APPEAL NO. 93557

Pursuant to the Texas Workers' Compensation Act, TEX. REV. CIV. STAT. ANN. art. 8308-1.01 *et seq.* (Vernon Supp. 1993) (1989 Act), a contested case hearing was held in (city), Texas, on June 2, 1993, (hearing officer) presiding as hearing officer. He determined that the appellant, claimant herein, reached maximum medical improvement (MMI) on June 8, 1992, with a 0% whole body impairment rating. He also determined that the claimant remains entitled to medical benefits. The claimant disagrees with this determination of MMI and urges that the report of the designated doctor should not be given presumptive weight because the great weight of the medical evidence is to the contrary.

DECISION

Determining there is sufficient evidence to support the findings and conclusions of the hearing officer, the decision is affirmed.

It is not disputed that claimant suffered injuries to his back, stomach and left shoulder on (date of injury), while picking up pylons for his employer, (employer). At the hearing, the parties resisted any further specification of which particular injuries were the subject of the contested MMI determination, stipulating only that claimant "sustained an injury on or about (date of injury)." The sole issue before the hearing officer was whether claimant reached MMI. The impairment rating of 0% found by the designated doctor, while not contested at the hearing, became a subject for relief sought on appeal as tied to claimant's assertion of not having reached MMI.

The extensive medical evidence introduced at the hearing discloses that the claimant received medical treatment and diagnoses as a result of several referrals among numerous personal physicians, as well as evaluations from (Dr. Mc), the carrier's doctor, and (Dr. D), the Commission-selected designated doctor. Article 8308-1.03(15).

The claimant was first seen after the accident by a minor emergency room physician and (Dr. O). He was entered into a program of physical therapy. On May 9, 1991, he was referred to (Dr. A) who became his primary treating physician. Dr. A diagnosed lumbosacral herniated nucleus pulposus (HNP) and lumbosacral strain and/or sprain. A CT scan showed a mild bulge at L4 and L5 and a "more noticeable bulging at L5 & S1." Dr. A referred the claimant to (Dr. J) for low back and left hip pain. On May 15, 1991, a (Dr. MO) conducted an MRI of claimant's lumbar spine. Test results showed a small midline posterior bulge without indentation of the thecal sac or lateralization which "may be" a very minimal midline herniation. The examination was otherwise "unremarkable." On March 25, 1992, Dr. A performed electromyography testing (EMG) on the claimant's left lower extremity and lumbosacral paraspinal muscles and concluded: "minimal findings consistent with a left L5 radiculopathy." At an August 4, 1992, visit, Dr. A diagnosed lumbosacral strain/sprain and lumbosacral HNP. He released the claimant for a return to sedentary work effective September 11, 1992, and described the claimant's condition as "about the same." On August 27, 1992, the designated doctor examined claimant and

reviewed his medical history. Dr. D concluded that "a lot of psychological problems" were "playing into [claimant's] widespread fibromyalagia." He assessed a 0% impairment rating for the claimant's lumbar and abdomen strains and a 0% impairment rating of the his left shoulder. He finds that MMI had been reached on June 8, 1992. (On June 8, 1992, Dr. Mc had examined the claimant and concluded in a report reviewed by Dr. A that the claimant "has had a neck sprain and lower back sprain, but I find no evidence of any pathology that would suggest a `ruptured disc or pinched nerve.'" He further concluded that the arthroscopic surgery on the claimant's left shoulder in July 1991, resulted in no pathology. He believes that the claimant reached MMI on June 8, 1992 with 0% impairment rating.)

Further examinations by a (Dr. BL) on December 4, 1992, resulted in a diagnosis of bilateral carpal tunnel syndrome (agreed by all parties to be a separate matter from these proceedings), C-6 radiculopathy and L-5 and S-1 radiculopathy. On December 8, 1992, Dr. A reported claimant as ". . . at least stable to better." On January 12, 1993, a (Dr. BA) found indications of a partial tear in the left shoulder within the left supraspinatoris at the myolendonous junction. An MRI of the cervical spine was "unremarkable." On January 14, 1993, a (Dr. VH) examined the claimant on referral from Dr. J. He found decreased motion in the left arm and lumbar syndrome without distinct radicular findings. He recommended further testing. On January 22, 1993, a (Dr. M) found disc protrusion at L5-S1. An MRI showed "no evidence of any significant extradural defects." To help exclude "artifact," he recommended further testing. On March 11, 1993, (Dr. B) concludes that anything beyond conservative management will not "affect his station in life or his complaints at all." On March 12, 1993, Dr. VH recommended a return to light duty. On February 23, 1993, and on April 27, 1993, Dr. A found essentially no change in claimant's condition.

