APPEAL NO. 92690

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 November 13, 1992, a contested case hearing was held in (city), Texas, with (hearing officer) presiding. He determined that appellant, claimant herein, had an average weekly wage of $79.15, that he reached maximum medical improvement on May 27, 1992 with 0% impairment, and that certain medical benefits after (date of injury 1) were solely caused by an automobile accident of (date of injury 1). Claimant asserts that AWW was not fair and just, that the impairment rating should have been 9% as set by the designated doctor, and that the auto accident of (date of injury 1) aggravated his compensable injury. Respondent, carrier herein, asks that the decision be affirmed.

DECISION

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

The issues at hearing addressed AWW, whether MMI was reached, what is the impairment, and whether carrier is responsible for medical benefits after (date of injury 1) when claimant was in a car accident. In addition to these issues, the benefit review conference also resulted in an interlocutory order dated August 17, 1992. That order provided that temporary income benefits be paid from April 20, 1992 until May 27, 1992 and that impairment income benefits then begin on May 28, 1992 for a period of 27 weeks, all based on an AWW of $151.74. (Prior to the time the hearing officer's decision was signed, at least 25 weeks had elapsed since the date ordered for IIBs to begin)

Claimant was in his second day of work for a temporary service in (city), Texas, when he said he injured his back on (date of injury 2). The injury was caused while at work at a fast food store's adjacent playground when claimant fell while trying to hold a loaded wheelbarrow that tilted to a side. Claimant was taken to a hospital emergency room where he was diagnosed as having a back and ankle contusion with "excellent prognosis-no serious injury Tylenol 3 at home." Lumbar and ankle x-rays were taken, he was told to stay off work 2 days, and he was told to return if he had a problem. On June 6th, claimant returned to the ER with his back and ankle still hurting; he was given a referral to Dr. W.

Dr. W is an orthopedic surgeon who claimant first saw a month later on July 9, 1991. Dr. W described a history given by claimant that is consistent with that recited above. Dr. W ordered an MRI which showed mild bulging of three discs; Dr. W in August injected a steroid into the spine. In September the claimant returned saying the pain had returned. Dr. W found him hypersensitive in the lumbar area but otherwise his exam was "relatively negative." He put claimant on physical therapy and regarded the problem as a lumbar strain. In his deposition, Dr. W said that claimant did not return after the September visit. Dr. W said that claimant appeared to magnify his complaints. Dr. W also said in his deposition that since claimant did not return, he could not state the specific day he had reached MMI, but Dr. W was of the opinion that claimant had no impairment from the (date

of injury) injury.

Claimant began physical therapy on September 11, 1991, but on September 19, 1991, he was noted to have failed to return for further care. During the time claimant was in physical therapy he was noted to have "several symptom magnification syndrome tendencies including. . .straight leg raising. . . ."

On (date of injury 1), claimant was in a car accident. He characterized the damage as minor--a headlight damaged and a front door dented--and commented that the other driver had no insurance and neither did he. He said that he went to the emergency room of a hospital and some pain killing drugs were given. He said that the injury to his back from this accident got better quickly but that he still had the lower back and leg problems from the work injury.

Claimant also said that he quit going to Dr. W because he started going to another doctor, but agreed that he told the carrier that Dr. W would not take him back. He said he did not magnify any pain to anyone and that when he went to an ER on December 2nd, he did not say that he had no pain in the neck and lower back until two days after the accident.

Claimant saw Dr. L, a neurosurgeon, on January 30, 1992 and in September 1992. In January, claimant complained of neck and low back pain. Dr. L said that lumbar x-rays were normal except for some disc space narrowing at L5-S1. He prescribed ibuprofen and ordered an MRI. The MRI showed a congenitally narrow canal with "very mild" protrusion of three discs, causing no nerve compression. He believed that claimant had reached MMI when he saw him last on September 17, 1992 with no impairment. In his deposition, Dr. L says that claimant did not tell him of any motor vehicle accident nor did he (Dr. L) have any information or records as to a car accident. In regard to the July 1991 MRI, Dr. L agrees with the conclusion reached by the physician, Dr. D, who conducted that study. Dr. D said that the July 1991 MRI showed a congenitally narrow thecal sac and "very mild protrusions of disc material are noted at L3-4, L4-5, and L5-S1. They do not appear to cause compression of neural elements at this time."

