APPEAL NO. 931164

This appeal arises under the Texas Workers' Compensation Act of 1989 (1989 Act), TEX. LAB. CODE ANN. § 401.001, *et seq*. (formerly V.A.C.S., Article 8308-1.01 *et seq.*). On November 16, 1993, a contested case hearing was held in (city), Texas, with (hearing officer) presiding. He determined that appellant (claimant) reached maximum medical improvement (MMI) on October 19, 1992, and that the certification of the designated doctor, (Dr. W), was valid. Claimant asserts that the designated doctor's amended report was rendered invalid by an ex parte letter from the carrier to the designated doctor; as a result the date selected by the hearing officer is incorrect; the date first chosen for MMI by the designated doctor should be selected by the hearing officer. Claimant also took issue with the hearing officer's denial of its request for deposition of Dr. W. Respondent (carrier) replies that the hearing officer contacted the designated doctor after the ex parte communication and the basis for the change in MMI dates was explained.

DECISION

We affirm.

Claimant worked for MH/MR County. Claimant's counsel announced that claimant "injured herself on or about (date of injury);" no further reference to the injury was made. There was no testimony or written statements by anyone offered into evidence except for medical documents and documents generated by the adjudication process by both parties.

Counsel for claimant on January 18, 1993, wrote to (PL) of employer with the offer that the parties agree to a designated doctor; three names were suggested in that letter with Dr. W being the doctor listed first. PL accepted Dr. W as the designated doctor. Dr. W evaluated claimant on March 23, 1993, and found MMI as of that date (March 23, 1993) with an impairment rating of 13%. Thereafter on April 2, 1993, PL wrote to Dr. W pointing out that MMI had been found on October 19, 1992 by (Dr. Wa), the treating doctor, and on December 11, 1992, by "our IME doctor," (Dr. H). PL closed the letter by stating, "[a]s the matter of Maximum Medical Improvement was not the disputed issue at the time, please advise if you will reconsider the date of MMI as well as the rate of whole body impairment." (This letter of PL does not indicate that it was sent to anyone other than Dr. W.) We note that on February 3, 1993, PL had written to Dr. W to schedule the evaluation. In that letter she compared the ratings given by Dr. Wa (16%) and Dr. H (0%) and stated the following, "[p]lease evaluate this patient for Maximum Medical Improvement and provide a whole body impairment rating for the aggravating injury that resulted from the captioned accident."

On April 7, 1993, Dr. W signed a new Report of Medical Evaluation (TWCC-69) indicating an impairment rating of 13%, but a different MMI date of October 19, 1992. By cover letter (this letter was dated April 1993 with a "3" written in black ink over an unknown number), Dr. W explained the first MMI date he gave by stating, "I put down the date I see the patient because I can vouch . . ." He added that he usually does not try to find an earlier date "without hard fact evidence . . . ." Later in the letter he said, "[o]bviously this patient has been MMI before I saw the patient and I feel that the most likely date would be that of

the treating physician as far as MMI date in this case."

Claimant's counsel then wrote to Dr. W in late April. In July 1993, a benefit review officer wrote to Dr. W pointing out the sequence of his opinions as to MMI with the letter of PL in between. The benefit review officer asked Dr. W to review the records again and tell the Texas Workers' Compensation Commission (Commission) when the claimant reached MMI. On July 27, 1993, Dr. W replied with an answer to the question asked by the benefit review officer. He referred to the opinion of the treating doctor, Dr. Wa, restated that he would "tend to go with the treating physician in this case," and pointed out there is "no indication in the records that any further significant testing, deterioration or improvement occurred from the October date to indicate that MMI had not occurred." He again stated that October 19, 1992, was the date of MMI. Texas Workers' Compensation Commission Appeal No. 93705, dated September 27, 1993, (among others) states that the designated doctor may change his opinion, but points out that no weight need be given to a change not explained.

On October 11, 1993, the hearing officer wrote to Dr. W. Attached to this letter was a copy of the questions which claimant's counsel had submitted in her request for deposition of Dr. W. The hearing officer in that letter states, "[t]hat request was denied for no good cause shown." Also attached to the letter were copies of correspondence in regard to the question of MMI of the claimant. The hearing officer asked Dr. W to review the matter and state whether any communication "from the adjuster influenced your opinion;" he also asked Dr. W to indicate whether there were any other contacts by the adjuster with him that were unknown to the Commission. Again, Dr. W replied, stating that the only influence of the adjuster was to cause him to review the records of the claimant. He stated that when he then received a letter from claimant's counsel he again looked at the records. He states that the decision to change the date resulted from reviewing the records and was not influenced by either side.

