APPEAL NO. 92395

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 July 9, 1992, a contested case hearing was held in (city), Texas, with (hearing officer) presiding. She held that maximum medical improvement (MMI) had not been reached and that (Dr. H) was a second choice of treating doctor. Appellant asserts that findings of fact addressing length of treatment by a doctor, initial choice of a treating doctor, unavailability of a treating doctor, proper certification of MMI, and lack of certification of MMI, along with conclusions of law that follow these findings, are in error.

DECISION

Finding that the evidence sufficiently supports the decision, we affirm.

Claimant, respondent herein, was employed by (construction) on (date of injury), when he hurt his back. No issue of compensability is before us. He saw a doctor on (date), Dr. W, to whom he was sent by the employer. In July 1991, he was laid off and then went to work for AEC, who released him because of his past injury. Next, he worked for EBC for a short period until he found that he could not do the work and quit in August, 1991. He has not worked since. During the time that he worked for EBC, that company was concerned about his back injury of (date of injury) and sent him to a doctor for review--that doctor was the same Dr. W who he had seen on (date) and probably on June 14th. When sent to Dr. W by EBC in late August 1991, more than 60 days had passed since respondent saw Dr. W for the first time about this injury.

The first issue raised by appellant is that Dr. W constituted respondent's first choice of treating doctor by operation of Tex W. C. Comm'n, 28 Tex Admin Code § 126.7 (Rule 126.7) which says that if a doctor chosen by the employer continues to treat an employee for 60 days, that doctor becomes the employee's choice of a treating doctor. Respondent's testimony indicated that Dr. W had not treated him since June, and in August Dr. W was checking his status on behalf of his new employer, EBC.

The hearing officer found that respondent did not receive treatment from Dr. W for a period of 60 days. Based on the respondent's testimony describing the basis for his visit to Dr. W in August 1991 and the medical records of Dr. W that were admitted (only an Initial Medical Report of the (date), treatment and one other page indicating that respondent was seen on June 14th and released from medical treatment), the finding that treatment of respondent by Dr. W did not comprise 60 days was sufficiently supported by the evidence. The Appeals Panel has previously questioned whether an examination pursuant to Article 8308-4.16 of the 1989 Act constituted a health care appointment in Texas Workers' Compensation Commission Appeal No. 92203 (Docket No. redacted) dated July 6, 1992. Appellant's next issue is addressed by this determination since that issue involved whether Dr. Mc was the initial treating doctor chosen. All agreed he was a treating doctor; the issue was whether he was the first or the second chosen treating doctor based on the appellant's

assertion that Dr. W was the first chosen. The evidence sufficiently supports the finding that Dr. Mc was the first chosen treating doctor.

Respondent first saw Dr. Mc, his family doctor, for this injury in August, 1991. By "Specific and Subsequent Medical Report" Dr. Mc indicated on June 15, 1992 that respondent changed his treating doctor to Dr. K on October 22, 1991. Respondent, at the hearing, did not indicate that he knew of the change in treating doctors, in October 1991, as recorded in (month year), but any question as to this change does not affect the issues in this decision. Dr. K, in a letter written to Kemper Insurance Company on October 22, 1991, stated that he found a bulging disc, discounted surgery, and recommended that respondent be referred to Dr. WA for a work hardening program. Dr. K's October letter appears in both Carrier Exhibit 6 and 8, and Exhibit 8 also contains Dr. K's letter of January 8, 1992, to Kemper in which he states:

> (Respondent) is seen in re-evaluation January 8, 1992. He tells me that he has not been started in Work Hardening as we had recommended. He tells me that you claim that you have not received our original consultation. It has been sent to you twice, and I am sending it to you for the third time.
>
> As I have said before, this man does not need my services, as he does not need surgery. He has been referred for a therapy program and Work Hardening Program with Dr. (WA).
>
> If you do not appreciate my advice, you may refer him to any other physician you care to. I do not intend to see him again.

Article 8308-4.62 of the 1989 Act addresses an employee's right to choose a treating doctor and describes subsequent choices. Article 8308-4.64 of the 1989 Act then lists situations in which a selection of a doctor does not constitute a choice of doctor. One exception in the latter article is:

> (4)a selection made because the original physician dies, retires, or becomes otherwise unavailable or unable to provide medical care to the employee;

Finding of Fact No. 12, that Dr. K became unavailable to treat respondent is sufficiently supported by the letter of Dr. K dated January 8, 1992 set forth above. Dr. K states that there is no need for claimant to see him anymore since his specialty is surgery which is not appropriate for respondent. Dr. K then goes further and says that he does not intend to see respondent again; no evidence indicates that Dr. K's reference to his intent was not sincere, and no evidence indicates that he ever treated respondent again. We note that respondent did not initiate this sequence that made Dr. K unavailable.

