APPEAL NO. 93762

This appeal arises under the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act). On July 30, 1993, a contested case hearing (CCH) was held in (city), Texas, with (hearing officer) presiding. The sole issue presented and agreed upon at the CCH was: "When did Claimant reach maximum medical improvement?" The hearing officer determined that claimant reached maximum medical improvement (MMI) on April 13, 1992, with a 12% impairment rating as certified by the designated doctor in an amended Report of Medical Evaluation (TWCC-69) dated 4-14-93.

Appellant, claimant herein, contends that respondent, carrier herein, improperly contacted the designated doctor, thereby causing the designated doctor to change her MMI certification several months after her examination of the claimant. Carrier responded that carrier's ex parte contact with the designated doctor was not an issue before the hearing officer, that even if it were, carrier's contact was "completely open-ended, utterly innocuous, and could in no matter be construed as an attempt to exert undue influence . . . on the designated doctor," and that there is no authority for prohibiting contact, either by the claimant or the carrier, with the designated doctor . . . (and that) prohibition of contact by the carrier with the designated doctor would be a denial of due process of law . . . ." Carrier urges we affirm the hearing officer's decision.

DECISION

The decision of the hearing officer is affirmed.

The facts are essentially not in dispute. Claimant testified, and the record supports, that she was injured on (date of injury) while pushing a sled or skid loaded with paper and that she injured her back and abdomen while employed by (employer), employer. Claimant testified she continues to have problems with her back and stomach. After the accident, claimant saw (Dr. A). Dr. A referred claimant to (Dr. F) who became the first treating doctor. Dr. F certified claimant reached MMI on April 13, 1992, with five percent impairment. Claimant testified she was dissatisfied with Dr. F and obtained permission to see another treating doctor. Carrier sent claimant to (Dr. G) in October 1991 while she was still treating with Dr. F. Dr. G diagnosed muscular strain of the lower back, did not certify MMI and estimated "disability" at approximately five percent. Subsequently claimant saw (Dr. P) as her second choice of treating doctor. Dr. P certified MMI on 6-3-92 with 11% impairment. Because of a dispute, the Texas Workers' Compensation Commission (Commission) appointed (Dr. R) as a designated doctor. Dr. R evaluated claimant and by an undated TWCC-69 and narrative report certified claimant as reaching MMI on 12-18-92 with a 12% whole body impairment rating. By a letter dated February 16, 1993, carrier's claim representative, adjustor herein, wrote claimant's attorney stating the adjustor disagreed with the designated doctor's MMI date and that:

In an effort to resolve this problem, I have contacted [Dr. R] and have requested she tell us if in fact she feels that the claimant had not reached MMI until the day

> of the examination or whether MMI was reached on the dates which [Dr. P] or [Dr. F] had reported she had reached it.

Apparently there was no response to the adjustor's inquiry because the record next reflects a letter dated April 9, 1993, from the adjustor to the designated doctor reciting claimant's prior doctors and Dr. F's and Dr. P's MMI dates and impairment. That letter stressed that MMI was important "as it will determine if [claimant] has received all the benefits she is entitled to or not." The letter goes on to state:

> In order to resolve this dispute we need your opinion as to the date [claimant] reached MMI. Was it reached on the date which [Dr. P] or [Dr. F] had reported she had reached it or was it on the date of your exam?

Apparently in response to this letter the designated doctor filed another TWCC-69, dated 4-14-93 certifying MMI on 4-13-92 with 12% impairment. In the narrative history portion of the form the designated doctor wrote: "See original report-addended date of MMI 04/13/92." No other information regarding Dr. R's reasoning for selecting the MMI date of 4-13-92 was evident.

The CCH was devoted principally to the effect of the adjustor's ex parte communication with the designated doctor. Claimant urges the hearing officer to accept the designated doctor's original certification of December 18, 1992. The hearing officer in his discussion of the evidence states:

> Although the Commission's Appeals Panel has encouraged Commission contact with designated doctors rather than unilateral contact, there is no authority for prohibiting contact. There is no indication of impropriety or undue influence in the Carrier's contact with [Dr. R].

