APPEAL NO. 93833

This case was originally heard in (city), Texas, (hearing officer) presiding as hearing officer, and is returned following our remand in Texas Workers' Compensation Commission Appeal No. 93537, decided August 11, 1993. We remanded the case because of concern whether this body had jurisdiction of the case, given the claimant's Notice of Injury (TWCC-41) and treating doctor's reports all reflect a 1990 date of injury. On remand the hearing officer referred to a stipulation of fact at the original hearing, whereby the date of injury had been stipulated as being (date of injury), and therefore submitted no additional information. First, we would note as a general proposition of law, that jurisdiction cannot be conferred by consent or stipulation of the parties, nor may it be waived either by a court or by a party litigant. *See* 16 TEX. JUR. 3d, *Courts* § 35 (1981) page 280. We recognize that factual matters may be stipulated by the parties. While neither party raised the question of jurisdiction, this appellate body is required to determine its own jurisdiction and to take notice of its want of jurisdiction when disclosed by the record. *See* Gibbs v. Melton, 354 S.W.2d 426, (Tex. Civ. App. - Dallas 1962, no writ). Secondly the hearing officer refers us to "the discussion on the record" where the stipulation was entered into. However, we note that at pages 16 and 17 of the transcript, as well as the tape recording, the hearing officer announced an agreement was reached, recited the stipulation, and the ombudsman (after earlier announcing he does not represent the claimant and is there only to assist) agreed to the stipulation. There was no evidence from the claimant on this point. Legal niceties aside, nonetheless, claimant, in her appeal from the decision on remand, in a handwritten and signed appeal, specifically states she agrees with the finding "that the date of injury was (date of injury), because this is the first time I was told by my doctors the problem I was having was job related." The claimant's statement in her appeal, while not evidence, does bring to light the underlying basis for the stipulation as to the date of injury in this repetitive trauma case. We accept claimant's statement contained in her pleading that establishes (date of injury), as the date of injury. Therefore we are satisfied that we have jurisdiction and will address the case on its merits.

The claim is brought under the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act) (formerly V.A.C.S., Article 8308-1.01 *et seq*.). The narrow issue both at the original hearing and on remand was "whether the great weight of the medical evidence is against the designated doctor's assessment of an 8% impairment rating." The hearing officer determined that the appellant, claimant herein, has an impairment rating of eight percent and that the impairment rating of eight percent by the designated doctor is not against the great weight of the medical evidence. Claimant contends that the hearing officer erred in accepting the designated doctor's assessment that her cervical injuries were not considered and requests that we reverse the hearing officer's decision and render a decision in her favor. Respondent, carrier herein, responds that the decision is supported by the evidence and requests that we affirm the decision.

DECISION

The decision of the hearing officer is affirmed.

As noted initially, there was virtually no testimony concerning the surrounding circumstances of the injury. The TWCC-41 notes that "[d]ue to repetitious and demanding physical tasks . . ." claimant injured her right shoulder and arm. Various medical reports indicate claimant was a cook for employer, a church, and that she complained of the onset of pain in her right forearm, shoulder, and neck over a period of time while working in employer's kitchen stirring foods during cooking. It is unclear from the record how, or when, claimant came to be treated by (Dr. SH), D.O., however it appears that Dr. SH was the treating doctor. Dr. SH in a Report of Medical Evaluation (TWCC-69) and in apparent accompanying narrative and "Supportive Documentation" certified maximum medical improvement (MMI) was reached 10-5-1992 with nine percent whole body impairment (claimant's Exhibit No. 2). Dr. SH in an amended TWCC-69 and accompanying narrative dated October 5, 1992, certified MMI on 10-5-1992, but states his earlier impairment contained "wrong figures" and assessed 17% whole body impairment and considered certain cervical injuries. Subsequently in a report dated February 8, 1993, Dr. SH reevaluated claimant for ". . . injuries sustained on the job, dated (date) . . ." reaffirmed his 17% impairment rating and both agreed and disagreed with various aspects of (Dr. C) assessment.

In a carrier request for medical examination order (TWCC-22), (Dr. T) was requested to examine claimant to determined MMI and whether "claimant is capable of returning to work." Dr. T, as found by the hearing officer, examined claimant on July 9, 1992, and prospectively certified she would reach MMI on "8/1/92" with 6% impairment on an unsigned TWCC-69 (Carrier's Exhibit No. C). In assessing the six percent impairment Dr. T did not consider a cervical injury.

By order dated November 6, 1992, the Texas Workers' Compensation Commission (Commission) appointed (Clinic) to examine claimant "to determined the correct impairment rating per AMA guidelines." It is undisputed that the examination at the Clinic was conducted by Dr. C (previously identified as Dr. C). The hearing officer notes in his discussion of the evidence on remand that:

> Early in the hearing, it became apparent that although the report of the designated doctor was signed by (Dr. S), the medical evaluation had been performed by [Dr. C], an associate of [Dr. S']s at the [Clinic]

In order to correct this situation the parties ". . . agreed that if [Dr. C] is qualified to perform a medical evaluation, the logical corrective action would be for him to sign as the designated doctor." Apparently it was determined or agreed that Dr. C was qualified and the hearing officer by memo dated 5-6-93 instructed "[p]lease send MEO to [Dr. C] designating him as the Degis. (sic) Dr., and request him to sign a TWCC-69 as the designated Dr., as well as sign any narrative that may be attached." In a TWCC-69, dated "25 May '93," Dr. C certified MMI on 12-1-92 with eight percent whole body impairment rating. Although there was no narrative accompanying this TWCC-69 (Hearing Officer's Exhibit No. 4), the December 11, 1992, narrative signed by Dr. S (Carrier's Exhibit E), details how Dr. C arrived at his eight percent impairment rating.

