APPEAL NO. 93958

This appeal arises 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*.). At a contested case hearing held in (city), Texas, on September 27, 1993, the hearing officer, (hearing officer), considered the following disputed issues: has the appellant (claimant) reached maximum medical improvement (MMI) and, if so, when; and what is the claimant's impairment rating. Giving presumptive weight to the report of the designated doctor selected by the Texas Workers' Compensation Commission (Commission) to determine the impairment rating, the hearing officer concluded that claimant's impairment rating was eight percent, not the 11% determined earlier by claimant's treating doctor. Further determining, however, that the designated doctor's report was not entitled to presumptive weight insofar as it stated claimant had reached MMI on April 29, 1993, the date the designated doctor examined claimant, the hearing officer concluded that claimant reached MMI on January 7, 1993, the date determined by his treating doctor. In his request for review, claimant asserts that the determinations of his MMI date and impairment rating "are inextricably interrelated in this case," and that the designated doctor knew she could have chosen an earlier MMI date but instead used the date of her examination of the claimant, namely, April 29, 1993. Claimant asks the Appeals Panel "to find that the designated doctor's report resolves the issues of impairment rating and date of [MMI]." The response filed by the respondent (carrier) asserts the sufficiency of the evidence to support the hearing officer's determinations and urges our affirmance.

DECISION

Finding the evidence sufficient to support the challenged findings and conclusions concerning claimant's MMI date, we affirm.

No witnesses were called and the case was presented through stipulations of fact and documentary evidence relied on by both parties. At the benefit review conference, the disputed issue was framed as follows: "Whether the designated doctor's date of [MMI] carries presumptive weight as the designated doctor was selected for the sole purpose of resolving a dispute over the impairment rating." At that proceeding the claimant's position was that the designated doctor's report should be given presumptive weight as to both his MMI date and his impairment rating, while the carrier's position was that it had disputed only the impairment rating not the MMI date, that the designated doctor was selected to determine only the impairment rating, and, thus, that there was no dispute over the MMI date. The hearing officer, commendably, advised the parties that he had decided for the sake of clarity to recast this issue into the two issues mentioned above and the carrier stated an objection. Similarly, the carrier objected to the claimant's six exhibits insofar as they were offered to prove the issues as recast by the hearing officer. However, the carrier has not filed a request for review and therefore we need not further address these matters.

In addition to stipulations concerning claimant's employment, the employer's coverage by carrier, and the venue for the hearing, the parties stipulated as follows:

4.[Claimant's] treating doctor, (Dr. V) issued a TWCC-69 [Report of Medical Evaluation] showing a date of [MMI] of January 7, 1993, and an impairment rating of 11%.

5.[Carrier] disputed only the impairment rating assigned by [Dr. V] and requested that the Commission assign a doctor to resolve this dispute as to an impairment rating on a TWCC-21. The carrier timely filed the TWCC-21 disputing [Dr. V's] impairment rating.

6.The carrier and claimant did not agree on the selection of a designated doctor. On March 26, 1993, the Commission appointed [Dr. S] as a designated doctor to examine [claimant] and provide her opinion about [claimant's] impairment rating.

7.On April 29, 1993, [Dr. S] examined [claimant]. The doctor completed a TWCC-69 reflecting an 8% impairment rating. The doctor also filled in the space for date of [MMI] as the day of the visit, April 29, 1993.