Dr. C saw claimant on February 18, 1992 at the referral of an insurance company. Dr. C is an orthopedic surgeon who teaches at (school). In a deposition, Dr. C said that claimant complained of pain in the low back and right hip, but did not tell him about the car accident of (month year). Dr. C answered that he did not think the car accident contributed to any of claimant's current problems or limitations because "he has no current problems." Dr. C characterized claimant not as magnifying his complaints, but as "holding on to his symptoms." His physical exam was normal except for a subjective response on straight leg raising. Dr. C had an MRI done which reflected bulging into the canal, no disc space narrowing, and no displacement of the nerve. It was a normal study. He diagnosed claimant as having a history of back strain. Dr. C also said that claimant was capable of returning to work without limitations on February 18th when he saw him. He believed that claimant reached MMI "a long time ago, but I cannot specifically point to a time." Dr. C says

claimant has no impairment. On a signed TWCC form 69 Dr. C marked item 14 as "yes" with the date shown as "long time ago" and impairment as "0". While the TWCC form 69 used at that time had no space to mark its date of completion, an accompanying narrative indicates it was accomplished on April 13, 1992.

The Commission selected a designated doctor, Dr. WE, who saw claimant on May 27, 1992. He found that claimant reached MMI on May 27, 1992 with a 7% impairment for three mild degenerative discs and 2% for a range of motion limitation, totaling 9% impairment. Dr. WE states, "We were supplied records by the insurance company which arrived after the patient was here, showing an emergency room visit, (date of injury 1), with low back and neck pain. However the patient states that is not him, that is not his visit." Claimant testified that the reason he told Dr. WE that the record was not his is because it was from (city).

While claimant objected to some exhibits offered by the carrier, he did not object, for lack of relevancy or any other reason, to carrier exhibit D, which contains the record of claimant coming to an ER in (city) on December 2, 1991; that record shows the date of (date of injury 1) (accident in (city), Texas) in a position on the form that is more prominent than that provided for the date of the visit. (Mr. P) was the patient involved and listed his birthdate as 4-30-71. (This is the same name and birthdate as was on the ER record in (city) on (date of injury 2), the date of claimant's compensable injury.)

The hearing officer considered testimony by the carrier's claims adjuster, Ms AH, that the carrier sought from the employer wage statements on "same or similar" employees since claimant had only worked two days when injured. The carrier rejected several because they were at the wrong rate of pay or were not accurate (one of which was less than one-half the amount than that of the one carrier proffered as the most accurate). AH further testified that it is virtually impossible to find a similar employee because of the temporary nature of the work, because work during this period in (city) was not abundant, and because the employer does not guarantee a certain amount of work. The hearing officer considered the irregularity of the work (*see* Article 8308-4.10(g) of the 1989 Act which provides that when the irregularity of work makes it impossible to reasonably apply other standards, then AWW may be determined using a "fair, just, and reasonable" standard) and applied the fair, just, and reasonable test. He looked to the employee's record that was most similar and considered that employee's number of hours worked during the 13 week period in question, then used that figure with claimant's wage rate to determine AWW under the facts of this case and the standard that was applied. *See* Texas Workers' Compensation Commission Appeal No. 92492, dated November 2, 1992. The AWW determined is supported by sufficient evidence of record.

