APPEAL NO. 92255

On May 12, 1992, a contested case hearing was held to consider whether appellant (claimant below) had reached maximum medical improvement (MMI). After considering the report of Dr. To, M.D., a doctor designated pursuant to the provisions of the Texas Workers' Compensation Act, TEX. REV. CIV . STAT. ANN. art. 8308-4.25(b) (Vernon Supp. 1992) (1989 Act) (who found that appellant had reached MMI on March 27, 1992 with a whole body impairment rating of two percent), other medical evidence presented by the parties, and the testimony of appellant, the hearing officer concluded that appellant had indeed reached MMI on March 27, 1992 and that the other medical evidence wasn't sufficiently great to overcome the presumptive weight given the designated doctor's report under Article 8308-4.25(b). In his request for review, appellant challenges the adequacy of the designated doctor's report and clinical examination as well as its finding of MMI, contending the great weight of the other medical evidence was to the contrary. Appellant's numerous other contentions are, in essence, that the report of the benefit review conference (BRC) did not address all issues raised at the BRC; that he didn't have the "representation" of a Texas Workers' Compensation Commission (Commission) ombudsman at the BRC; that he didn't know before Dr. To was selected that he had 10 days in which to attempt to reach agreement with respondent on the selection of the designated doctor; that neither the benefit review officer (BRO) nor the hearing officer should have considered an earlier report prepared by JSt, M.D. finding MMI; and, that the designated doctor's concurrence in appellant's entering a work hardening program contradicts his finding of MMI. Appellant requests the Commission to order respondent to resume payment of temporary income benefits (TIBS), and to correct Dr. To's two percent whole body impairment rating to reflect loss of function due to pain and discomfort. Respondent views the sole question on appeal as whether the hearing officer's decision that MMI was reached on March 27, 1992, is supported by the evidence.

DECISION

Finding no merit in appellant's contentions and finding sufficient evidence to support the hearing officer's findings and conclusions, we affirm.

Appellant was employed by (employer) as a teller. He said he first began to manifest back problems in 1976 and understood he had Schmorl's nodes, as well as Scheuermann's disease which he described as a condition involving the failure of his vertebrae to grow as rapidly as the rest of his body. Appellant is unaware of the current status of his Scheuermann's disease. He said employer hired him knowing he had back problems. He apparently sustained a back injury on _____ in the course and scope of his employment. The evidence wasn't clear as to whether such back injury was a new injury or the aggravation of his preexisting back condition. The injury apparently was caused by lifting boxes of coins and again it wasn't clear whether the injury at the (employer) was a single, discrete event or the result of repeated lifting of heavy coin boxes. In any event, that appellant had a compensable injury and was receiving TIBS

and medical benefits was not in dispute, and the sole issue before the hearing officer was whether appellant had reached MMI on March 27, 1992, as the designated doctor found.

According to the BRC report, no disputed issues were resolved at the BRC held on April 10, 1992. The sole disputed issue at the BRC, according to the report, was "[w]hether the great weight of the medical evidence is contrary to Dr. To's finding that [appellant] has reached [MMI]." At the contested case hearing, appellant disagreed with that statement of the issue but did agree to its being reframed by the hearing officer to "whether the Claimant has reached [MMI]." The BRC report did not indicate that Dr. To's two percent whole body impairment rating was a disputed issue, and it was not an issue at the contested case hearing aside from appellant's occasional references to his contention that Dr. To should have assigned some additional impairment rating for pain and discomfort pursuant to the AMA Guildlines. At the BRC, appellant's position was stated as challenging Dr. To's MMI determination on the basis that the great weight of the medical evidence was to the contrary. The BRC report reflected that in addition to Dr. To's report, other medical evidence was considered including reports from Dr. N, Dr. W, Dr. M, Dr. G, Dr. C, Dr. Tu, Dr. St, and Dr. Sc. The BRO recommended that appellant be found to have reached MMI on March 27, 1992. Appellant's complaints about the BRC are, in essence, that he didn't receive Commission ombudsman assistance; that the BRO essentially disregarded his many complaints about Dr. To's finding of MMI; that the BRO shouldn't have considered Dr. St's report; that the BRO failed to address Dr. To's failure to assign a percentage of impairment based on loss of function due to pain and discomfort; and that he wasn't given the 10 days to attempt to reach agreement with respondent on the selection of the designated doctor as provided for in Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE §130.6 (TWCC Rule). As appellant put it, the BRC "seemed all cut and dried."

