APPEAL NO. 93631

Pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act), a contested case hearing was held in (city), Texas, on April 22 and June 2, 1993, (hearing officer) presiding as hearing officer. She concluded that the appellant (claimant) suffered a compensable injury in the course and scope of his employment on (date of injury); that pursuant to the report of the designated doctor the claimant reached maximum medical improvement (MMI) on July 15, 1992, with zero percent impairment; and that the carrier had no authority to unilaterally suspend temporary income benefits (TIBS) effective on July 15, 1992, based solely on a certification by a carrier selected doctor that the claimant had reached MMI on July 15, 1992. Although the hearing officer concluded that the carrier had no authority to suspend payment of TIBS, she did not order any further payment of TIBS for any period after July 15, 1992. The claimant appeals the hearing officer's decision not to order further TIBS payments and challenges the adequacy of the designated doctor's medical examination of the claimant. The respondent (carrier) objects to the hearing officer's Finding of Fact No. 7 and Conclusion of Law No. 6 regarding the existence of a disability after July 16, 1992, and the inability of the claimant to obtain and retain employment at pre-injury wages after July 16, 1992.[1]

DECISION

We affirm the decision of the hearing officer.

There is no dispute that the claimant sustained an injury to his lower back and knee in a slip and fall accident at this place of employment on (date of injury). On February 27, 1992, he began treatment with (Dr. L) who diagnosed limitation of motion and muscle spasms. A lumbar spine MRI was performed on March 20, 1992, with resultant findings of "minimal . . . diffuse posterior bulge on L4/5 which produces no significant indentation on the thecal sac or root sleeves." In a report of June 11, 1992, Dr. L concluded that the claimant's continuing pain was caused by swelling at the sciatic nerve and prescribed more physical therapy. At the carrier's request, the claimant first visited (Dr. S) on July 1, 1992. Dr. S diagnosed a "musculoligamentus sprain to the lumbosacral spine & a contusion of the Rt. knee." He concluded that the claimant was completely recovered. On July 15, 1992, Dr. S reported that the claimant had reached MMI on that date with a zero percent impairment rating. Based on these medical conclusions, the carrier terminated all further TIBS payments. By letter of July 30, 1992, the claimant filed a notice with the Texas Workers' Compensation Commission (Commission) that he was disputing Dr. S's evaluation. Sometime in late August 1992, the claimant and his family moved to (state). On September 17, 1992, the Commission

[1] Since the carrier first raised these contentions and a further one about abandonment of medical care in its response of August 6, 1993, to the claimant's request for review, we consider them untimely raised and do not address them on this appeal. *See* Texas Workers' Compensation Commission Appeal No. 92193, decided July 2, 1992.

appointed (Dr. W) designated doctor to determine disability, MMI and impairment rating. An original appointment with Dr. W for October 29, 1992, was canceled due to the claimant's return to (state). On November 5, 1992, the claimant requested a benefit review conference (BRC) on the question of whether the carrier was justified in stopping TIBS based on Dr. S's finding and whether he had a right to be examined by a designated doctor in (state). The BRC was held on March 17, 1993. On April 15, 1993, Dr. W examined the claimant and concluded that he had reached MMI on July 15, 1992, (as later clarified) with a zero percent impairment rating. On his last visit on July 27, 1992, Dr. L reported that claimant continued to have pain, limitation of movement, and "slight muscle spasms."

The claimant contends that the carrier violated Section 408.004(e) of the Act, TWCC Advisory 92-05, and Texas Workers' Compensation Commission Appeal No. 92374, decided August 28, 1992, when it unilaterally stopped further TIBS payments effective July 15, 1992, and that, to the extent that Appeal No. 92374, *supra*, interprets existing law, it should be given retroactive application in this case. He further asserts, in what is the core underpinning of his appeal, that the Commission has inherent equitable power to enforce Section 408.004(e) and should do so by ordering the carrier to pay TIBS after July 15, 1992, regardless of Dr. W's finding that MMI was reached on that date, in the amount that it otherwise would have paid up to January 21, 1993 (the date of the BRC), had it abided by the cited statute, advisory and Texas Workers' Compensation Commission Appeals Panel decision.