Before considering the findings of fact concerning MMI, one conclusion of law that

dealt with choice of doctors was appealed and is appropriate to include at this point. The findings previously discussed sufficiently support the conclusion that respondent is entitled to be treated by his second choice of doctors, Dr. H. Dr. H has been seen by respondent since Dr. K ceased to be a treating doctor because of unavailability, which allowed respondent to make a choice to replace Dr K. Also, as shown by the quoted portion of Dr. K's letter of January 8th, Dr. K had referred respondent to Dr. WA for work hardening prior to Dr. K becoming unavailable. The fact that Dr. WA did not see respondent until after Dr. K ceased to be available does not make Dr. WA respondent's choice of treating doctor. In addition we refer to Texas Workers' Compensation Commission Appeal No. 92064 (Docket No. redacted) dated April 3, 1992, and Texas Workers' Compensation Commission Appeal No. 92147 (Docket No. redacted) dated May 29, 1992, which indicate that Articles 8308-4.68 and 8308-8.26 of the 1989 Act govern disputes over medical treatment and billing.

Appellant states also that the hearing officer erred in Finding of Fact No. 14 which said that Dr. WA did not properly certify MMI. That finding was made after the hearing officer reviewed a Form TWCC-69 (old form) signed by Dr. WA which says that MMI was reached on March 10, 1992 with 0% whole body impairment. No entry was made in Item 13 which calls for information about respondent's condition, findings of previous appointments not reported, and "a description of the most recent clinical evaluation." While the TWCC-69 before us contained no space for a date of the evaluation, Dr. WA did write "4-14-92" immediately below his signature. The copy offered by the carrier as part of Exhibit 8 did not contain any accompanying report of examination, narrative summary, or progress note dated the same day that could be viewed together with the TWCC-69 in determining whether it complied with applicable articles of the 1989 Act and rules of the Commission. *See* Texas Workers' Compensation Commission Appeal No. 92077 (Docket No. redacted) dated April 13, 1992. That Appeals Panel decision did not say or stand for the proposition that the Commission should review all other reports made by Dr. WA, at times other than when he evaluated respondent for MMI, together with reports from his work hardening center, to see if the composite meets the criteria for certification of MMI. Certainly if no other criteria prevents certification of MMI, an attachment to the TWCC-69 that comprises all of item 13 of the form (rather than splitting the information between the form and the attachment) will not circumvent certification. The Appeals Panel has upheld a hearing officer's determination that proper certification of MMI was not made when the TWCC-69 contained no information in item 13. *See* Texas Workers' Compensation Commission Appeal No. 92132 (Docket No. redacted) dated May 15, 1992. The TWCC-69 of Dr. WA, submitted with item 13 blank, did not substantially comply with requirements for certification of MMI; it did provide sufficient evidence for the hearing officer to find that Dr. WA did not properly certify MMI.

While not an issue on appeal, appellant at the hearing attacked the ability of the respondent, as a layman, to dispute MMI. In doing so, appellant cited Texas Workers' Compensation Commission Appeal No. 92031 (Docket No. redacted) dated March 13, 1991. That decision was not addressing whether a dispute of MMI could be made, but referred to Article 8308-1.03(32) of the 1989 Act which defines MMI in terms of evidence

that is "based on reasonable medical probability." Under that criteria, Appeal No. 92031 questioned whether the hearing officer should give any weight to the claimant's testimony that he was still improving and pointed out that such testimony was the only evidence offered that MMI had not been reached. Subsequently, Texas Workers' Compensation Commission Appeal No. 92164 (Docket No. redacted) dated June 5, 1992, stated:

> 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.

Similarly, Texas Workers' Compensation Commission Appeal No. 92312 (Docket No. redacted) dated August 19, 1992, in pointing out that a claimant may not be free of pain when MMI is reached, stated:

> Lay testimony about the nonexistence of MMI will not overcome the presumption accorded to the designated doctor.

Article 8308-4.25 of the 1989 Act and Rule 130.6(a) provide that MMI may be disputed and neither limits the ability of the claimant, because of any lack of medical training, to raise that dispute.

The only other evidence addressing MMI was that of the Commission's designated doctor who did not find that MMI had been reached but estimated a date that it would be reached in the future. While appellant asserts error in the finding of fact that said no other doctor found MMI in respondent, no evidence supports that assertion. This finding is based on sufficient evidence of record. The conclusion that MMI has not been reached is sufficiently supported by the finding that Dr. WA did not properly certify MMI and the finding that no other doctor did so (which includes the designated doctor, whose report is given presumptive weight--see Article 8308-4.25(b) of the 1989 Act).

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

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Joe Sebesta
Appeals Judge

CONCUR:

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Robert W. Potts
Appeals Judge

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Susan M. Kelley
Appeals Judge