APPEAL NO. 93629

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. 1993) (Now TEX. LAB. CODE ANN. § 401.001, *et seq*.) On June 30, 1993, a contested case hearing was held in (city), Texas, with (hearing officer) presiding, to determine whether the claimant, Mr S, who is the respondent in this case, had disability due to a compensable injury, and whether the claimant's change to (Dr. B) in March 1993 was in compliance with applicable statute and rules relating to change of doctor. The hearing officer ruled favorably to claimant on both issues.

The carrier has timely appealed this decision, noting that the great weight and preponderance of the evidence is contrary to the hearing officer's determination that the claimant had disability. The carrier cites the lack of objective evidence of injury. The carrier's argument concerning the weight of evidence is tied to another point of appeal-- that the hearing officer erred by admitting evidence tendered by the claimant, with no finding of good cause, which carrier argued had not been exchanged as required. The carrier further argues that claimant should be presumed to have reached maximum medical improvement (MMI) based upon Rule 130.4. (Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 130.4.) The carrier argues that the estimated date of the first treating doctor as to when MMI would be reached should be taken as a certification of MMI. The carrier argues that the finding of disability is erroneous because the claimant changed treating doctors in violation of Section 408.023 (formerly Art. 8308-4.63). Although the compensability of the injury was not in issue, carrier appears to argue that claimant was not injured.

The claimant argues that the carrier's appeal was untimely. He argues that the fact he is able to carry on activities of daily living does not mean he does not have disability. He states that tape recordings upon which carrier bases some of the appeal have been taken out of context. Claimant argues that he should not return to work until he has received a clean bill of health. He responds that he had a right to change his treating doctor to Dr. B and asks that the hearing officer's decision be upheld.

DECISION

We affirm the hearing officer's determination that Dr. B became claimant's treating doctor. We reverse and remand this case for further development and consideration of the evidence on the issue of disability, finding that: 1) the hearing officer erred by admitting into evidence, absent a finding of good cause, documents that had not been exchanged by the claimant to the carrier or disclosed through interrogatories; and 2) by taking "official notice" of the claims file at the hearing, on the hearing officer's own motion, without further identifying documents from the file that were considered in the decision, or without giving the opportunity to either party to pose objections or respond to any such information. We are unable to evaluate the carrier's other points of error as to the weight of the evidence until these other matters are clarified.

The appeal was timely filed within 15 days after receipt by the carrier. It is considered except to the extent that it brings into question the compensability of the injury which has previously been resolved by an earlier hearing decision in claimant's favor.

TREATING DOCTOR

We agree that Dr. B became claimant's second treating doctor. Claimant was injured on (date of injury). Rule 126.9, governing change of doctors and implementing

Section 408.023 to apply to changes made after January 1, 1993 (regardless of date of injury), was not effective until July 1, 1993. Prior to that, there was no procedure for dispute of a Commission-approval of change in treating doctor.

The claimant's change of doctor was approved by the Commission, and not appealable at that time, in March 1993. We therefore reject carrier's point of error on this matter.

OFFICIAL NOTICE

In the past, we have commented unfavorably on the taking of "official" notice of an entire claims file by hearing officers. In Texas Workers' Compensation Commission Appeal No. 93103, decided March 22, 1993, the Appeals Panel stated: "Hearing officers should not take official notice of entire claims files. We recommend that the hearing officer make hearing officer exhibits of relevant documents which are in the claims file and which the hearing officer wishes to consider in resolving the case, instead of taking official notice of such documents. In this way, the parties and the Appeals Panel can more readily discern which documents were considered by the hearing officer and such documents are more likely to be transmitted to the Appeals Panel when a case is appealed (without an additional request for documents) than if the documents are officially noticed."

In Texas Workers' Compensation Commission Appeal No. 93341, decided June 16, 1993, the Appeals Panel commented: "We observe that the taking of official notice of an entire claim file is not sufficiently specific to permit an appellate review of the record. Specific documents should be noticed when that evidentiary mechanism is used by a hearing officer." We note that in at least one unpublished decision, a case was reversed and remanded so that the hearing officer would specify the "relevant" documents from the claims file that were officially noticed.

The case at hand was vigorously disputed, with objections on both sides as to relevance of various evidence. Both parties alluded at the hearing to a prior hearing in which the issue of whether an injury occurred in the course and scope of employment was determined. Both parties argue in their appeals various facts which were not brought out in the testimony during the hearing nor in the exhibits therein. The matter of official notice was raised initially by the hearing officer at the part of the proceedings where she was presenting her exhibits, and the carrier moved that an interlocutory order entered by the benefit review officer should be included. The hearing officer responded that she did not have this document in her file, then stated: "I would imagine that, considering what the issues are, I may have to take official notice of the claimant's file. . . . [a]nd I think that should take care of that." Nearly immediately thereafter, the hearing officer stated that she would take official notice of Claims File No. 92-018148. After closing argument, the carrier asked that a TWCC-69 from the first treating doctor be included in the record. The following interchange ensued:

HEARING OFFICER:I'm taking official notice of the claimant's file, so that would be in there also.

