APPEAL NO. 92441

This appeal arises under the Texas Workers' Compensation Act of 1989 (1989 Act), TEX. REV. CIV. STAT. ANN. arts. 1.01 through 11.10 (Vernon Supp 1992). On June 30, 1992 a contested case hearing was held in (city), Texas, with (hearing officer) presiding. She found that claimant, appellant herein, had reached maximum medical improvement (MMI) with no impairment and therefore was entitled to no more income benefits. Appellant states that he has been unjustly treated and is filing an appeal to have his case reopened; the case will be reviewed to see if reversible error occurred.

DECISION

Finding that the decision is supported by sufficient evidence of record, we affirm.

Appellant was working for a construction company on (date of injury), when he slipped while on the first level of a scaffold. He grabbed a pole to keep from falling and swung around and heard something pop in his back. There was no issue as to injury or notice and appellant went to a hospital emergency room that night to be checked.

Appellant was then treated by Dr. M from March 27, 1991 to, at least February 19, 1992. Initially Dr. M noted tenderness but no spasm. X-rays and an MRI of the back done in May 1991 were normal. Appellant was treated with Tylenol 4 (with additional drugs including Soma, Vicodin and Dalmane), physical therapy and bedrest. On February 12, 1992, Dr. M returned appellant to work effective February 17th. On March 11, 1992, Dr. M saw appellant and apparently prepared the TWCC-69 that was admitted into evidence. That form does not have a space for the examination date, but it notes that Dr. M was aware of the second MRI (a disc was slightly bulging) that was prepared on March 3, 1992, when he determined that MMI had been reached on February 17, 1992, with no impairment. He refers to the fact that Dr. F also saw appellant in November 1991 and thought that he should return to work. He refers to the normal MRI as part of the basis for his conclusion but notes that the recent MRI was different and recommends a third opinion.

Appellant pointed out that when he stopped going to Dr. M (apparently in February or March 1992), he began to see Dr. B. Dr. B, according to appellant, told appellant that "he didn't see where washing a car would affect appellant in any type of way" but that he should do no lifting. Appellant indicated that he needed time to get added comments from Dr. B as to his condition. The hearing officer did not grant a continuance but told appellant that she would leave the record open for two weeks, until July 15th, for appellant to provide whatever he wanted to from Dr. B. In addition appellant pointed out that Dr. B does not prescribe Tylenol 4 for him as Dr. M did, but said that he was able to get Tylenol 4 from a friend and that he had taken three of them the day of the hearing. Appellant said that the drug does not affect his understanding or thinking.

Documents in evidence from medical personnel also include the following:

Dr. P did an electromyogram of appellant's left arm which was normal.

Dr. F saw appellant on behalf of the respondent in November 1991 and reported his physical exam as normal, but noted that he did not have the MRI (at that time there was only one MRI, which was read as normal). He saw no need for surgery and said that he should be able to return to work.

Dr. B is a neurosurgeon who appellant was currently seeing. A letter from Dr. B dated March 24, 1992 to the respondent says that appellant wants his records transferred to Dr. B. His impression is a herniated disc at L4-5 and he planned to do another study of the disc and possibly surgically remove it.

An MRI dated April 24, 1992, shows mild bulging of the L4-5 disc and was described as similar to the MRI of March 3, 1992.

Dr. K was apparently named as the designated doctor. (There was no appointing order in the record, but the benefit review conference report of May 20, 1992, referred to Dr. K's report that MMI has not been reached, as that of the designated doctor.) No party contested that Dr. K was so appointed. Dr. K on May 6, 1991, wrote that the appellant did have tenderness in the lower back and some limitation in straight leg raising. He stated that the last MRI showed a possible small herniated disc and, noting that the appellant "feels that he is disabled," Dr. K agreed with Dr. B that another study and possible excision of the disc was called for. This summary apparently was the one used at the BRC to indicate that MMI had not been reached. Dr. K thereafter changed his opinion after receiving a video sent by the respondent and prepared a TWCC-69 which found MMI on June 3, 1992 with no impairment. (The video showed appellant walking with a cane at an office building and later walking, bending, and washing cars, unhindered.) The respondent said at hearing, when appellant requested time to get comments from Dr. B which the hearing officer granted, that it had sent a copy of the video to Dr. B also so appellant should encounter no delay in being able to secure Dr. B's comments.