We decline the claimant's invitation to the Appeals Panel to find it has inherent equity powers in aid of its jurisdiction (*See* Section 410.203(b)) and find sufficient other bases to decide this appeal. In so doing, we note that the carrier was in violation of the Act when it terminated TIBS. This should have been obvious to the carrier from the statute which was only emphasized by Appeal No. 92374, *supra*, and even more strongly by TWCC Advisory 92-05 for the reasons stated in the opinion and the advisory and for those reasons advanced by the claimant in his appeal.

The question for us to decide is not one of law, but the proper remedy for a violation of the law. Appeal No. 92374 did not order post-MMI TIBS to be paid for the simple reason that the statute clearly authorizes TIBS only up to MMI. To do otherwise would seriously distort, if not pervert the entire compensation scheme intended by legislature as enacted in the 1989 Act. That decision directed a reinstatement of TIBS benefits until MMI was finally determined. In the present case, MMI was determined. Further payment of TIBS after MMI was clearly beyond the authority of the hearing officer because such would be a direct violation of Section 408.102(a) of the 1989 Act. Charged as we are to implement the act, we are unable to find any authority in any Commission official to do otherwise. The proper remedy in this case was twofold. First, as Appeal No. 92374, points out, this "serious matter" of MMI calls when appropriate for expedited

treatment within the Commission. *See* Rule 140.3(a). The claimant waited some four months before formally demanding a BRC on the issue of continued payment of TIBS even though he apparently attempted an informal resolution with the carrier. The BRC was not held until January 21, 1993. Perhaps the claimant's election to leave the state of Texas hindered an efficient and timely pursuit of his claim. Or perhaps greater diligence could have been exercised in setting a BRC date. In any event, we believe the claimant could have and should have pursued this claim more aggressively with the BRC. Secondly, Section 415.002 provides for administrative penalties for knowing and intentional violations of the Act by an insurance carrier. Even though in the contested case hearing, the claimant's attorney dismissed this possible remedy out of hand as inadequate, we do not believe so. On the contrary, we believe that the possibility and threat of administrative sanctions is an important means for protecting claimants from illegal termination of benefits and should be vigorously pursued in appropriate cases.

For these reasons, we decline to find in this case inherent equity jurisdiction in the Commission to order continued payment of TIBS after MMI in violation of the Act as a sanction against a carrier.

The claimant also challenges the adequacy of the designated doctors examination and particularly Conclusion of Law No. 5, that the great weight of the medical evidence other that the designated doctor's report was not contrary thereto. Sections 408.122(b) and 408.125(e) provide that the report of the designated doctor shall have presumptive weight on the issue of MMI and impairment rating unless the great weight of the other medical evidence is to the contrary. The claimant's medical evidence does not contradict or challenge either Dr S's or Dr. W's conclusions. Even his treating physicians in (state) basically diagnosed sciatica and a bulging disc. The claimant's own statement of disagreement with the reports is not medical evidence. Texas Workers' Compensation Commission Appeal No. 92495, decided October 28, 1992. Similarly, the claimant does not otherwise address how the examination was inadequate other than to assert that Dr. W did not use certain equipment. We have found in Texas Workers' Compensation Commission Appeal No. 92255, decided July 27, 1992, that lay testimony about the adequacy of a designated doctor's examination must itself be supported by medical evidence in order to defeat the presumption of great weight. Claimant again fails to support his contention with medical evidence. Under these circumstances, we will not substitute our judgment for that of the hearing officer's conclusion that the great weight of the medical evidence was not contrary to the designated doctor's conclusions.

Finally, claimant contended on appeal that he was improperly denied the opportunity to challenge the impairment rating of the designated doctor. The hearing officer concluded that the question of the impairment rating was not properly raised as an issue. The claimant contends that impairment rating was an issue subsumed in the basic challenge to the weight to be given the designated doctor's report. As stated above, the

testimony of the claimant is not generally considered probative evidence on the question of the adequacy of a medical examination. Given the lack of any expert medical evidence to in any way challenge Dr W's report and findings, we find no error in the refusal of the hearing officer to allow a specific challenge to the designated doctor's impairment rating.

For the reasons set forth above, the decision of the hearing officer is affirmed.

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Gary L. Kilgore
Appeals Judge

CONCUR:

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Stark O. Sanders, Jr.
Chief Appeals Judge

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Thomas A. Knapp
Appeals Judge