CARRIER:Okay.

HEARING OFFICER:You've rested and you didn't, you know. . . .

CARRIER:Well, I had moved to reopen for the purposes to make sure that this record is, in fact, in evidence, and make sure that it is in the claimant's file that you're taking judicial notice of.

HEARING OFFICER:Well, if it's not in the claimant's file, then it's not a part of the Commission's records.

CARRIER:It should be in the claimant's file. It should be in their records. What I'm saying is that to make sure--I'm assuming that it is, but since [claimant] has brought up an issue saying that it's not in the records, I want to make sure that it is in the records, because I'm under the assumption that it is in the records.

In Appeal No. 93341, the Appeals Panel noted that the taking of official notice had not been objected to at the hearing. Consequently, it was not discussed as a point of error. However, in this case, assuming that there was a meeting of the minds of the parties on the scope of the "claims file" or the purposes for which it was being officially noticed, such that a cogent objection could even be made, we believe that the official notice of the claims file in this case was error requiring corrective action.

In this case, the "claims file," in its broadest interpretation, could well include the transcript and proceedings and evidence developed in another hearing which may or may not have been appealed, and to which either party could have legitimately objected if introduced into the contested case hearing on the issues here at hand. It could include evidence not exchanged by either of the parties, but simply filed with the Commission and not copied to the other, to which these parties could legitimately have objected if presented at the hearing. It could include filings by third parties to the Commission of which either the carrier or claimant, or both, were unaware. It could include matters that were not physically in the file as of the date of the hearing, but were nevertheless date-stamped by the Commission prior to the date of the hearing. In such circumstance, this Panel might assume that such documents were considered by the hearing officer that were, in fact, not. A claims file can include records relating to a claim that are on computer, but not in documentary form, which may or may not have been reviewed by the hearing officer.

Finally, information contained in a claim file and made part of the record through official notice could include evidence specifically disallowed by a hearing officer during testimony. For example, the hearing officer observed (when claimant objected) that she did not see the relevance of testimony relating to any felony convictions. However, it is possible that the "claim file" could contain reference to this. We do not believe that it is left to this Panel to guess and speculate whether a hearing officer has made, in effect, a "running ruling" to any such information where ever it appears.

We have stated before that omitting facts from a statement of evidence or discussion does not constitute reversible error, recognizing that failure to summarize evidence does not mean it was not considered. *See* Texas Workers' Compensation Commission Appeal No. 92185, decided June 18, 1992. Therefore, while it is true that the hearing officer mentions in her statement of evidence certain matters observed in the claims file, we are not at liberty to conclude that only such documents were considered. For these reasons, we

reverse and remand the case to the hearing officer with instructions to clearly indicate matters from the claims file which she considered in making this decision and provide copies of such matters or documents as exhibits.

EVIDENCE ADMITTED OVER OBJECTION BUT NOT EXCHANGED

The carrier objected to all of claimant's evidence on the basis that he failed to exchange such information in accordance with Section 410.160 and that he further failed to answer interrogatories. The hearing officer admitted transcripts of a telephone conversation dated April 20, 1993, in which the claimant asserted an intent not to answer interrogatories, and further stated: "I can use all the little letters of the law in my benefit, too. Just remember that. I can stall and I can do all the little b_____ little divisions that you all do, too." The contested case hearing at that time was set for May. Further in the conversation, claimant stated, ". . . and if you don't get all your information in time for this hearing here in May, that's fine and dandy, then you'll have to postpone with the 10 days and that's fine and dandy with me 'cause my checks still stay instated. You understand that, buddy?" A continuance in the hearing was subsequently granted.

At the hearing, claimant countered carrier's objections by pointing out that he had just received some records from his second treating doctor, Dr. B, that morning, that he had received some of the documents he was submitting from the carrier, and that he had given a written release to the carrier for his medical records for all his injuries. He also argued, essentially, that the carrier had records directly from the doctors in question. He stated that he had returned answers to interrogatories by regular mail, on a date that he could not remember. He stated he had not retained a copy of his answers.

Although the hearing officer observed that one document in claimant's evidence was dated two days before the hearing, she made no finding or pronouncement of "good cause." Her articulated reason for admitting the evidence over objection was "since [claimant] is not represented, and since the carrier had copies of these records and it will not come as a surprise. . . . I'll note your objection, but I will allow [claimant] to offer his evidence."