The hearing officer points out in his opinion that the great weight of the other medical evidence in the record concluded that there was no impairment to the claimant based on his (month year) compensable injury. The designated doctor was the only doctor, as opposed to two orthopedic surgeons and a neurosurgeon (among this group was the treating doctor),

who found any impairment. As the hearing officer pointed out, the claimant's records of treatment from the ER showing injury from a car accident were not considered by the designated doctor because claimant denied that they were his. In addition, the hearing officer also points out that the impairment assigned by the designated doctor was based in large part on mild degenerative discs with only 2% impairment based on range of motion. The other three doctors all considered the same MRI's and other objective criteria as did the designated doctor in concluding that there was no impairment rating. The hearing officer points out in his opinion that the injury to claimant on (date of injury 2) was not serious, that claimant's low back had healed from the (date of injury 2) injury by the time he went to the ER in December 1991 following the car accident, that claimant's records of that ER visit indicate he had no pain prior to the car accident, that his ankle injury had apparently healed, and that the cervical problems mentioned in medical evidence after the car accident indicate that such accident was "more severe than claimant indicated." (There was no cervical injury in the (date of injury 2) compensable injury.)

The Appeals Panel has stated that when a hearing officer does not base his determination of an impairment rating on the report of the designated doctor, he should detail the evidence, state why the great weight of other medical evidence is to the contrary, and state in what regard the other evidence greatly outweighs the report of the designated doctor. *See* Texas Workers' Compensation Commission Appeal No. 92522, dated November 9, 1992. The hearing officer has detailed the evidence in his opinion; one significant point left out is the recurring opinion that claimant magnified his complaints, held on to his symptoms, or tended to magnify his symptoms. (Both the physical therapist and Dr. C point to claimant's reaction to straight leg raising.) Next, the hearing officer did not go into great detail in his findings as to why the other evidence is to the contrary, but throughout his opinion he points to the evidence that claimant was healed or had no impairment prior to seeing the designated doctor and that claimant denied to the designated doctor that certain records were his. He also pointed out that the designated doctor based his opinion on degenerative changes in discs, albeit mild, and a range of motion test (which is in part subjective). *See* Texas Workers' Compensation Commission Appeal No. 92335, dated August 28, 1992. In addition, a test such as range of motion, while appropriate in assessing impairment, could be open to more subjectivity in this case than would a test such as an MRI. Finally, the response to the range of motion test could have been influenced by the subsequent injury in the car accident. The hearing officer did address the last prong of the explanation sought for overturning a designated doctor's opinion--in what regard does the other evidence greatly outweigh the designated doctor's report. The hearing officer makes it clear that the designated doctor's report is greatly outweighed as to its impairment finding. All other doctors in this case found no impairment, and unlike other Appeals Panel opinions which registered concern because an earlier evaluation found more impairment than a later one raising a question that more time for healing possibly entered into the comparison, the reverse of that sequence is present in this case. *See* Texas Workers' Compensation Commission Appeal No. 92561, dated December 4, 1992. While the passage of time in Appeal No. 92561 was synonymous with decreased impairment, in this case all doctors who saw the claimant prior to the designated doctor found no impairment and the designated

doctor was told that records of a car accident were not claimant's. The determination by the hearing officer that the designated doctor's impairment rating of 9% was contrary to the great weight of the other medical evidence is not against the great weight and preponderance of the evidence.

The hearing officer also found that the sole basis for Dr. L's treatment in January 1992 of claimant was the auto accident of (date of injury 1). This was the only medical treatment provided to claimant in 1992. Dr. L said that his diagnosis when he saw him was "mild, gradually improving chronic cervical and lumbosacral strain". This, along with other evidence that the injury of (date of injury 2), which included no cervical problem, had healed, together with the question of credibility raised by claimant's testimony as compared to the medical records, provides a sufficient basis for the hearing officer to conclude that treatment after the auto accident was solely caused by it. Claimant did not object to "sole cause" as a defense at the hearing, so will not be allowed to raise it first on appeal.

The decision and order of the hearing officer are affirmed.

Joe Sebesta
Appeals Judge

CONCUR:

Stark O. Sanders, Jr.
Chief Appeals Judge

Robert W. Potts
Appeals Judge