The hearing officer then accepted the designated doctor's amended MMI certification of MMI of April 13, 1992, with a 12% impairment.

Claimant appeals, citing language in Texas Workers' Compensation Commission Appeal No. 92570, decided December 14, 1992; Texas Workers' Compensation Commission Appeal No. 92595, decided December 21, 1992; and Texas Workers' Compensation Commission Appeal No. 93268, decided May 21, 1993. Claimant argues that "there does not have to be direct and convincing evidence that the doctor's report does show partiality or is tainted, but that it should never even give rise to such implication."

As claimant argues, the Appeals Panel has in the past, and continues in the present, to express concern about ex parte communications between the parties and a designated doctor. We have frequently noted the important and unique position accorded the designated doctor in the resolution of disputes over MMI and impairment ratings. Texas Workers' Compensation Commission Appeal No. 92412, decided September 28, 1992;

Texas Workers' Compensation Commission Appeal No. 93586, decided August 26, 1992; *et al.* and accorded the designated doctor's reports presumptive weight. (Sections 408.122(b) and 408.125.) We have in the cases cited by claimant discouraged unilateral contact by one of the parties with the designated doctor in order to avoid the perception that the designated doctor is not impartial.

More recently we have again expressed our concern regarding unilateral communications between a carrier and the designated doctor in Texas Workers' Compensation Commission Appeal No. 93455, decided July 22, 1993, and as quoted in Texas Workers' Compensation Commission Appeal No. 93613, decided August 24, 1993, where we stated:

> The nature of the unilateral communication between the carrier and the designated doctor, quoted at length above, could tend to compromise the perception, if not the reality, of impartiality on the part of the designated doctor in this case. We have commented on this problem in the past. *See* Texas Workers' Compensation Commission Appeal No. 93272, decided May 24, 1993; Texas Workers' Compensation Commission Appeal No. 92595, decided June 16, 1992. Without the appearance of impartiality the entire designated doctor process may be undermined. We appreciate that a party may need a clarification of a statement by a designated doctor; but that party should communicate its need for clarification to the Commission, with notice of its request to all other parties, and allow the Commission to contact the doctor to request clarification. Using this procedure as well as the discovery procedures available, such as deposition on written questions, provides each party sufficient access to the designated doctor for legitimate communication without potentially compromising the impartiality, or appearance thereof, of the designated doctor.

In Texas Workers' Compensation Commission Appeal No. 93702, decided September 27, 1993, there was extensive correspondence between the parties and the designated doctor and we stated:

> One major barrier to a proper determination of this issue is that the parties through their unilateral communications with the designated doctor appear to have drawn him into a legal and political debate concerning both what the Texas workers' compensation law is and should be. This debate, and we cannot fault the designated doctor for entering it at the invitation of the parties, has managed to obscure the *medical* opinion of the designated doctor as to whether the claimant has reached MMI. This type of problem is one reason we have been so critical of unilateral communications between the parties and the designated doctor.
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> As should be evident we have become increasingly critical of unilateral

communications with the designated doctor by the parties in general. However, we observe, as carrier in the instant case points out, that there is no authority in the 1989 Act or the Commission rules which would prohibit or limit such contact by the parties. However, we question carrier's argument, and the hearing officer's comment on the record, that limiting such unilateral contact would be a constitutional violation of due process, as long as discovery procedures, such as deposition on written questions, and clarifying correspondence through the Commission remain available. Certainly we would not hesitate to take appropriate action were any prejudice, undue influence or other untoward action, to result from such a unilateral contact.

