APPEAL NO. 93899

This appeal arises pursuant to 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*.). A contested case hearing was held on August 31, 1993, in the (city), Texas, field office of the Texas Workers' Compensation Commission (Commission). The issues before hearing officer (hearing officer) were whether the respondent in this case, hereinafter carrier, is financially liable for medical treatment rendered to the appellant, hereinafter claimant, by Dr. D; for what time period claimant experienced disability; whether the claimant has reached maximum medical improvement (MMI) and, if so, when claimant reached MMI; and what is claimant's correct impairment rating. The claimant alleges error in the hearing officer's determination that the claimant did not have disability after January 26, 1993 and that the opinion of the designated doctor as to MMI and impairment "was not overcome by the great weight of contrary evidence." He also contends that the hearing officer erred in finding that the claimant was employed by (employer). on (date of injury), as the issue of claimant's employment status was not before the hearing officer and no evidence was permitted on such issue. The carrier basically contends that the hearing officer's determinations on the appealed issues are supported by credible evidence.

DECISION

We affirm the decision and order of the hearing officer.

The hearing officer found that the claimant sustained an injury on (date of injury), while employed by (employer). (employer). At the time of injury, the claimant had been sent to work at a Goodyear facility, where he injured his neck in the course of doing some lifting.

After being seen initially at the (city) Industrial Clinic, claimant began treating with (Dr. B) on October 29, 1992. Dr. B treated claimant conservatively, prescribing medication and physical therapy. Reports from Dr. B show negative x-rays of the dorsal and cervical spine, and show Dr. B's initial impression that claimant's symptoms were compatible with mild thoracic outlet syndrome. Dr. B also ordered an MRI and referred the claimant to (Dr. R) for a neurosurgical consultation. On December 3, 1992, Dr. R reported the MRI as "entirely normal," and stated his impression that the claimant may have had some strain or sprain of the muscles on the right side of his neck, but that there was no evidence of any mass such as a disc or tumor, nor any compression of the nerve roots. Dr. B's remaining patient notes show claimant continuing to complain of pain on December 10th, but that Dr. B stated, "I have nothing else that I can really offer him at this time except exercises. I will try to release him to work and see him back in about six weeks." Dr. B's notes also show that claimant did not keep, or cancelled, scheduled appointments on January 21 and March 8, 12, and 18, 1993.

The claimant testified that at the December appointment Dr. B released him to light duty work and that he took the release to (Mr. H), employer's president, who in turn called (Mr. Ho), a supervisor who worked for Mr. H. That day, claimant said, he tried to drive a forklift but was unable to use his right arm. That evening, he said, Mr. Ho told him not to

come back because he could not do regular work. The claimant said he did not see Dr. B after that date, and specifically denied he saw him on January 25, 1993. The entry for that date in Dr. B's notes says, "See form." A Specific and Subsequent Medical Report completed by Dr. B on January 26th releases claimant to full duty work, states the claimant still had a little discomfort in the scapular area and down the right arm, and recommends the claimant continue to do exercises and recheck in six weeks for a final visit.

Mr. H did not remember claimant having brought in a light duty release, but he testified that on February 5, 1993, claimant brought in a regular duty release from Dr. B dated January 25th. He said that he told claimant to report back to his regular shift on "whatever date he was supposed to go back to work." He said claimant returned on February 12th, worked a full night, and called in sick the next two nights. The next day he said Mr. Ho called him to see if claimant had called in to work, and Mr. H told him he had not. Claimant stated that he did not see Dr. B on January 25th, and that he was not aware that Dr. B had given him a regular duty release. He further denied that he had gone back to work in February. Mr. H testified that if claimant had returned to work in January employer would have had a full duty position for him at the same wages as he had made prior to his injury.

