APPEAL NO. 92453

On July 29, 1992, a contested case hearing was held in (city), Texas, with (hearing officer) presiding as the hearing officer. The hearing officer determined that the claimant, (claimant), appellant herein, sustained an injury in the course and scope of his employment on (date of injury), that appellant is not entitled to temporary income benefits (TIBS) because he did not have disability for a period of eight days, and that appellant reached maximum medical improvement (MMI) on February 3, 1992. The hearing officer ordered that appellant take nothing in TIBS and ordered respondent, the employer's workers' compensation insurance carrier, to pay reasonable and necessary medical benefits in accordance with the Texas Workers' Compensation Act, TEX. REV. CIV. STAT. ANN. art. 8308-1.01 *et seq*. (Vernon Supp. 1992) (1989 Act).

Appellant contends that the hearing officer erred in her findings and conclusions with regard to MMI and asks that we reverse her determination on MMI.

DECISION

The decision of the hearing officer is affirmed.

The hearing officer found that on (date of injury), appellant injured his back, neck, and shoulder in the course and scope of his employment when the truck in which he was riding lurched forward and then stopped suddenly causing appellant to fall. On the day of his injury, appellant was sent to (Dr. V), M.D., whom the parties referred to as the "company doctor." In an undated Report of Medical Evaluation (TWCC-69), (Dr. V) reported that appellant reached MMI on February 3, 1992, and assigned appellant a whole body impairment rating of zero percent. Appellant testified he chose to be treated by (Dr. C), D.C., from February 17, 1992, to May 20, 1992. In a Specific and Subsequent Medical Report (TWCC-64) dated May 1, 1992, (Dr. C) reported that he anticipated that appellant would achieve MMI on May 15, 1992. In a deposition on written questions taken June 26, 1992, (Dr. C) stated that it was hard for him to answer with any reasonable medical probability whether appellant had reached MMI because he had not seen appellant since May 20, 1992. He said that as of his last visit, appellant had not reached MMI. Appellant said that he had also been treated by (Dr. H). Several reports that purported to be from (Dr. H) were in evidence, but none of them mention MMI. At the April 9, 1992, benefit review conference (BRC), the parties agreed on (Dr. Cl) as the designated doctor. Appellant testified that he thought he was examined by (Dr. Cl) in June 1992, and that (Dr. Cl) gave him a physical examination from "head to toe." Over appellant's objections, three reports from (Dr. Cl) were admitted into evidence. In a June 11, 1992 "Neurosurgical Evaluation Report," (Dr. Cl) reported his findings after giving appellant a physical examination, and stated, among other things, that "[i]n terms of maximum medical improvement, I think he has probably reached it. (Dr. V) gave it to him on 2-3-92." In a report dated July 17, 1992, (Dr. Cl) stated that "I agree with the maximum medical improvement by (Dr. V)." In an undated Report of Medical Evaluation (TWCC-69), (Dr. Cl) reported that appellant reached MMI on February 3, 1992.

MMI 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; or (B) the expiration of 104 weeks from the date income benefits begin to accrue. Article 8308-1.03(32). Pursuant to Article 8308-4.25(b), the report of the designated doctor has presumptive weight, and the Commission must 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.

The hearing officer made the following findings and conclusion relevant to her determination on MMI:

Finding 9.(Dr. V) certified claimant as having reached MMI on February 3, 1992, with zero percent whole body impairment.

Finding 10.(Dr. Cl) was the designated doctor.

Finding 11.(Dr. Cl) certified claimant as having reached MMI on February 3, 1992, with a zero percent whole body impairment.

Finding 12.(Dr. Cl's) opinion has not been overcome by the contrary medical evidence.

Conclusion 5. Claimant reached MMI on February 3, 1992.

Appellant's first contention is that the reports and documents of (Dr. Cl), Respondent's Exhibit No. 5, are unauthenticated, hearsay documents which are inherently untrustworthy and unreliable and should not have been admitted into evidence. At the hearing, appellant did not raise a hearsay objection, but did object on the basis that the documents were not properly authenticated. Ordinarily, in passing on the correctness of the trial court's ruling in admitting evidence, the reviewing court will consider the ruling in light of the objection made at trial, and the complaining party will not be heard to present reasons for excluding evidence other than those made at trial. *See* Marsh v. State, 276 S.W.2d 852 (Tex. Civ. App. - San Antonio 1955, no writ). In any event, all three of (Dr. Cl's) reports which comprised Respondent's Exhibit No. 5 were signed by (Dr. Cl) and thus were admissible under Article 8308-6.34(e) as written reports signed by a health care provider.

