (Dr. JP) for a second opinion on his left ankle. Dr. JP's April 20, 1992, report stated that claimant had full range of motion (ROM), minimal pain, and that no further treatment was indicated. This report also mentioned that claimant had been referred to Dr. E "for a second opinion" and was told Dr. E does not see "this type of condition," apparently referring to the ankle injury. According to the letterhead of the reports, Drs. P, E, B, and JP were members of the same orthopedic surgery group.

Claimant offered Dr. P's report of his February 26, 1993, visit indicating he was having some pain in his left leg. Dr. P prescribed medication, recommended continued exercise, and scheduled claimant for a follow-up visit. Carrier objected to this exhibit on the ground it had not been previously exchanged and the hearing officer summarily admitted the document merely stating the objection would be "noted." In Texas Workers' Compensation Commission Appeal No. 93111, decided March 29, 1993, we commented as follows on a similar handling of an objection: "Claimant did not appeal this question so it will not be addressed any further, but we by no means endorse such handling of objections based on untimely exchange and note we have written repeatedly on the subject." The hearing officer erred in admitting the exhibit without making the required good cause determination. *See* Article 8308-6.33(e); Rule 142.13c(3). However, because we are persuaded the exclusion of the report would probably not have resulted in a different decision, we find the error harmless. *Compare* Texas Workers' Compensation Commission Appeal No. 92077, decided April 13, 1992. The apparent purpose for offering the report was to show that since claimant was still seeing Dr. P for pain in his left leg, the designated doctor's later MMI date is the more accurate. However, we have observed that MMI does not necessarily equate to the absence of pain and complete recovery, but rather "the point at which further material recovery or lasting improvement can no longer be reasonably anticipated according to reasonable medical probability." Texas Workers' Compensation Commission Appeal No. 92670, decided February 1, 1993. Claimant was

still complaining of pain when seeing Dr. P in February 1992, as the records reveal, and admission of a record showing complaint of pain a year later did not, in our view, probably result in the hearing officer's erroneously giving presumptive weight to the designated doctor's report.

Dr. E's report of May 27, 1992, to carrier's adjuster, stated his examination was accomplished pursuant to the carrier's order. Dr. E's report stated he examined both shoulders, both knees, and the left ankle and noted that claimant, then age 64, had pain in both knees and shoulder two years earlier. Dr. E's impression was bilateral articular cartilage degeneration of the knees and he stated that "[t]he injury on the job aggravated the degenerative condition in the knees." Dr. E's report said he did not further consider claimant's left shoulder because he said the claimant does not believe the left shoulder was involved or aggravated by the injury. He said claimant reached MMI for his various injuries on the following dates: for his ankle fracture, six months after the date of injury; for his right knee, three months after the injury; for his left knee, December 11, 1991 (three months after surgery); and for his right shoulder, eight weeks after the injury. He stated no MMI date for claimant's left shoulder stating it was not aggravated by the injury. His "total body permanent impairment of 15 percent due to either causation or aggravation of conditions due to the injury" consisted of one percent for the ankle, four percent for each knee, and six percent for the right shoulder. Dr. E's May 27, 1992, narrative report was not signed; however, he signed a Report of Medical Evaluation (TWCC-69) and the date "09/16/92" is typed in the signature block of the TWCC-69 along with Dr. E's name. The TWCC-69 does not refer to the May 27th report but was attached to it when introduced into evidence. The TWCC-69 stated that claimant reached MMI on "12-11-91" with a whole body impairment rating of 15% consisting of the same constituent percentages as contained in the May 27th report.

The carrier introduced its Request for Setting a [BRC] (TWCC-45), dated October 16, 1992, indicating that the treating doctor refuses to respond to a request to review Dr. E's MMI and impairment rating, that temporary income benefits (TIBS) continue "with no current medical since MEO of 5/27/92," and requesting the Commission to ask the treating doctor for a medical status report and to name a designated doctor and set a BRC to resolve MMI and impairment rating dispute. We do not know whether the carrier was proceeding to obtain an MMI certification from Dr. P pursuant to the procedures in Rule 130.4 and there was no disputed issue concerning either the treating doctor's apparent failure either to certify to claimant's having reached MMI or to indicate agreement or disagreement with Dr. E's MMI and impairment determinations. According to other exhibits, the Commission received Carrier's BRC request on November 2, 1992, and selected Dr. O as the designated doctor on December 2, 1992. Carrier attached to its request for review several items of correspondence from its adjuster to Dr. P initiated during the period July 18 through December 3, 1992, regarding the matter of Dr. P's responding to Dr. E's report. We have previously noted that our review is limited to the record developed at the hearing and we

have refused to consider evidence first tendered on appeal. *See* Texas Workers' Compensation Commission Appeal No. 92165, decided June 5, 1992. Carrier provides no basis for us to consider these evidentiary items which were neither offered nor considered at the hearing below and we decline to consider them.