Pursuant to approval by the Commission, the claimant was allowed in April of 1993 to change treating doctors, to (Dr. D). (Medical reports in evidence also show claimant having been seen by (Dr. G), who apparently was Dr. D's associate.) On April 6th Dr. D noted numbness in claimant's right hand and problems elevating his right upper extremity due to tightness in his thoracic muscle. He also said claimant's x-ray revealed an anterior bone spur at the superior body of C5, which was small and appeared "newish." On May 11th, Dr. D ordered an EMG, and stated that claimant's MRI axial views were not of good enough quality and needed to be redone. On June 14th Dr. G stated his impression of cervical spine disease and disc injury secondary to trauma, with right arm radiculitis, pending further studies. Drs. D and G on April 6th restricted claimant to light duty work, no heavy lifting, but put him on no-work status on June 14th. The claimant stated he was continuing to see Dr. D about once a month and that he has not returned to work because his shoulder pain prevents him from lifting.

On July 15, 1993, claimant saw (Dr. T), a designated doctor appointed by the Commission. Dr. T found the claimant to have reached MMI as of that date, with a three percent impairment rating. Dr. T wrote, "[Claimant] does not have a demonstrable neurologic lesion and/or a definite cervical abnormality by imaging studies. I do not feel that further imaging studies, and/or testing and/or surgical/medical treatments are likely to improve his symptoms or employability, or decrease his impairment. I would allow this patient to return to work activities as tolerated. If he is unable to tolerate this due to chronic and incapacitating difficulties, he may have to consider alternative employment."

The claimant was also seen by carrier's doctor, (Dr. S), who wrote on August 17th that he agreed with Dr. T's date of MMI and impairment rating. He stated his belief that claimant had a chronic cervical strain syndrome, but that he was not a candidate for surgery.

He recommended an EMG nerve conduction study, however, to determine whether there was evidence of carpal tunnel syndrome or radiculopathy, and stated that he would modify his report subsequent to that time. He also stated that he believed claimant could have returned to work on January 26, 1993, with light duty and progressive return to more normal activities, although he said claimant reported there was "some resistance on the part of his employer to accommodate him in that capacity."

With regard to the issue of disability, the hearing officer found that the claimant was unable to obtain and retain employment at wages equivalent to the wage he earned prior to (date of injury) until January 25, 1993, but not thereafter. In the discussion section of the decision, the hearing officer stated that it appeared that claimant visited Dr. B on January 26, 1993, and was determined at that time to be capable of returning to work on a full-duty status. Therefore, the hearing officer reasoned, a preponderance of the credible evidence does not support claimant's contention that he has had disability at all times since his injury.

The claimant in his appeal points to evidence to the contrary, including the statements quoted above in the reports of the designated doctor and of the carrier's doctor, Dr. S, along with the statements of Drs. D and G and claimant's own testimony. The only evidence to the contrary, contends the claimant, was the comment in Dr. B's records; claimant disputes that he saw Dr. B on January 26th. Thus, the claimant argues, the overwhelming weight of the evidence indicates he continues to have disability.

The claimant further argues that the evidence of disability detailed above indicates that he has significant limitations which preclude his normal return to work and that further testing and treatment is needed; thus, he argues, the evidence is inconsistent with a finding of MMI and as such Dr. T's opinion is overcome by the great weight of contrary evidence.

Addressing the latter issue first, this panel has many times distinguished between the concepts of "disability" and "maximum medical improvement," and have emphasized that they are not the same. Texas Workers' Compensation Commission Appeal No. 91060, decided December 12, 1991. Where, as here, the Commission has appointed a designated doctor to determine the issues of MMI and impairment, the opinion of that doctor is entitled to presumptive weight unless the great weight of the other medical evidence is to the contrary. Section 408.122(b); 408.125(e). Upon our review of the record, we find no error in the hearing officer's determination that Dr. T's report was not overcome by such evidence. Claimant argues that the evidence regarding claimant's ability to work, and his need for further tests, militates against a determination of MMI (which, we note, is defined in the 1989 Act as the earlier of either the earliest date after which, based on reasonable medical probability, further material recovery from or lasting improvement to an injury can no longer reasonably be anticipated, or the expiration of 104 weeks from the date on which income benefits begin to accrue). Medical evidence which appears to support a determination that MMI has been achieved includes Dr. B's statement that he had nothing else to offer claimant in the way of treatment except exercises and Dr. S's agreement with Dr. T's certification (although pending one further study); Drs. D, G, and R had not certified MMI, although Dr. R deferred to Dr. B's opinion. With the evidence in this posture, we cannot