Appellant's second contention is that (Dr. Cl's) opinion should not have been given presumptive weight because the great weight of the other medical evidence is to the contrary. Having reviewed the medical evidence on the issue of MMI, we conclude that the hearing officer's finding that (Dr. Cl's) opinion was not overcome by the contrary medical evidence to be sufficiently supported by the evidence. (Drs. C) and (V) agreed that appellant had reached MMI on February 3, 1992; only (Dr. C) disagreed with (Dr. Cl's) opinion as to MMI. (Dr. H) did not provide an opinion as to MMI. We do not find the maritime law case cited by appellant, Maritime Overseas Corp. v. Thomas, 681 S.W.2d 160 (Tex. App. - Houston [14th Dist.] 1984, no writ) to be controlling. In that case, the court

reversed and modified the jury verdict that a seaman who was injured in February 1977 had attained "maximum medical cure" on June 24, 1978 where there was no evidence that he received medical treatment after July 18, 1977, which tended to improve his condition. The court held that the opinion of the seaman's doctor, who had not seen the seaman from July 18, 1977 until December 8, 1978, that the seaman had not reached maximum medical cure until some sixteen months following the accident was not supported by a factual basis and thus was without probative value. In the present case, (Dr. Cl), the designated doctor, examined appellant on or about June 11, 1992, reported his findings, and opined that he agreed with (Dr. V's) certification of MMI, which was given as of February 3, 1992. In addition to considering the report of (Dr. V), (Dr. Cl) indicates that he also examined x-rays taken by (Dr. C) and did not find any significant findings on them. Thus, (Dr. Cl) had a factual basis for his opinion that appellant reached MMI as of February 3, 1992. We do not find in the MMI provisions of the 1989 Act or in the Commission's rules, any provision which specifically restricts the designated doctor to certifying MMI only as of the date of his or her examination of the employee.

Appellant's third contention is that (Dr. Cl's) Neurosurgical Evaluation Report does not state that appellant reached MMI on February 3, 1992. As indicated earlier, in the neurosurgical report of June 11, 1992, (Dr. Cl) stated that appellant has "probably" reached MMI. We need not decide whether the words used by (Dr. Cl) in his June 11th report would be sufficient to certify MMI because also in evidence was a TWCC-69 (the Commission form used to report MMI and impairment rating) signed by (Dr. Cl) in which he reported that appellant had reached MMI on February 3, 1992. (Dr. Cl's) TWCC-69 is not complained of on appeal. We hold that the hearing officer's finding that (Dr. Cl) certified appellant as having reached MMI on February 3, 1992, to be sufficiently supported by the evidence.

Appellant's fourth contention is that (Dr. Cl's) Neurosurgical Evaluation Report should not have been admitted into evidence because appellant never received a copy of that report from respondent. Appellant raised the same objection when the report was offered into evidence. The BRC was held on April 9, 1992. Pursuant to Tex. Workers' Comp. Comm'n, 28 TEX. ADMIN. CODE Sec. 142.13(c) parties must exchange documentary evidence, including medical reports, no later than 15 days after the BRC, and thereafter must exchange additional documentary evidence as it becomes available. Respondent's attorney represented that he had received the June 11th report on or about July 16th and that he immediately sent it to appellant's attorney. Respondent presented to the hearing officer a letter dated July 16, 1992, addressed to an attorney associated with the law firm representing appellant (the attorney was present at the hearing) which letter indicated that respondent was sending with the letter "medical" recently received from (Dr. Cl). A signed "green card" bearing the same certified mail number as the letter and showing receipt on July 20th was also presented for the hearing officer's consideration.

The hearing officer determined that the June 11th neurosurgical report had been exchanged with appellant and admitted the report into evidence. We cannot conclude from the record that the hearing officer erred in finding that the June 11th report had been exchanged and in admitting it into evidence. However, if the hearing officer did err in

admitting the report, we do not believe her ruling amounted to reversible error. Reversible error is not ordinarily shown in connection with rulings on questions of evidence unless the whole case turns on the particular evidence admitted or excluded. *See* Atlantic Mutual Insurance Company v. Middleman, 661 S.W.2d 182 (Tex. App. - San Antonio 1983, writ ref'd n.r.e.). In this case, in addition to (Dr. Cl's) neurological report of June 11th, the hearing officer also had before her (Dr. Cl's) TWCC-69 and his report of July 17, 1992, from which she could reasonably have concluded that (Dr. Cl) certified appellant as having reached MMI on February 3, 1992.

The decision of the hearing officer is affirmed.

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Robert W. Potts
Appeals Judge

CONCUR:

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Stark O. Sanders, Jr.
Chief Appeals Judge

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Joe Sebesta
Appeals Judge