APPEAL NO. 92164

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 1992). On March 25, 1992, a contested case hearing was held in (city), Texas, with (hearing officer) presiding. He found that claimant, appellant herein, was not entitled to receive temporary income benefits from respondent after having reached maximum medical improvement in regard to an injury of (date of injury). Appellant asserts that his injury of (date), with a different employer and insurance carrier, is an aggravation of the earlier injury and that benefits are due to him from this respondent. (At the time of hearing, appellant had not filed claim for the injury of (date) against the carrier for his employer at that time.) (See *infra*).

DECISION

Finding that the decision is not against the great weight and preponderance of the evidence, we affirm.

Appellant, on cross-examination stated that he had injured his back on (date of injury), lifting a tool box while he worked for (employer 1) for whom respondent is the workers' compensation insurance carrier. He received temporary income benefits and his doctor, (Dr. H), returned him to work in March 1991. In (date), appellant worked at a (employer 2) when he reached above his head to a circuit breaker and felt pain in his back. He went back to Dr. H, who in August 1991 returned him to work.

Respondent introduced a TWCC Form 69 (the form is a copy of TWCC-69 [date of injury] with the form number cut off from the bottom of the page but nevertheless is a Form 69). That form, signed by Dr. H, indicates in item 14 that maximum medical improvement was reached on March 22, 1991, with an impairment rating of "0%." Each applicable blank has an entry (including item 7 which stated the "date of injury" was "(date of injury"), but the entry for item 13 is limited, stating that "Patient's range of motion is negative." This TWCC Form 69 appears to have been completed no earlier than (date), since appellant testified he went to work for (employer 2) in (month) and item 3 of the form lists Employer's name as (employer 1 and employer 2). Nevertheless, appellant did not object to or question the report when it was offered into evidence at hearing.

The issue described at hearing by the respondent was, "[s]hould temporary income benefits be paid by the respondent for the injury of (date)?" to which appellant agreed that that was what he understood the issue to be. At hearing the appellant offered two letters from Dr. H to respondent dated August 6 and August 30, 1991, which said that the (date) injury was a "re-aggravation" of the (date of injury) injury and also called it a "flare-up." The subsequent letter also alluded to releasing appellant back to work in August. Respondent's second exhibit was another form (TWCC-69) also signed by Dr. H, showing an injury of (date) (at hearing this date was referred to as an error and should be "(date)") and indicating maximum medical improvement was reached on August 20, 1991, with an impairment rating of "0%." There was no issue litigated involving medical benefits at the hearing although

appellant in his closing argument said that he had not been sufficiently taken care of when released by Dr H after the first injury. He also said in closing that the (month) injury was a re-aggravation of the original injury, and that he is due benefits, including medical benefits for "that period of time."

On appeal, appellant takes issue with two statements in the hearing officer's "Statement of Case" and two statements in the "Statement of Evidence." No question as to any finding of fact or conclusion of law is asserted. Specific statements of the hearing officer followed by appellant's comments follow:

1.The issue in this case was whether the Claimant was entitled to receive temporary income benefits from the carrier as of July 29, 1991.

I disagree. The issue in this case is whether the claimant is entitled to receive benefits due him from the carrier as of July 29, 1991 as provided for under the Texas law. This could be medical compensation or temporary income benefits or both.

2.The claimant's position was that he had suffered a disability on (date of injury), the Carrier had paid temporary income benefits for that injury, that the Claimant had re-injured himself on (date), and that the claimant was entitled to temporary income benefits.

I disagree. I have said that I had a flareup of my injury on (date of injury). The doctor referred to them as attacks. Since leaving (employer 1) I have suffered about ten of these flare-ups prior to (date) while working for two other employers.

3.The Claimant was working for (employer 1) on (date of injury), when he injured his back. The carrier paid temporary income benefits to the claimant. The claimant's treating doctor completed a TWCC Form 69 showing that the claimant reached maximum medical improvement on March 22, 1991, with a zero percentage rating of whole body impairment.

I was not given a impairment test until just before I was released from the doctor on 8-30-91. I do not agree with this evidence since no impairment test was performed to substantiate a zero percentage rating of whole body impairment. This evidence should be disallowed.

4.The question of whether the carrier should pay medical benefits for the injury of (date), was not an issue in the contested case hearing.

I disagree. This is the major issue. I feel the medical attention given me under the Texas Workers' Compensation Laws was given to me in good faith and should have been paid by the carrier at the time of treatment.

The hearing officer's quoted remarks in appellant's first two assertions were not inconsistent with the evidence or the declarations made by the parties at hearing prior to final argument. In the first, the issue was as stated by the hearing officer, notwithstanding that the appellant may have thought it was broader in scope. In the second, the summation of claimant's position, stated by the hearing officer, was not materially different

from the way appellant himself described his initial injury in (date of injury) and his subsequent pain in (month).