In his request for review, claimant argues that the report of the designated doctor, Dr. D, should not be given presumptive weight because the great weight of the medical evidence is to the contrary. He asks for an MMI date of April 17, 1993, for his lower back "as . . . (Dr. A) states" and that he be referred to Dr. BL for an impairment rating. He also requests that he not be found to have reached MMI with regard to his left shoulder until Dr. J determines it.

Article 8308-1.03(32)(A) defines MMI as "the point after which further material recovery or lasting improvement to an injury can no longer reasonably be anticipated." Articles 8308-4.25(b) and 4.26(g) provide that the report of the designated doctor selected by the Commission will be given presumptive weight and that the Commission will base its determination of MMI and impairment rating on this report unless the great weight of the other medical evidence is to the contrary. The ultimate determination of MMI and impairment rating must be made on the basis of medical not lay evidence. Texas Workers' Compensation Commission Appeal No. 93518, decided on August 5, 1993, and No. 92394, decided on August 17, 1992. The great weight determination amounts to more than a mere balancing or preponderance of the medical evidence. Texas Workers' Commission Appeal

No. 92412, decided on December 2. 1992. A designated doctor's report should not be rejected "absent a substantial basis to do so." Texas Workers' Compensation Commission Appeal No. 93039, decided March 1, 1993. And medical conclusions are not reached by counting the number of doctors who take a particular position. They must be weighed according to its "thoroughness, accuracy, and credibility with consideration given to the basis it provides for opinions asserted." Texas Workers' Compensation Commission Appeal No. 93493, decided July 30, 1993.

The hearing officer gave presumptive weight to the MMI certification and, even though not listed as an issue, to the impairment rating of the designated doctor. He concluded that the great weight of the other medical evidence was not contrary to the report of the designated doctor. Article 8308-4.25 and 4.26. Our review of the evidence supports the hearing officer's finding and conclusions. We note too, that Dr. Mc determined the same MMI date and impairment rating.

Claimant focuses his argument on two points: First, that Dr. A certified MMI in April 1993, based on an office visit of April 27, 1993. This report (Claimant's Exhibit 16) does not specifically state when the claimant reached MMI. It only says claimant "has reached statutory MMI." Article 8308-1.03(32)(B) provides that MMI is presumed to have been reached "104 weeks from the date income benefits begin to accrue," or about the time this report was made. Whatever the intent of Dr. A in making this ambiguous diagnosis, it is arguably inconsistent with his statement of June 26, 1992, that claimant probably has already reached MMI, with his other conclusions from repeated examinations that the claimant has stabilized, and with a TWCC-69 (Carrier's Exhibit 7) stating MMI has been reached and referring to a May 29, 1992, physical therapist report as the basis for the conclusion that MMI has been reached. Although it may not be an endorsement of the designated doctor's report in every detail, it hardly can be said to challenge, or even be inconsistent with, those basic conclusions. It does not rebut the presumptive validity of the designated doctor's report.

Secondly, claimant contends that there should be no finding of MMI on his shoulder until Dr. J determines that he reached MMI. There is no evidence that Dr. J has, up to the time of this appeal, made such a finding. (As an aside, we note that the Act authorizes the parties to agree on a designated doctor, or failing agreement, for the Commission to appoint one. It does not give any party sole authority to make this appointment). In a March 2, 1993 letter, Dr. J confirms that the claimant continues to have shoulder pain, possibly the result of a partial tear of the rotator cuff. He proposed more testing. Suspending a determination of MMI pending future tests or operations could create an open-ended process inconsistent with considerations of finality and expeditious decision making. The hearing officer as the sole judge of the evidence was able to reach a determination of MMI based on the evidence presented at the hearing. Texas Workers' Compensation Commission Appeal No. 92275, decided August 11, 1992. The hearing officer determined

that there was sufficient evidence to support the designated doctor's determination and that no more evidence was required. Clearly his determinations are not so against the great weight and preponderance of the evidence as to be manifestly wrong or unjust. *See* Cain v. Bain, 709 S.W. 2d 175 (Tex. 1986). Accordingly, the decision is affirmed.

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Stark O. Sanders, Jr.
Chief Appeals Judge

CONCUR:

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Joe Sebesta
Appeals Judge

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Lynda H. Nesenholtz
Appeals Judge