APPEAL NO. 93575

This appeal arises under the Texas Workers' Compensation Act of 1989 (1989 Act), TEX. REV. CIV. STAT. ANN. arts. 8308-1.01 through 11.10 (Vernon Supp. 1993). On June 17, 1993, a contested case hearing was held in (city), Texas, with (hearing officer) presiding. She determined that the claimant reached maximum medical improvement (MMI) on July 22, 1992, with five percent impairment. Appellant (claimant) asserts that she was not represented until the hearing and received incorrect advice, including about the reaching of MMI. Respondent (carrier) replied that the decision of the hearing officer should be affirmed.

DECISION

We affirm.

At the hearing the issue was not stated. The hearing officer's decision reflects that the issue reported from the benefit review conference (BRC) asked what the amount of claimant's impairment was. The issue on appeal states that prior to the hearing, the claimant was not advised to frame the issue to include when MMI was reached, so a new hearing should be held.

Article 8308-6.42(c) of the 1989 Act states that the Appeals Panel "shall determine each issue on which review was requested."

The Appeals Panel determines:

That the decision of the hearing officer is sufficiently supported by the evidence; no request or motion was made at the hearing for additional issues upon which to consider a remand for new hearing.

After introductory remarks, this hearing immediately considered stipulations, which the hearing officer states on the record were presented to her by the parties prior to the hearing. The hearing officer then adds, "the parties have reached an agreement so even though that agreement will be reflected in here I will go ahead and include all of the stipulations on the record." While the record on review contains no "agreement", it does contain the parties' agreement, through counsel, to seven stipulations that affect the determination of this case. Those seven stipulations will be summarized hereafter:

1. Claimant's treating doctor first found MMI on July 17, 1992, but later changed that date to September 21, 1992, with impairment of 12%.

2. Claimant saw a doctor for the carrier on September 16, 1992, who diagnosed the problem as bursitis in the right shoulder.

3. The claimant's first treating doctor referred her to two doctors who favored injections in the shoulder; one diagnosed bursitis in the shoulder.

4.Another doctor seen on March 23, 1992, for a second opinion diagnosed capsulitis (inflammation of the joint enclosure) of the left shoulder and released her to work on March 25, 1992.

5.The designated doctor stated that claimant reached MMI on July 22, 1992, with 5% impairment.

6.Carrier paid temporary income benefits (TIBS) from January 29, 1992 to March 25, 1992; fifteen weeks of impairment income benefits (IIBS) were paid from December 3, 1992 to March 24, 1993.

7.Claimant reached MMI on July 22, 1992, with an impairment of 5%.

No motion was made to expand the BRC reported sole issue of impairment rating to consider whether MMI had been reached. As stated, all stipulations were agreed to by both parties at the hearing; these stipulations provide sufficient evidence upon which to base, not only a decision as to impairment rating, but also one in regard to when MMI was reached. (We note that claimant at the hearing commented after agreeing to the above stipulations that she was "forced" to take this "position" because of the counseling received prior to the hearing--no reference was made in regard to MMI.)

Claimant, who was represented by an attorney at the hearing, states on appeal that prior to the hearing, she was not informed of the ramifications of not contesting the MMI date and had she been, states that she could have agreed to have surgery and then her treating doctor would not have said that she reached MMI. While no outcome can be predicted when facts such as claimant describes are changed, it is possible to make the following observation:

The opinion of the designated doctor as to both MMI and impairment rating is entitled to presumptive weight unless the great weight of other medical evidence is to the contrary. (*See* Article 8308-4.25 and 4.26 of the 1989 Act.)

While claimant's treating doctor's opinion could be, or be part of, what is sufficient to be the "great weight of medical evidence to the contrary", it is very possible that the designated doctor's opinion as to both MMI and impairment rating would have been given presumptive weight, even if an issue of MMI had been considered by the hearing officer, with the same outcome as that reached.

The record contains no medical opinions or records so it is impossible to determine what was considered in regard to surgery and whether the views of various doctors as to surgery were placed before the designated doctor for his consideration. As stated, the

record does not show that any request was made at the hearing to enlarge the issues.

The Appeals Panel has stated that it will not consider an issue that is raised for the first time on appeal when it could have been raised at the contested case hearing. *See* Texas Workers' Compensation Commission Appeal No. 91100, decided January 22, 1992. The request that the case be remanded for the adding of an issue of MMI is not granted.

We observe that the hearing officer's decision and order provide that medical benefits will be paid, and we note nothing in the decision, or stipulations that appeared therein, that would limit that benefit. The decision and order of the hearing officer are affirmed.

Joe Sebesta
Appeals Judge

CONCUR:

Philip F. O'Neill
Appeals Judge

Thomas A. Knapp
Appeals Judge