Appellant's third and fourth positions, while directed at the "Statement of Evidence," are viewed as questioning the decision itself. Recognizing that appellant is pro se, the record of hearing still discloses no objection in the form of a question, remark, or any other indication that appellant viewed the TWCC-69 relating to the (date of injury) injury as improper. The determination as to maximum medical improvement was raised for the first time on appeal. While the TWCC-69 that addressed the injury of (date of injury), did not provide all the information that item 13 requested, maximum medical improvement was certified by appellant's treating doctor. Absent some type of objection to it at hearing, we will not consider its admissibility now. *See* Parkview Gen Hosp v. Waco Const Inc, 531 S.W.2d 224 (Tex. Civ. App.-Corpus Christi 1975, no writ) and Texas Workers' Compensation Commission Appeal No. 91104 (Docket No. FW-00104-91-CC-2) decided January 21, 1992. (Note: If a claimant disagrees with a certification of Maximum Medical Improvement, notice may be given to the commission under Tex W. C. Comm'n, 28 Tex Admin Code § 130.6 (rule 130.6), and a designated doctor will be directed to examine the claimant. On the other hand, if an impairment rating is not disputed within 90 days, rule 130.5 states that it becomes final.)

The finding that maximum medical improvement was reached in March 1991, together with the fact that appellant no longer worked for employer 1 when he injured himself in (date), provided a sufficient basis upon which the hearing officer could conclude that this respondent was not liable to pay temporary income benefits with respect to the injury of (date). "Temporary income benefits continue until the employee has reached maximum medical improvement." Article 8308-4.23(b) of the 1989 Act. "Maximum medical improvement" means the earlier of: "(A) the point after which further material recovery from or lasting improvement to an injury can no longer reasonably be anticipated, based on reasonable medical probability; . . ." Article 8308-1.03 (32). In addition this appeals panel has held that eligibility for temporary income benefits to compensate the employee for disability continues until maximum medical improvement has been reached. *See* Texas Workers' Compensation Commission Appeals No. 91045 (Docket No. AU-00055-91-CC-1) decided November 21, 1991 and No. 91125 (Docket No. HO-00159-91-CC-1) decided February 18, 1992. Even if the appellant had objected at hearing, as he does on appeal, that the TWCC-69 should not be admitted because no "impairment test" was performed to substantiate a zero impairment, the form could have been admitted because no requirement for an "impairment test" is set forth in the 1989 Act or rules of the commission to substantiate a zero impairment. In addition, a finding of "maximum medical improvement" is to be

certified by a doctor. *See* Article 8308-4.26(d). The determination of maximum medical improvement is to be based on "reasonable medical probability." *See* Article 8308-1.03 (32). A claimant may attack a finding of maximum medical improvement by seeking another evaluation or, for example, by pointing out defects in a certification of maximum medical improvement. His testimony alone, however, cannot support a determination of maximum medical improvement as it can findings of injury and disability. *See* Houston General Ins. Co. v Pegues, 514 SW2d 492 (Tex. Civ. App.-Texarkana 1974, writ ref'd n.r.e.) When maximum medical improvement is litigated in a contested case hearing, the hearing officer considers all the evidence at the hearing, beginning with that as to certification of maximum medical improvement by a doctor, in deciding whether maximum medical improvement has occurred and, if so, whether it is based on reasonable medical probability. *See* Lucas v. Hartford Accident and Indem. Co., 552 S.W.2d 796 (Tex. 1977).

The record supports the hearing officer's assertion that there was no issue as to whether respondent had to pay medical benefits. The issue at hearing was agreed to and the first indication by appellant that he questioned medical benefits was in his closing statement. While, as stated by the hearing officer, medical benefits were not at issue in this hearing, that does not mean that the determination of the hearing officer as to temporary income benefits affects whether medical benefits are due. "Income benefit" means a payment made to an employee for a compensable injury. The term does not include medical, death, or burial benefits." Article 8308-1.03(26) of the 1989 Act. The appeals panel has stated that medical benefits have not necessarily ceased just because maximum medical improvement has been reached. *See* Texas Workers' Compensation Commission Appeal No. 91125, *supra*. Medical benefits do not have to cure or promote added recovery of an injury; they may also relieve the effects of the injury. Article 8308-4.61(a)(1) of the 1989 Act. Article 8308-4.68 then provides the mechanism for a carrier to dispute either the amount or the entitlement to medical benefits when it chooses not to pay a health care provider. That article also provides that the carrier shall report why payment for health care should not be made and allows an Administrative Procedure and Texas Register Act hearing under article 8308-8.26(d) of the 1989 Act.

The decision of the hearing officer is not so contrary to the evidence as to be manifestly unjust and wrong. Twin City Fire Ins Co v. Grimes, 724 S.W.2d 956 (Tex. App.-Tyler 1987, writ ref'd n.r.e.). We affirm.

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Joe Sebesta
Appeals Judge

CONCUR:

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Stark O. Sanders, Jr.
Chief Appeals Judge

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Robert W. Potts
Appeals Judge