At the contested case hearing, respondent introduced a Report of Medical Evaluation (TWCC-69), signed by Dr. To, an orthopedic surgeon, which stated that appellant reached MMI on March 27, 1992, and which assigned him a whole body impairment rating of two percent. This report, portions of which were difficult to read, stated that on _____ appellant injured his low back while loading 30 pound boxes of coins into a security truck; that his complaint was mid-back pain; that a 7/91 MRI revealed a bulge at L4-5; that appellant had mid-back tenderness; that the diagnoses were thoracic and lumbar spine strain, and preexisting Schmorl's nodes upper lumbar spine; that no surgery was necessary; and, that appellant could use a work hardening program to strengthen his back muscles. Appellant conceded that this report indicated that Dr. To had reviewed his medical records and he testified that Dr. To had a thick folder of his medical records present during the clinical exam. He also said that x-rays were taken at Dr. To's office prior to the clinical examination.

Appellant attacks the validity of Dr. To's finding of MMI on the basis that his clinical

exam was inadequate (exam was brief; appellant wasn't asked to disrobe; Dr. To didn't look at his back and neck but confined the physical exam to appellant's knees, ankles, feet, and reflexes, didn't conduct compression, range of motion, and flexion tests, and didn't use an inclinometer); that while Dr. To's TWCC-69 report stated it was "per the 3rd Edition of the AMA Guidelines," it didn't reflect that such guidelines were the "second printing" of the third edition, the version required by Article 8308-4.24; that Dr. To's TWCC-69 report wasn't forwarded to the Commission and the parties no later than seven days after Dr. To's exam as required by TWCC Rule 130.1(h), since appellant received his copy by telephonic document transfer two days before the BRC; that the TWCC-69 report doesn't show how Dr. To reached his conclusion on MMI, i.e. the data relied on; that Dr. To didn't understand his report would get presumptive weight; that Dr. To didn't determine the degree of appellant's pain impairment; that the impairment evaluation was conducted before appellant was "static and well-stabilized following completion of all necessary passive, surgical, and rehabilitative treatment;" and, that when appellant advised Dr. To he was to see Dr. Sc the next day about the possibility of entering a rehabilitation and pain management program, Dr. To encouraged him to keep the appointment.

The other medical evidence included a December 11, 1991 report from JSt, M.D., an orthopedic surgeon. While it may be correct that the parties agreed to use Dr. To's report to establish the date respondent contended appellant reached MMI, Dr. St's report was nonetheless relevant on the disputed issue and properly considered. According to this report, appellant dated the onset of his present back pain complaints to _____; attributed the aggravation of his preexisting condition (Scheuermann's disease) to the stooping and bending required in his job; continued working full-time until April 5, 1991 and part-time until July 1991; and has been treated since his injury by Dr. N, a chiropractor, although he has also seen Dr. Tu and Dr. M. Dr. St reviewed the records of Drs. N and M, MRI and CAT scan studies, conducted a clinical examination, and diagnosed (1) preexisting thoracic vertebral apophysitis, (2) low back strain, by history (without positive objective clinical abnormalities from the standpoint of appellant's job related injury), and (3) degenerative disc disease, lumbosacral spine. Dr. St went on to opine that appellant had reached MMI respecting his job related injury of _____, and had zero percent whole body impairment, referencing the third edition of the Guides. The report indicated a copy would be sent to appellant's treating doctor, Dr. N. Appellant also testified that Dr. To's report was sent to his treating doctor. From the comments of appellant and of counsel for respondent, it appeared that at some time, possibly at the BRC, the parties agreed that respondent would rely on Dr. To's report with the 3/27/92 MMI date, rather than Dr. St's report, and that respondent then paid appellant additional TIBS to 3/27/92.

Appellant introduced a "Radiographic Biomechanical Pathology Report" of 4/28/92, apparently prepared by RL, D.C., which reported the results of a review of appellant's

spinal x-rays; a "Radiology Report" of April 28, 1992 from DW, D.C., which discussed appellant's spinal x-rays; a series of "digitized x-rays" of appellant's spine compared with a reference spine model; and an EMG scan report from Dr. N of May 7, 1992. None of these documents mentioned MMI. Appellant also introduced a Specific and Subsequent Medical Report (TWCC-64), signed by Dr. N on April 22, 1992, which stated he was seeing appellant twice a week, that appellant's prognosis was "three to six months," and that his date of achieving MMI was "undetermined." Dr. St's report had stated he saw no indication for chiropractic treatment and didn't consider such treatment to be necessary or reasonable for appellant's condition.

Appellant also introduced a March 22, 1992 report from JSc, M.D., a physical medicine and rehabilitation specialist, who stated he had reviewed appellant's records, including his treatment by Dr. M in the 1970s and 1980s, apparently for his preexisting spinal problems. He noted that appellant, then age 26, had been receiving chiropractic treatments three to five times a week for the past 10 months, and "has not really responded from a long-term standpoint to frequent manipulation treatments or frequent physical therapy modalities," nor to medications. Dr. Sc's report also referred to appellant's psychiatric history and stated that although appellant could perform light duty physical jobs, his emotional status and chronic pain status would make him a poor candidate for any work setting at the present time. Dr. Sc's report did not address whether appellant had reached MMI.