We also reject carrier's argument that claimant's request for review was not proper and "amounts to nothing more than an 'end run' or collateral attack, and not an actual dispute of the issue determined by the hearing officer." Claimant's position that carrier's improper unilateral contact with the designated doctor resulted in the designated doctor's improper amendment of her MMI date, some four months after she examined claimant, was absolutely clear and the hearing officer stated he would allow claimant to present evidence on this point. Claimant's position on appeal has not changed from that at the CCH and on which the hearing officer heard evidence.

Finally we note, and encourage, the actions of the hearing officer in Texas Workers' Compensation Appeal No. 93719, decided September 29, 1993. In that case, which is similar to the instant case, carrier's counsel made ex parte contact with the designated doctor, questioning his MMI date in view of three other doctor's records and reports which indicated an earlier MMI date. This resulted in the designated doctor rendering a new report (TWCC-69) certifying a different MMI date than originally certified. Quoting from Appeal No. 93719:

> At the hearing held on May 21, 1993, the claimant's counsel complained about the ex parte communication by the carrier's counsel with the designated doctor and also voiced concern that all medical records, including a recent MRI, had not been made available to Dr. W (the designated doctor) at the time of his examination. At the conclusion of the May 21st session, the hearing officer stated that another session would be necessary and that in the meantime he would write directly to Dr. W, attach all the medical records on the claimant including the recent MRI as desired by the claimant, advise Dr. W that it was inappropriate for the carrier's counsel to contact him directly, ask Dr. W to render a separate IR (impairment rating) not including the cervical area, and issue another report including whether MMI had been reached and if so, when.
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> While we fully agree with the complaint concerning the carrier's counsel's ex parte correspondence with the designated doctor on the matter of MMI, and have

> so firmly cautioned against on several occasions (Texas Workers' Compensation Commission Appeal No. 93702, decided September 27, 1993; Texas Workers' Compensation Commission Appeal No. 93613, decided August 24, 1993; Texas Workers' Compensation Commission Appeal No. 93455, decided July 22, 1993), we believe the action taken by the hearing officer in obtaining another opinion and report from the designated doctor cured any harmful error. We have stated that a designated doctor can, under limited and appropriate circumstances, amend or correct his certification and report. *See* Texas Workers' Compensation Commission Appeal No. 92503, decided October 29, 1992; Texas Workers' Compensation Commission Appeal No. 92441, decided October 8, 1992. We do not find any inappropriate circumstances here that have not been effectively cured by the action of the hearing officer.

The hearing officer, in the instant case, could, and possibly should, have written Dr. R, attached the other reports, asked if Dr. R would wish to re-examine claimant, advise Dr. R to disregard carrier's adjustor's previous correspondence and ask Dr. R to issue another report, based on her examination and the medical records before her, regarding whether MMI had been reached and, if so, when. This would have also had the benefit of addressing claimant's contention that she has been getting better since December 1992.

However, the hearing officer, in this case, had the medical records in front of him, heard claimant's argument and legal authority on unilateral contact and determined that there was no indication of impropriety or undue influence in the carrier's contact with the designated doctor. We would further note that carrier's adjustor advised claimant's attorney, by letter dated February 16, 1993, that carrier disagreed with the designated doctor's original MMI date and advised that the adjustor had contacted Dr. R and had requested that the designated doctor confirm or amend her MMI date. Claimant took no action on this until the benefit review conference on June 4, 1993. Upon a careful review of the record we cannot say that the determinations of the hearing officer were so against the great weight and preponderance of the evidence as to be manifestly wrong or unjust. In re King's Estate, 244 S.W.2d 660 (Tex. 1951); Pool v. Ford Motor Co., 751 S.W.2d 629, (Tex. 1986). Nor are we willing to say, as a matter of law, that carrier's unilateral contact

with the designated doctor, although discouraged, constituted such improper action to require a reversal of the hearing officer decision. Consequently the hearing officer's decision is affirmed.

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Thomas A. Knapp
Appeals Judge

CONCUR:

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Stark O. Sanders, Jr.
Chief Appeals Judge

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Joe Sebesta
Appeals Judge