APPEAL NO. 931187

This appeal is brought pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act) (formerly V.A.C.S., Article 8308-1.01 *et seq*.). A contested case hearing was held on November 22, 1993, in (city), Texas, with (hearing officer) presiding as hearing officer. The issues at the hearing were whether the respondent (claimant) reached maximum medical improvement (MMI), and if so when, and what was his correct impairment rating. At the hearing, the parties agreed that the correct impairment rating was 14%. The hearing officer found that, in accordance with the report of the Texas Workers' Compensation Commission (Commission) selected designated doctor, the claimant reached MMI on April 5, 1993, and that the great weight of the other medical evidence was not to the contrary. The appellant (carrier) appeals this determination of MMI on the grounds that the designated doctor amended his original report and the "undisputed evidence" established an MMI date of October 15, 1992.

DECISION

The decision and order of the hearing officer are affirmed.

It is not disputed that the claimant sustained a herniated disc at L5-S1 on (date of injury), in the course and scope of his employment. On April 29, 1992, he underwent a lumbar discography. By memorandum of May 26, 1992, his treating physician, (Dr. D) wrote that he recommended surgery, but the claimant declined in favor of more conservative therapy. He further noted that, as of then, there was no change in his physical examination and that the claimant remained neurological intact in his lower extremities. In a Report of Medical Evaluation (TWCC-69), Dr. D certified that the claimant reached MMI on October 15, 1992.

(Dr. A) was selected as the designated doctor by the Commission to determine MMI and assign an impairment rating. He assigned an MMI of April 5, 1993, the date of his examination of the claimant. By letter of October 4, 1993, some six months later, (Ms. F), an adjuster for the carrier, wrote Dr. A a letter in which she enclosed Dr. D's "final medical report . . . certifying the (claimant) at maximum medical improvement effective 10/15/92." She asked Dr. A if he would "indicate what information you took into consideration when you selected 4/5/93 as the date of maximum medical improvement beyond 10/15/92." Dr. A responded by handwritten note on a copy of the adjuster's letter:

10/22/93

MMI should be dated after discogram and after he turned down the proposed surgery.

The hearing officer found as fact that April 5, 1993, the date of Dr. A's examination, was after both the discogram and after the claimant turned down surgery.

Based on this evidence, the carrier at the hearing and on appeal, asserts that the "undisputed evidence" shows that the claimant reached MMI on October 15, 1992. We

observe that attached as "Exhibit C" to the carrier's appeal is a purported "revised TWCC-69" signed on November 22, 1993, (the date of the hearing) by which Dr. A states:

I would agree with the MMI date of 10/15/92 as per [Dr. D] (this allowed [claimant] ample time to decide on the proposed surgery)

This document was not introduced into evidence at the hearing. It was not part of the record. No explanation is given why it was not introduced at the hearing, nor is a claim made by the carrier "that it would probably produce a different result." Texas Workers' Compensation Commission Appeal No. 93970, decided December 9, 1993. We do not now consider it for the first time on appeal. Section 410.203(a).

Section 408.122(b) of the 1989 Act provides that when a designated doctor is chosen by the Commission to determine the date of MMI, the report of that doctor shall have presumptive weight and the Commission shall base its determination of whether the claimant has reached MMI on that report unless the great weight of the other medical evidence is to the contrary. Whether the great weight of the other medical evidence is contrary to the opinion of the designated doctor is normally a factual determination. Texas Workers' Compensation Commission Appeal No. 93459, decided July 15, 1993. The contested case hearing officer, as finder of fact, is the sole judge of the relevance, materiality, weight and credibility of the evidence, including the medical evidence. Garza v. Commercial Insurance Company of Newark, New Jersey, 508 S.W.2d 701 (Tex. Civ. App.-Amarillo 1974, no writ); Texas Employers Insurance Association v. Campos, 666 S.W.2d 286 (Tex. App.-Houston [14th Dist.] 1984, no writ).

In this case, the carrier attempted to overcome the statutory presumption in favor of the report of the designated doctor by pointing to the doctor's own hand written statement on Ms. F's letter to him as an amendment of his original TWCC-69. The hearing officer described the statement "[a]s a cryptic note hurriedly scribbled on the bottom of a letter." The fact that this note was written by Dr. A six months after his examination of the claimant also raised questions for the hearing officer about the weight to be given it. In addition, the terms of the note (MMI after the discogram and after surgery was turned down) are literally met even if Dr. A's certification of MMI on April 5, 1993, is accepted.

The contention of the carrier in this case is similar to that raised in Texas Workers' Compensation Commission Appeal No. 93850, decided November 8, 1993. In that case the carrier asked a designated doctor to review his opinion on MMI in light of the treating doctor's conclusion that the claimant reached MMI some six months earlier. The designated doctor by letter conceded that he had no reason not to concur that the treating doctor "was in a better position to assess" when MMI occurred and that the claimant "may well be considered to have reached" MMI as of the earlier date. The hearing officer, nonetheless, found that the designated doctor did not by this letter amend his report. The Appeals Panel affirmed, concluding that the evidence supported this finding. The hearing officer could consider the letter along with other medical evidence, but, as merely a statement of non-disagreement with the treating physician, it did not constitute, along with

the treating doctor's opinion, the great weight of the medical evidence necessary to overcome the designated doctor's opinion.

In the case under appeal, the hearing officer properly considered Dr. A's handwritten remarks. However, as in Appeal No. 93850, *supra*, we construe those remarks as no more than a statement of non-disagreement with Dr. D. As such, the hearing officer could find that, in conjunction with Dr. D's opinion, these later remarks of Dr. A did not constitute the great weight of the other medical evidence. Having thus reviewed the record in this case, we conclude that the hearing officer properly accorded presumptive weight to Dr A's determination that MMI was reached on April 5, 1993, the date of his examination and that this determination is supported by sufficient evidence and is not so against the great weight and preponderance of the evidence as to be clearly wrong and manifestly unjust. Cain v. Bain, 709 S.W.2d 175 (Tex. 1986).

In affirming the decision and order of the hearing officer we again state that unilateral communications between the carrier and the designated doctor should not be undertaken and in an appropriate setting could give rise to the need for corrective action. Texas Workers' Compensation Commission Appeal No. 93613, decided August 24, 1993. Our affirmance in this case also should not be considered an endorsement of the hearing officer's statement that "[a]ny attack on (the designated doctor) should be with a finding of maximum medical improvement and impairment rating which is beyond cavil." (Emphasis added). The proper statutory standard is "great weight of the other medical evidence to the contrary." That was the standard applied in this case, and under that standard we affirm.

The decision and order of the hearing officer are affirmed.

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Alan C. Ernst
Appeals Judge

CONCUR:

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Stark O. Sanders, Jr.
Chief Appeals Judge

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Thomas A. Knapp
Appeals Judge