Article 8308-4.25(b) provides as follows:

> If a dispute exists as to whether the employee has reached [MMI], the commission shall direct the employee to be examined by a designated doctor selected by mutual agreement of the parties. If the parties are unable to agree on a designated doctor, the commission shall direct the employee to be examined by a designated doctor selected by the commission. The designated doctor shall report to the commission. The report of the designated doctor shall have presumptive weight, and the commission shall base its determination as to whether the employee has reached [MMI] on that report unless the great weight of the other medical evidence is to the contrary.

Article 8308-6.34(e) provides that the hearing officer, as the fact finder, is the sole judge of the relevance and materiality of the evidence, as well as the weight and credibility it is to be given. We will not substitute our judgment for his nor disturb his factual findings where, as here, there is some evidence of a substantial and probative character to support them. Commercial Union Assurance Company v. Foster, 379 S.W.2d 320, 322-323 (Tex. 1964). We are well satisfied here that Dr. To's report, which was entitled to presumptive weight, was not contrary to the great weight of the other

medical evidence adduced. Dr. To's report was corroborated by Dr. St's earlier report. After Dr. To's report was sent to appellant's treating doctor, he obviously disagreed when he signed the TWCC-64 stating appellant's MMI date was undetermined. We find no merit to appellant's assertions, unsupported by any medical evidence, that Dr. To's examination was inadequate to support his determination of MMI. We similarly find no merit in appellant's assertions of defects in the accomplishment of the TWCC-69 itself. It appears to meet the requirements of TWCC Rule 130.1. We would further observe that Dr. To's apparent concurrence in appellant's commencement of a work hardening program is not inconsistent with his determination that appellant had reached MMI. MMI is defined as the earlier of the expiration of 104 weeks from the date benefits begin to occur, or "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) (1989 Act).

As for appellant's assertions of numerous other issues present at the BRC which were not forwarded by the BRO for resolution at the contested case hearing, including the manner in which the designated doctor was selected, we note that Hearing Officer Exhibit No. 1 contains a copy of the Commission's letter of April 20, 1992, which forwarded to appellant a copy of the BRC report. This letter advised appellant, among other things, that the BRC identified the unresolved disputed issue, each party's position thereupon, and the BRO's recommendation for its resolution. The letter went on to state that any party could make a written response to the unresolved dispute and that such a response must be sent to the Commission no later than 20 days after receiving the BRC report. TWCC Rule 142.7(e)(2) provides that "[a]n unrepresented claimant may request additional disputes to be included in the statement of disputes by contacting the commission in any manner no later than 15 days before the hearing." No evidence was adduced by appellant, nor did the record otherwise indicate, that he made a written response to the statement of disputed issues, or otherwise attempted to comply with TWCC Rule 142.7 in an effort to get additional disputed issues included in the statement of disputes for resolution by the hearing officer. *See* Texas Workers' Compensation Commission Appeal No. 91100 decided January 22, 1992, where we commented on the failure to raise issues at earlier proceedings and our unwillingness to address them for the first time on appeal.

We have noted in prior decisions that our review is limited to the record developed at the hearing (Article 8308-6.42(a)), and we have rejected exhibits first tendered on appeal. *See, e.g.*, Texas Workers' Compensation Commission Appeal No. 92154 decided June 4,1992. We decline to consider documents attached to appellant's request for review which were not a part of the record developed at the hearing. In so doing, we observe that appellant did not show that he only acquired knowledge of such documents after the hearing; that the information in the documents would probably produce a different result; or, that it was not a want of diligence that kept appellant from earlier

learning of the documents. One of the documents was the report of Dr. Sc, already a part of the record. Another document consisted of several pages of information concerning "The Impairment System," apparently excerpted from some publication. The third document was a note, ostensibly from Dr. To, which stated that appellant "should stay off work till work hardening program completed (4-6 weeks)." None of these documents mentioned MMI nor would they, even if considered, have resulted in Dr. To's report being contrary to the great weight of the other medical evidence.

After a careful review of the record, we are satisfied that no reversible error was committed by the hearing officer and that the findings were not based upon insufficient evidence nor were they so against the great weight and preponderance of the evidence as to be manifestly unjust. In re King's Estate, 150 Tex. 662, 244 S.W.2d 660, 662 (1951); Pool v. Ford Motor Co., 715 S.W.2d 629, 635 (Tex. 1986).

Finding no error, the decision and order of the hearing officer are affirmed.

_____
Philip F. O'Neill
Appeals Judge

CONCUR:

_____
Robert W. Potts
Appeals Judge

_____
Susan M. Kelley
Appeals Judge