We have noted before that there is no requirement to exchange information back to an opposing party when the source of the document is that same party. Texas Workers' Compensation Commission Appeal No. 91088, decided January 15, 1992. However, the record in this case does not indicate which documents the hearing officer may have believed fell within this category.

We note that because interrogatories are required to be limited to information that cannot be readily derived from the documentary evidence that is required to be exchanged, the failure to answer interrogatories could not be used to exclude evidence that was required to be exchanged (although noncompliance with other discovery is evidence that could be considered by a hearing officer on the issue of "good cause").
We have stated before that it is error for a hearing officer to admit evidence that was not exchanged as required without a finding of good cause. Texas Workers' Compensation Commission Appeal No. 92431, decided October 5, 1992. In light of statements made by claimant which are indicative of an intent to impede timely disclosure to the carrier, we are unwilling to imply such a finding. We would also note that some of Dr. B's records are dated during May 1993, after the April 2, 1993, benefit review conference, but well before the contested case hearing. Without any proof of whether a medical release was furnished to

the carrier regarding records from Dr. B, we cannot begin to consider whether such would constitute "an exchange" in accordance with Section 410.160.

Although we are unable to fully outline the evidence given the ambiguity as to the "claims file" issue, we will briefly summarize the contested case hearing record to the extent relevant to the disability issue. The claimant sustained an injury on (date of injury), in the course and scope of his employment as a working manager at a T-shirt printing shop. Claimant's injuries were diagnosed in December 1991 as repetitive trauma to his wrists and elbows, and chondromalacia of the right knee. (Compensability was apparently established in an earlier contested case hearing decision, so carrier's appellate arguments that claimant was not injured are without merit in this proceeding).

Although physical therapy was prescribed by (Dr. N), claimant's first treating doctor, he did not attend. Claimant did not see a doctor from June 1992 until he first saw Dr. B in March 1993, shortly after his temporary income benefits were suspended by interlocutory order. Claimant had not sought employment at all up to the date of the hearing. During the hearing, claimant testified that he did not think he could not work because of pain. He testified to an ability to do numerous activities of daily living, including playing musical instruments (presumably with involvement of the wrists and elbow). Other reasons he stated that he felt would interfere with his ability to work included the lack of training, limited skills, his history of workers' compensation claims, and his criminal convictions (none of these are factors which establish disability resulting from the compensable injury). In fact, claimant testified that he felt there were tasks he could physically perform (managerial) but for which he would need retraining. Prior to seeing Dr. B, claimant was found by Dr. N to have full range of motion in the affected areas, and his objective testing was normal.

In light of the clear indication in the hearing decision that Dr. B's reports were an important part of the decision that claimant had disability as of the date of the hearing, we cannot say that admission of these reports was harmless error. Therefore, we remand for consideration of the issue of admissibility of those records in light of this discussion and applicable requirements of the statutes and rules.

On remand, it is suggested that the record clearly indicate which documents were required to be exchanged by the claimant, which were not exchanged at or after the benefit review conference, and findings relating to the existence and basis of "good cause" for any failure to exchange.

MMI PRESUMPTION ISSUE

MMI was not an issue at the benefit review conference. While discussed at the beginning of the hearing, MMI and Rule 130.4 was not clearly agreed to or allowed as an additional issue and is not listed in the hearing decision as an issue. We have before noted that Rule 130.4 does not establish a presumption that MMI was reached, but merely creates a presumption for carrying out a procedure to determine MMI. Texas Workers' Compensation Commission Appeal No. 92389, decided September 16, 1992. We cannot agree that the hearing officer erred by not finding that claimant reached MMI.

In closing, we observe that although carrier argues in appeal that the hearing officer should not have granted a continuance, it does not appear that carrier's attorney objected at the hearing to the continuance, nor does carrier indicate how such would be reversible error, and we will therefore decline to assign error.

In summary, we reverse and remand for further action of the hearing officer to clarify the record on the matters relating to evidence admitted, but asserted not to have been exchanged, and as to official notice of the claims file. Until these matters are resolved, we feel that a decision on points of error regarding the sufficiency of evidence as to disability would be premature. We emphasize that the hearing officer is free to reconsider the issue of disability as appropriate in light of her actions on the evidentiary matters that are remanded.

Pending resolution of the remand, a final decision has not been made in this case. However, since reversal and remand necessitate the issuance of a new decision and order by the hearing officer, a party who wishes to appeal from such new decision must file a request for review not later than 15 days after the date on which such new decision is received from the Texas Workers' Compensation Commission's division of hearings, pursuant to Section 410.202. *See* Texas Workers' Compensation Commission Appeal No. 92642, decided January 20, 1993.

Susan M. Kelley
Appeals Judge

CONCUR:

Stark O. Sanders, Jr.
Chief Appeals Judge

Thomas A. Knapp
Appeals Judge