say the hearing officer erred in accepting the report of the designated doctor. As we have held before, overcoming the opinion of a designated doctor requires more than a mere balancing of the evidence. Texas Workers' Compensation Commission Appeal No. 92412, decided September 28, 1993.

With regard to the issue of disability, we have held that determining the end of disability can be difficult and imprecise. Texas Workers' Compensation Commission Appeal No. 91045, decided November 21, 1991. We have also held that, unlike the issue of MMI, there is no limit on the type of evidence that may be considered. Texas Workers' Compensation Commission Appeal No. 92209, decided July 13, 1992. In this case, regardless of whether the claimant actually saw his then-treating doctor on January 25th or 26th, the evidence shows that Dr. B released him to full duty on the latter date; Dr. B's opinion also was supported by Dr. R. Contrary opinion was provided by Drs. D and G, who first released claimant to limited duty and then took him off work; in addition, Dr. T would have released claimant to work "as tolerated" and Dr. S would have released him to light duty on January 26th. Mr. H's testimony was that claimant brought in Dr. B's release in February but only worked one day; claimant stated that he attempted to work one day in January but was sent home because of his inability to perform his job. Clearly, both the lay and medical evidence with regard to this issue are in conflict, and resolving such conflict was the role of the hearing officer, who is the sole judge of the relevance and materiality of the evidence and of its weight and credibility. Section 410.165(a); Garza v. Commercial Insurance Company of Newark, N.J., 508 S.W.2d 701 (Tex. Civ. App.-Amarillo 1974, no writ). We will not substitute our judgment for that of the hearing officer where her decision is supported by the evidence and is not so against the great weight and preponderance of the evidence as to be manifestly unjust and unfair. In re King's Estate, 150 Tex. 375, 244 S.W.2d 660 (1951). The fact that a different fact finder could have drawn different inferences from the evidence presented also is not a sound basis for our reversal. Texas Workers' Compensation Commission Appeal No. 92113, decided May 7, 1992.

Finally, the claimant argues the hearing officer erred in finding that claimant was employed by (employer). on the date of injury. As the claimant says in his request for review, "There was no evidence as to [claimant's] employment status and the hearing officer abused her discretion in making findings on an issue that was not raised by the parties. The Act specifically prohibits the hearing officer from considering issues not raised at the benefit review conference. Claimant has not consented to any determination on this issue. The hearing officer did not permit any discovery or testimony concerning this issue."

The record of the hearing shows the claimant attempted to develop evidence regarding the relationship between (employer). and a company referred to as "B," apparently under a borrowed servant theory. The hearing officer sustained carrier's objection to such line of questioning, stating that claimant should have added employment status as an issue. She further stated that a finding regarding claimant's employer was necessary to support liability of the carrier and jurisdiction of the Commission. The hearing officer's decision includes findings of fact that on (date of injury) claimant was employed by (employer)., who on that date subscribed to a policy of workers' compensation insurance issued by carrier.

Our review of the record shows that it contains evidence in support of such finding, which was not challenged by carrier at the hearing or on appeal. The hearing officer was correct in making such finding, which is fundamental to any decision concerning the compensability of an injury. Texas Workers' Compensation Commission Appeal No. 93768, decided October 7, 1993.

The decision and order of the hearing officer are affirmed.

Lynda H. Nesenholtz
Appeals Judge

CONCUR:

Stark O. Sanders, Jr.
Chief Appeals Judge

Robert W. Potts
Appeals Judge