The hearing officer determined that claimant reached MMI on December 1, 1992, with an impairment rating of eight percent and such was not against the great weight of the other medical evidence.

The claimant in her appeal indicates disagreement that the impairment rating should be eight percent, because Dr. SH had given an impairment rating of 17% which considered her cervical problems. Specifically, claimant disagrees with the hearing officer's Finding of Fact No. 5 which stated "claimant's claimed injuries involved repetitive motion injuries to her right arm and shoulder" and Finding of Fact No. 6 which stated "[c]laimant's claimed injury did not include any injury to her cervical vertebrae." Essentially the disagreement is between the treating doctor, Dr. SH's impairment rating of 17% which includes cervical problems and the designated doctor, Dr. C's impairment rating of 8%, which does not include consideration of any cervical problems.

Claimant also "clarifies" her statement that Dr. C's exam lasted 2-1/2 hours, by explaining the time she spent at the Clinic was 2-1/2 hours and the actual examination lasted about 10 minutes. However, a careful review of side B of the tape recording, at No. 192 on the counter dial, clearly reflects:

Q:How long did the examination by [Dr. C] take?
A:About 2-1/2 hours.

Regarding the appointment of the Clinic as either a medical examination order doctor or a designated doctor, we observe that Section 408.125(d) and (e) of the 1989 Act appears to give only the parties or the Commission the power to choose a designated doctor. A doctor, per Section 401.011(17) of the 1989 Act is one who is "licensed and authorized to practice" certain health related skills. Since there was no issue raised about whether the "Clinic" can be a designated doctor, or can choose the doctor who will do the evaluation, an issue regarding that questionable practice will not be addressed other than to note that such a practice does not appear to comply with the cited provisions of the 1989 Act.

Although there appears to be some confusion as to who would be the designated doctor, it appears from the evidence, and the discussion on the record, that the parties agreed that Dr. C was the Commission-appointed designated doctor, and as such his opinion on impairment "shall have presumptive weight . . . unless the great weight of the other medical evidence is to the contrary." Section 408.125(e) (formerly Article 8308-4.26(g)). Claimant in closing argument, but not reurged on appeal, argued that Texas Workers' Compensation Commission Appeal No. 92627, decided January 7, 1993, dealing with the designated doctor and "the ability to abdicate his role" in the examination requires that another designated doctor should be appointed. However, nothing in that decision, or other decisions, would indicate that if initially the designated doctor's examination or report is defective, another designated doctor should be appointed, as claimant argued at the CCH. Conversely, we have approved, on a number of occasions, circumstances where an otherwise defective report is returned to a designated doctor for completion or correction. *See* Texas Workers' Compensation Commission Appeal No. 93735, decided October 5,

1993; Texas Workers' Compensation Commission Appeal No. 93407, decided July 6, 1993. Further it would appear from the discussion on the record and the hearing officer's comments that the parties agreed that Dr. C was a Commission designated doctor, if he was otherwise qualified, which he apparently was.

As to the weight to be given to a designated doctor's report compared to a treating doctor, we have observed that no other doctor's report, including a report of a treating doctor, is accorded the special presumptive status of the designated doctor. Texas Worker's Compensation Commission Appeal No. 92366, decided September 10, 1992, and Texas Workers' Compensation Commission 92412, decided September 28, 1992. In Appeal 92412, *supra*, we said that to overcome the presumptive weight of the designated doctor requires more than a mere balancing of the evidence and only the "great weight" of other medical evidence can overcome it. In the instant case, there are only the reports of the treating doctor to overcome the presumptive weight of the designated doctor. Lay testimony, such as that from the claimant, does not constitute such medical evidence necessary to overcome the presumptive weight of the designated doctor's report. Texas Workers' Compensation Commission Appeal No. 92312, decided August 19, 1992; Texas Workers' Compensation Commission Appeal No. 93157, decided April 15, 1993.

Whether claimant's injury included an injury to her cervical vertebrae is a factual question for the hearing officer to resolve. Section 410.165(a) provides that the hearing officer is the sole judge of the weight and credibility to be given the evidence. Certainly claimant's initial complaints appeared to be regarding her right shoulder and arm. The hearing officer clearly believed, and so found, that claimant's injury did not include an injury to her cervical vertebrae. That finding is supported by sufficient evidence and where there is sufficient evidence to support the determination there is no sound basis to disturb the decision.

Finding that the determinations of the hearing officer were not so against the great weight and preponderance of the evidence as to be manifestly wrong or unjust, In re King's Estate, 244 S.W.2d 660 (Tex. 1951); Pool v. Ford Motor Co., 751 S.W.2d 629 (Tex. 1986), we affirm the decision of the hearing officer.

Finally, we would note that the marginal comment on the decision to remand is inappropriate, unnecessary to express disagreement with that decision, and unprofessional.

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Thomas A. Knapp
Appeals Judge

CONCUR:

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Robert W. Potts
Appeals Judge

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Gary L. Kilgore
Appeals Judge