The hearing officer, when she said that she would leave the record open until July 15th for appellant to get his doctor's comments, also gave respondent until July 22nd to comment on the submission by appellant's doctor. The decision does not state that appellant submitted any document by July 15th but does reflect that the respondent submitted the letter it received from Dr. M, in which he referenced the respondent's June 24th letter to Dr. B raising 10 questions about its enclosed video. Apparently Dr. B provided the inquiry he received to Dr. M and the record only shows that Dr. B, in a very short letter dated July 13, 1992, said that a study is scheduled and appellant is unable to work; no reference was made to MMI. Consistent with his February assertion that MMI had been reached, Dr. M, by letter dated July 6th, says again that MMI has been reached with no impairment.

As stated, the record does not contain a copy of the order of designation so it is impossible to say whether there were any limits to Dr. K's review as designated doctor.

Without an order showing otherwise, however, we cannot say that Dr. K was prohibited from amending or changing his report in the circumstances of this case. There is no evidence that the information Dr. K considered between his initial submission and the latter TWCC-69 was immaterial or irrelevant. Similarly, there is no evidence that Dr. K revised his initial submission because of any motive other than his evaluation of the appellant's condition. Further, and equally important, the revision was prepared within a short period of the initial submission and before the contested case hearing.

The hearing officer is the sole judge of the weight and credibility of the evidence. Article 8308-6.34(e) 1989 Act. She could view the revised report of Dr. K, submitted in June 1992 as entitled to consideration as the designated doctor's report under the provisions of Article 8308-4.25, 1989 Act, and give it presumptive weight. After reviewing all the medical evidence of record, including a determination of MMI by appellant's primary physician in February 1992, we find sufficient evidence to uphold the hearing officer's Finding of Fact No. 6, which reads:

6.Dr. [K]'s subsequent certification of claimant's maximum medical improvement has not been overcome by the great weight of contrary medical evidence.

The evidence is also sufficient to uphold the hearing officer's Findings of Fact Nos. 7 and 8 that Dr. K's revised report found zero percent impairment, and his report was not overcome by other evidence. Finding of Fact No. 5 that Dr. K's initial opinion has been overcome by the great weight of medical evidence is not necessary to the decision (*see* Texas Indem. Ins. Co. v. Staggs, 134 Tex 318, 134 S.W.2d 1026 (1940)), and may be disregarded.

While there was sufficient evidence of record to support the hearing officer's finding that the injury in question does not prevent appellant from obtaining and retaining employment, the determination of MMI makes that finding unnecessary. Article 8308-4.23(b) provides that temporary income benefits continue until MMI is reached. After MMI is reached, all income benefits relate to impairment, not disability. In addition, the finding relating to no intervening injury is not against the great weight and preponderance of the evidence. A later MRI showing a bulging disc when an earlier one did not show an abnormal disc does not necessarily mean that another injury occurred. *See* Texas Workers' Compensation Commission Appeal No. 92316 (Docket No. redacted) decided August 21, 1992, which related that a disc could bulge with no injury at all.

The hearing officer, contrary to the assertion in the appeal, did not treat appellant unjustly. While a continuance was not granted, time was given him to provide additional material from Dr. B for the hearing officer to consider. The denial of a continuance was not an abuse of discretion. The record does not show that appellant could have presented any other evidence had the hearing been continued. The hearing officer questioned the appellant to draw out his basis for believing that MMI had not been reached and that disability still existed. In addition, when he became anxious, she recessed the hearing and allowed him to talk to a lawyer. Her questions upon appellant's return made it clear that if appellant had obtained counsel, she was prepared to allow sufficient time for that counsel

to act in representing appellant. Appellant stated that he did not have counsel. When appellant objected to the admission of the video, the hearing officer questioned him about whether he appeared in it and concluded that his concerns addressed the weight of that evidence, not its admissibility. Her ruling was not in error.

The decision of the hearing officer is not against the great weight and preponderance of the evidence and is affirmed.

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Joe Sebesta
Appeals Judge

CONCUR:

_____
Stark O. Sanders, Jr.
Chief Appeals Judge

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Philip F. O'Neill
Appeals Judge