Dr. O's TWCC-69, signed on January 25, 1993, stated that claimant reached MMI on January 25, 1993, with a 17% impairment rating consisting of eight percent for the left leg, six percent for the right upper extremity, and four percent for the right leg, which equated to 17% using the "combined table." The detailed narrative report attached to Dr. O's TWCC-69 clearly indicated Dr. O reviewed the reports of Dr. P, Dr. B, Dr. JP, and Dr. E, and stated that "after this length of time the patient has reached MMI of his injury. . . ." As can be seen from the TWCC-69 forms of Drs. E and O, both determined impairment ratings of six percent for claimant's right shoulder or upper extremity, four percent for his right knee, and five percent and eight percent, respectively, for the left ankle and knee/left leg. The three percent difference in Dr. O's and Dr. E's ratings were for the left leg injuries. Neither awarded a rating for the left shoulder. Carrier's complaint that Dr. O awarded impairment for body parts not injured is without merit. Carrier contended that claimant had preexisting right shoulder arthritis which was an ordinary disease of life and that he had pain from it before the work-related injury. However, not only did claimant testify he injured his right shoulder when he fell, but both Drs. E and O indicated his right shoulder was aggravated by the injury. We have frequently stated that a compensable injury may consist of the aggravation of a preexisting condition. *See* Texas Workers' Compensation Commission Appeal No. 91038, decided November 14, 1991. The carrier suggests we distinguish between those preexisting conditions which caused pain and those where pain did not commence until after the job-related aggravation. Carrier cites no authority for such a distinction and we decline to draw it.

The carrier took Dr. O's deposition by written questions on April 2, 1993, and, after establishing that Dr. O examined claimant on January 25, 1993, asked whether he disagreed with Dr. E's MMI date. Dr. O responded: "I can or cannot agree with [Dr. E]. I did not examine patient before." Asked whether it was within reasonable medical probability, as opposed to certainty, that MMI was reached December 11, 1991, as Dr. E determined, Dr. O responded: "Is possible, but I cannot attest that." Dr. O also stated that he used the third edition of the AMA Guides in determining the impairment rating, and that all his opinions in the deposition were based upon reasonable medical probability.

Carrier argued at the hearing that the hearing officer should find that Dr. E's MMI date of December 11, 1991, was the correct date because claimant's condition remained relatively unchanged from that date to the January 25, 1993, MMI date found by Dr. O. Carrier further argued that it was unfair to make the carrier pay TIBS for more than a year after MMI is reached just because a designated doctor will not or cannot say that MMI was reached prior to the date of his or her examination of the injured employee. (We note that

expedited procedures may be requested and can be invoked by the Commission to preclude the passage of significant amounts of time when MMI remains in dispute.) Claimant argued that it was the carrier and not him who disputed Dr. E's MMI date and impairment rating in the first place but that he did agree with Dr. O's report. At the conclusion of the argument, the hearing officer engaged in a colloquy about the possibility of an issue regarding whether Dr. E's report was disputed by either party within 90 days, noted the typewritten date of September 16, 1992, on Dr. E's TWCC-69, and said she would take official notice of the claimant's Commission file. The carrier mentions in its request for review (but does not appear to assign as error) that the hearing officer said she would take official notice of claimant's Commission claims file and says that such would be improper without specifically identifying the particular documents noticed and making them a part of the record. However, not only was there no objection taken to the hearing officer's announcement but there is no indication in the hearing officer's decision that indeed she actually noticed any particular document in the Commission's file. We observe that the taking of official notice of an entire claim file is not sufficiently specific to permit an appellate review of the record. Specific documents should be noticed when that evidentiary mechanism is used by a hearing officer.

Claimant's argument on appeal, in brief, is that the hearing officer erred in giving presumptive weight to the designated doctor's report contending he simply used the date of his examination as the MMI date. The designated doctor, however, stated he could neither agree nor disagree with Dr. E's MMI date, and that while it was possible Dr. E's date was correct, he could not attest to such. Respecting the report of a designated doctor selected by the Commission, such report has presumptive weight and the Commission shall base its MMI determination and impairment rating on such report unless the great weight of the other medical evidence is to the contrary. Articles 8308-4.25(b) and 8308-4.26(g). We have previously stated that a "great weight" determination amounts to more than a mere balancing or preponderance. *See e.g.* Texas Workers' Compensation Commission Appeal No. 92412, decided September 28, 1992. We agree with the hearing officer that the great weight of the other medical evidence is not contrary to the report of the designated doctor in this case.

We do not substitute our judgment for that of the hearing officer where, as here, the challenged findings are supported by sufficient evidence. Texas Employers Insurance Association v. Alcantara, 764 S.W.2d 865 (Tex. App.-Texarkana 1989, no writ). The challenged findings and conclusions of the hearing officer are not so against the great weight and preponderance of the evidence as to be manifestly unjust. In re King's Estate, 150 Tex. 662, 244 S.W.2d 660 (1951); Pool v. Ford Motor Co., 751 S.W.2d 629 (Tex. 1986).

Finding no reversible error and the findings and conclusions sufficiently supported by the evidence, we affirm the hearing officer's decision.

Philip F. O'Neill
Appeals Judge

CONCUR:

Stark O. Sanders, Jr.
Chief Appeals Judge

Gary L. Kilgore
Appeals Judge