APPEAL NO. 931170

This appeal arises under the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq*. (formerly V.A.C.S. Article 8308-1.01 *et seq*.) (1989 Act). A contested case hearing was held on November 17, 1993, in (city), Texas, to determine whether appellant's (hereinafter claimant) current back condition is related to his injury of (date of injury), and whether the first date of maximum medical improvement (MMI) and impairment rating assigned to claimant was timely disputed. Hearing Officer (hearing officer) determined that the claimant did have a herniated disk in his back but that his back problems are due to degenerative changes and are not related to his (date of injury), injury. She also determined that the first date of MMI and impairment rating assigned to the claimant were not timely disputed. The claimant seeks our review of this decision; the respondent, hereinafter carrier, contends that the hearing officer's decision should be affirmed.

DECISION

We affirm the hearing officer's decision and order.

The claimant testified that on (date of injury), as he was coming down a ladder backwards, he slipped and fell, twisting his left knee and hitting his lower back on a guard rail. He was sent to the safety department, where ice was applied to his swollen knee; when his knee remained swollen for several days he was sent to (Dr. R), who ordered physical therapy. The claimant also told Dr. R about pain he was having in his right hip, but Dr. R told him it was arthritis. (The claimant testified that he did not have hip pain prior to his accident.) When claimant did not improve following the physical therapy, Dr. R referred him to (Dr. B), who determined he needed surgery. (Dr. L) performed arthroscopic surgery on claimant's knee in August of 1991, as well as a second surgery in December of 1991. The claimant said he did not report hip pain to Dr. B.

During physical therapy following his second surgery, around January or February of 1992, the claimant's hip started bothering him again. He reported the pain to his physical therapist and to Dr. L, who believed it was arthritis. Dr. L subsequently certified that claimant reached MMI on April 1, 1992, with a five percent impairment rating. The claimant said he found out about Dr. L's impairment rating when there was a change in his benefit check and he called the carrier to inquire about it. At the time he said he told the carrier that he "didn't think the knee was ready to go back to work," but that he would try. He said he had no conversations with anyone at the Texas Workers' Compensation Commission about Dr. L's certification or impairment rating.

Thereafter, claimant worked several jobs in various locations; he stated that his hip bothered him when he worked but not when he was inactive. At the completion of the last job, on September 20, 1992, he said his hip had gotten worse. He had been seeing a (Dr. W) because his knee had started bothering him again, and on September 24, 1992, he saw Dr. W for his hip pain. Dr. W x-rayed claimant and diagnosed arthritis; however, because of claimant's continued complaints of pain Dr. W ordered tests, including a CAT scan and

MRI, which disclosed a ruptured disk. On November 5, 1992, (Dr. M) performed surgery on claimant's back. On December 8th, in response to a letter from carrier, Dr. M wrote that claimant's back problem was related to his knee injury of (date of injury). Because carrier wanted a second opinion, claimant saw (Dr. O), who he said concurred with the need for surgery and the fact that the back problem was related to the accident.

Pursuant to a medical examination order issued in conjunction with a benefit review conference, claimant saw (Dr. H) to determine the existence of a causal relationship between the back injury and the (date of injury), accident. Dr. H examined the claimant, reviewed his medical records, spoke to claimant's physical therapist, and indicated an intent to speak with Dr. R. On May 23, 1993, he wrote that he found no relationship or mention of a back injury prior to September 24, 1992, and that he did not believe that claimant's back condition was related to the original injury.

The hearing officer made findings of fact that Dr. L's certification of MMI and impairment rating have never been disputed by either party, and that his back problems are due to degenerative changes and are not related to his injury of (date of injury). With regard to the first issue, the claimant contends on appeal, as he did at the hearing, that Dr. L did not use the correct version of the American Medical Association's Guides to the Evaluation of Permanent Impairment ("AMA Guides"), and that claimant accordingly was not obliged to dispute that doctor's impairment rating.