The hearing officer found that Dr. W's evaluation of claimant was valid and determined that MMI was on October 19, 1992, with 13% impairment.

Claimant argues that numerous Appeals Panel decisions state that communication with the designated doctor should be through the Commission, rather than ex parte. It is true that the Appeals Panel is highly critical of ex parte communications with the designated doctor after the claimant has been examined, but no rule of the commission addresses this point. Any party engaging in this practice risks invalidating the opinion of the designated doctor. *See* Texas Workers' Compensation Commission Appeal No. 931130, decided January 26, 1994; Texas Workers' Compensation Commission Appeal No. 93613, decided August 24, 1993. In Texas Workers' Compensation Commission Appeal No. 93719, decided September 29, 1993, the negative effect of an ex parte communication was found to have been cured by the subsequent inquiry of the hearing officer to the designated doctor. In this case, the Commission through the benefit review officer and the hearing officer inquired of the designated doctor and received an explanation for his action in changing the MMI date. The explanation given was considered and found to answer the relevant

questions. Claimant argues that the change by the designated doctor must be made on a review of "relevant or material" information, citing Texas Workers' Compensation Commission Appeal No. 92441, decided October 8, 1992. That decision involved new evidence not previously considered by the designated doctor; it did not say that a change could only be made after consideration of information not previously considered; it also, as correctly stated by claimant, indicated that an evaluation of the claimant's condition must be the basis for any change. The record does not indicate that the designated doctor changed the date of MMI for a reason other than his review of the claimant's records. The finding that the designated doctor's opinion is valid is sufficiently supported by the evidence.

In determining that the designated doctor's opinion, relating to MMI being reached on October 19, 1992, is valid, the Appeals Panel considered claimant's appeal of the hearing officer's denial of a request for written deposition to the designated doctor. At the hearing, claimant renewed the request for such deposition it earlier had made. In the decision, the hearing officer stated that the request was not approved because "no good cause was shown" and Dr. W "had answered all relevant questions."

The language of the applicable rule, Tex. W. C. Comm'n, 28 TEX. ADMIN. CODE § 142.13 (Rule 142.13), is open to some interpretation. A key area of such rule is 142.13(b) which describes the sequence of discovery. This part of the rule states that parties will exchange documents before requesting "additional discovery by interrogatory . . . or deposition." (Emphasis added.) It says depositions are described in Rule 142.13(e) and adds that additional discovery will be limited to evidence "not readily derived from evidence exchanged." Rule 142.13(e) addresses depositions but contains no criterion involving good cause.

A question may arise because Rule 142.13(f) deals with "Additional Discovery." This says that discovery (not just depositions) may be permitted "beyond that described above" (both Rule 142.13(b) and Rule 142.13(e) precede this subsection and are viewed as being "above"), upon a showing of good cause. We do not read Rule 142.13(f) as controlling the request to depose the designated doctor made by the claimant in this case; as a result, denial cannot be premised on a failure to show good cause. *See also*, Texas Workers' Compensation Commission Appeal No. 92613, decided December 28, 1992, in which the Appeals Panel was critical of an interpretation of discovery and deposition rules that limited the development of evidence. A hearing officer would not be remiss in considering Rule 142.13(b), (d) and (e) as readily available to either party to develop evidence, subject only to applicable limitations.

The hearing officer also stated in his reason for denial that the designated doctor had already answered all relevant questions. In this case the proposal for agreement as to a designated doctor was made by counsel for claimant and that proposal submitted Dr. W's name. Rule 142.13(b) also indicates that the "additional discovery" it refers to includes depositions and says it will be limited to evidence not readily derived from exchanged material. This part of the rule places some limitation on approving a request for deposition; the hearing officer considered that limitation in stating that Dr. W had answered all relevant

questions. Our review of the claimant's questions relevant to the issues (considering that the claimant knew the background of Dr. W since claimant suggested him) indicates that the hearing officer did not act arbitrarily in determining that the designated doctor had answered relevant questions and in applying Rule 142.13.

The decision and order are sufficiently supported by the evidence and are affirmed.

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Joe Sebesta
Appeals Judge

CONCUR:

_____
Gary L. Kilgore
Appeals Judge

_____
Alan C. Ernst
Appeals Judge