APPEAL NO. 92473

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 24, 1992, a contested case hearing was held in (city), Texas, with (hearing officer) presiding. He determined that claimant, respondent herein, had not reached maximum medical improvement (MMI) and was entitled to temporary income benefits (TIBS). Appellant asserts that the hearing officer should have found that MMI had been reached as did the properly designated doctor who found MMI. In the alternative, appellant asserts that it was error for the hearing officer to ignore the report of the physician who evaluated respondent even though he was not properly designated.

DECISION

Finding that the hearing officer's decision was sufficiently supported by evidence of record, we affirm.

Since the hearing dealt with only the issues of MMI and designated doctor, the injury was only referred to peripherally. Apparently respondent hurt her back when helping a customer lift a heavy box; he let go to adjust his grip and all the weight shifted to her when she was not in a position to support it.

The hearing officer announced at the beginning of the hearing that the issue was maximum medical improvement with a subissue of whether Dr. M was a designated doctor. No objection was raised to such issues; without objecting to the issue concerning a designated doctor, it is too late to do so on appeal. The hearing officer found that Dr. M was not designated properly, was not the treating doctor, and was not conducting a required medical examination under Article 8308-4.16.

Respondent testified that she called appellant because the doctors she had seen had not helped her. She told an adjuster, "I need to see a doctor that's going to help me." The adjuster replied to the effect that he had the names of three doctors--one was Dr. M. She then said that the adjuster cautioned her that she had to go because it would be the "second opinion of Dr. W." (On approximately October 24, 1991, Dr. W had conducted a medical examination at the request of the carrier and had predicted that MMI would be reached in "2 or 3 months".) She was also told that she could be fined if she did not go.

The appellant introduced a copy of its letter dated March 6, 1992, to respondent which referenced the telephone conversation between respondent and an adjuster. It said it was verifying that Dr. M had "been selected as the designated third doctor per section 4.25" of the 1989 Act. It gave the date of examination as March 17, 1992 and stated the location. It ended by saying, "[i]f you have any questions regarding this matter, please do not hesitate to contact me." It did not refer to the Commission as directing this, and did not refer respondent to the Commission.

Respondent was queried as to her understanding of "designated doctor". The hearing officer asked her, "did you have any understanding of the concept of a designated doctor? Was that explained to you?" She answered, "No". In cross examination, the appellant asked respondent, "[y]ou understand that you were going to him as a designated doctor pursuant to Section 4.25?" Her answer was, "[y]eah, because I didn't have anything to hide. And maybe I--I thought maybe he'd find what was really wrong with me".

The appellant introduced a copy of a TWCC-22 which shows that the Commission on August 23, 1991, ordered respondent to report for a medical examination, requested by the carrier, to Dr. W; it did not give a time of appointment. In contrast, no evidence was introduced that the Commission, per Article 8308-4.25(b), directed that respondent see a designated doctor selected either by the parties or by the Commission. No evidence was introduced that the provisions of Tex W. C. Comm'n, 28 Tex Admin Code § 130.6 (Rule 130.6), were met. That rule in part says, "[t]he Commission shall inform an unrepresented employee that an OMBUDSMAN is available to explain the contents of the agreement for a designated doctor." Such an explanation is particularly necessary now that the appeals panel has upheld an amendment to a designated doctor's report. *See* Texas Workers' Compensation Commission Appeal No. 92441 (Docket No. redacted) decided October 8, 1992. Claimants probably would not be aware of developments and interpretations of the 1989 Act if not provided an explanation as called for by Rule 130.6. Respondent was unrepresented.

No report, other than that provided by Dr. M, indicated that MMI has been reached. The report of Dr. W, the carrier's medical examiner, merely anticipated a date in the future when it could be reached; a prediction of MMI does not constitute a certification of MMI. Because the statute and the applicable rule were not followed and the Commission did not direct that Dr. M be the designated doctor, the hearing officer was correct in closely reviewing the matter to see if an agreement as to a designated doctor could be found. *See* Texas Workers' Compensation Commission Appeal No. 92312 (Docket No. redacted) decided August 19, 1992, which upheld a report from a designated doctor whose designation was not processed through the Commission. In that instance the claimant was represented by counsel and more than one letter between the parties made it clear that the topic was a designated doctor. In this instance, there is sufficient evidence to support the hearing officer's decision that the designated doctor was not properly selected. The respondent's testimony that she called the carrier to get a name of another doctor who could help her was not contradicted. Her reply to the appellant on cross-examination indicated that she thought she might be helped medically by seeing Dr. M, "maybe he'd find what was really wrong with me." This belief by respondent that she was going to another doctor for a determination of what was wrong with her was not contradicted by the appellant's own letter which further confused what, if anything, was agreed to, when it referred to the "designated third doctor". There is no evidence that respondent had been seen by two designated doctors prior to Dr. M; there is evidence of prior treating doctors and one prior examining doctor. The evidence does not support that respondent and appellant reached a meeting of the minds concerning the role of Dr. M so no agreement took place.

The hearing officer was correct in finding that Dr. M did not conduct an examination pursuant to Article 8308-4.16 because there is no evidence that the Commission required respondent to see Dr. M under the provisions of that article or that 180 days had elapsed since Dr. W's examination under that article in October 1991.

The hearing officer in his "Discussion of the Case" said that he would ignore the opinion of Dr. M as to MMI. It is true that Dr. M's opinion does not force the hearing officer to weigh it against the opinion of Dr. S, the treating doctor, who said that MMI had not been reached. Dr. M's opinion should be characterized, however, as having raised a dispute that is to be addressed by the designated doctor process in Article 8308-4.25, 1989 Act. The next step is to secure a designated doctor, consistent with Article 8308-4.25, to address the dispute as to MMI. Without having been provided the opinion of a designated doctor, the hearing officer has not been presented with a dispute as to MMI upon which he should rule. Therefore, his decision that MMI has not been reached is based on sufficient evidence of record and is affirmed.

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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