The documentary evidence indicated that Dr. V stated on a Report of Medical Evaluation (TWCC-69), signed on February 4, 1993, that claimant had reached MMI on January 7, 1993, the date of his visit, with an impairment rating of 11% for lumbar discs and abnormal range of motion (ROM). With a Notice of Refused/Disputed Claim form (TWCC-21), dated February 25, 1993, the carrier disputed the "disability rating of 11%" and requested the Commission to assign a doctor "to resolve this dispute." The Commission's letter of March 26, 1993, to claimant, with copies to Dr. S, the carrier, and claimant's attorney, advised that he was to be examined by Dr. S on April 29, 1993, and that the purpose of the examination was to determine "percentage of impairment only." Claimant's attorney wrote Dr. S on March 30, 1993, forwarding medical records and stating that the Commission had selected her as a designated doctor "to assign an impairment rating if [claimant] has reached [MMI]." This letter went on to instruct that if Dr. S found that claimant will have no further lasting improvement or material recovery from the effects of his injury, then she should "check off the block on form TWCC-69 assigning [MMI]." The letter further instructed Dr. S as follows: "You must assign a date on which you believe [claimant] could expect no further lasting recovery or material improvement, that is, the date of [MMI]. You may choose the date of your examination or another more appropriate date. If you certify [MMI], you must also assign an impairment rating based on the third edition, second printing of the AMA Guides to the Evaluation of Permanent Impairment." Prior decisions have stated that the designated doctor is the agent of the Commission and have discouraged unilateral contacts by parties with the designated doctor. *See e.g.* Texas Workers' Compensation Commission Appeal No. 93762, decided October 1, 1993. Having presumed to instruct the Commission's designated doctor as to how to perform her assignment, this letter asks Dr. S to state an MMI date. After having suggested that such date could be the date of her examination, claimant then sought at the hearing to have such date given presumptive weight. As there has been no appeal by the carrier concerning this communication, or any other potential appealed issue, we need not take corrective action under the circumstances

of this case.

Dr. S's TWCC-69 stated that claimant had reached MMI as of "4/29/93," the date of his visit, and that he was assigned an impairment rating of "8%" for abnormal lumbar spine and ROM. According to Dr. S's narrative report accompanying her TWCC-69, claimant was injured on (date of injury), when he slipped and fell on a wet floor "dropping a calf on him."

Our decision in Texas Workers' Compensation Commission Appeal No. 93910, decided November 22, 1993, is dispositive of this appeal. In that case, only the impairment rating was in dispute although the designated doctor, as in the instant case, filled in the date of the injured employee's examination as the date of MMI on the TWCC-69. We recognized that a party may decide to dispute only an impairment rating and that a designated doctor may be selected to determine only such disputed rating. Having said that, however, we went on to state the following:

> In regard to MMI, we have previously held that it is prudent, if not essential, for a designated doctor who is appointed to evaluate a claim for an impairment rating to also render an opinion on MMI inasmuch as an impairment rating is not assessed until MMI is reached. (Citations omitted.) However, in accordance with our decision in Texas Workers' Compensation Commission Appeal No. 93710, decided September 28, 1993, and as noted by the hearing officer, since the designated doctor was appointed to determine impairment rating only, his opinion on MMI was not entitled to presumptive weight.

We do not find that the hearing officer's determination that claimant reached MMI on January 7, 1993, to be against the great weight and preponderance of the evidence. In Dr. V's narrative report which reflected claimant's visit on January 7, 1993, and which accompanied his TWCC-69, Dr. V observed that claimant had last been seen on December 3, 1992, and commented thusly: "Since that time he is continuing to be approximately the same as he has been in the past with lower back . . . My impression is the patient is at [MMI] for two-level lumbar disc disease with limitation of [ROM]." In her narrative report of April 29, 1993, Dr. S mentioned the several doctors who had provided treatment for claimant and reported that he stated he still had pain in the middle of his back radiating into his legs. We have previously noted that the attainment of MMI "will not, in every case, mean that the injured worker is completely free of pain or impairment, or that the injured worker is able to return to the prior occupation." Texas Workers' Compensation Commission Appeal No. 92312, decided August 19, 1992. The medical evidence in the case we here consider does not indicate any such improvement in the claimant's condition after January 7, 1993, as would constitute the great weight and preponderance of the evidence against the determination that indeed claimant had reached MMI on January 7, 1993. It was for the hearing officer as the sole judge of the weight and credibility of the evidence (Section 410.165(a)) to resolve whatever conflicts in the evidence he may have discerned. *See* Appeal No. 93910, *supra*. We conclude that the hearing officer correctly determined claimant's MMI date and impairment rating. The hearing officer's decision will be set aside only if the evidence supporting the hearing officer's determination is so weak or against the

overwhelming weight of the evidence as to be clearly wrong or manifestly unjust. Atlantic Mutual Insurance Co. v. Middleman, 661 S.W.2d 182 (Tex. App.-San Antonio 1983, writ ref'd n.r.e.).

The decision of the hearing officer is affirmed.

Philip F. O'Neill
Appeals Judge

CONCUR:

Susan M. Kelley
Appeals Judge

Gary L. Kilgore
Appeals Judge