Tex. W. C. Comm'n, 28 TEX. ADMIN. CODE § 130.5 (Rule 130.5) provides that the first impairment rating assigned to an employee is considered final if the rating is not disputed within 90 days after it is assigned. This panel has held that this requirement applies with equal force to a designation of MMI, Texas Workers' Compensation Commission Appeal No. 92693, decided February 8, 1993, and that the 90 day period begins to run from the time that the party desiring to dispute the matter is notified or has knowledge of the rating. Texas Workers' Compensation Commission Appeal No. 93111, decided March 29, 1993. Whether an impairment rating has been timely disputed is a question of fact. Texas Workers' Compensation Commission Appeal No. 93047, decided March 5, 1993. Uncontroverted and clear notice to a carrier of a dispute would constitute sufficient notice, although the Commission should also be notified so that the dispute resolution process can be implemented. Texas Workers' Compensation Commission Appeal No. 93200, decided April 14, 1993.

The hearing officer in this case implicitly determined that the claimant's response to the carrier, upon learning of Dr. L's finding of MMI and impairment, did not constitute a dispute. The claimant does not challenge this finding, but rather argues that if the correct version of the AMA Guides is not used no impairment rating has been given and there is nothing to dispute. This panel has never held that a flaw in a doctor's report renders the report void such that the 90-day dispute rule does not apply. Rather, we have held that the rule "affords a method by which the parties may rely that an assessment of impairment and MMI may safely be used to pay applicable benefits" by providing for a "liberal time frame" in which such assessment will be open to dispute. Texas Workers' Compensation Commission

Appeal No. 92670, decided February 1, 1993. Therefore, the rule's intent is to give either party an opportunity to challenge a doctor's finding of MMI or impairment for whatever reason. Claimant's point of error is thus without merit.

With regard to the hearing officer's finding as to claimant's back condition being unrelated to his accident, the claimant points to evidence supporting his position and states that Dr. H, who he says is a non-board certified orthopedist who does not perform surgery, was not qualified as "designated doctor" to render an opinion on the subject.

The record shows that Dr. H was appointed by the Commission to render an opinion under Section 408.004 (we note that Rule 126.6(f), a Commission rule which implements this statutory provision, provides that a doctor who conducts an examination solely under the authority of an order issued under that rule shall not be considered a designated doctor). While Dr. H's letterhead indicates he is an orthopedic surgeon, the 1989 Act does not provide that such doctor be of any particular area of specialization. *See, e.g.*, Texas Workers' Compensation Commission Appeal No. 93105, decided March 26, 1993.

With regard to the medical evidence relating to the issue of causation, it is true that Dr. M stated that claimant's back injury was related to the (date of injury) incident. However, Dr. H found that it was not. This conflict was one for the hearing officer as sole judge of the evidence, Section 410.165(a), to determine, and we cannot say that her decision in this regard is so against the great weight and preponderance of the evidence as to be manifestly unfair and unjust. Atlantic Mutual Insurance Co. v. Middleman, 661 S.W.2d 182 (Tex. App.-San Antonio 1983, writ ref'd n.r.e.). We therefore will not set aside such decision.

As a final note, we observe that we have previously stated that "if an MMI certification or impairment rating were determined, based on compelling medical or other evidence, to be invalid because of some significant error or because of a clear misdiagnosis, then a situation could result where the passage of 90 days would not be dispositive." Texas Workers' Compensation Commission Appeal No. 93489, decided July 29, 1993. That opinion stressed, however, that the particular circumstances of each case must be evaluated in such a situation. In this case, we are satisfied that the hearing officer appropriately evaluated the law and the facts, and that her determination on the issue of causation, as we stated above, is supported by the evidence of record.

The hearing officer's decision and order are accordingly affirmed.

Lynda H. Nesenholtz
Appeals Judge

CONCUR:

Gary L. Kilgore
Appeals Judge

Alan C. Ernst
Appeals Judge