APPEAL NO. 93897

This appeal arises under 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*.). At a contested case hearing held in (city), Texas, on September 1, 1993, the hearing officer, (hearing officer), according presumptive weight to the report of the designated doctor selected by the Texas Workers' Compensation Commission (Commission), determined that the appellant (claimant) reached maximum medical improvement (MMI) on January 5, 1993, and that his whole body impairment rating was six percent. In his request for review, the claimant challenges the sufficiency of the evidence to support the conclusion that claimant reached MMI on January 5, 1993, pointing to language in the designated doctor's narrative report accompanying that doctor's Report of Medical Evaluation (TWCC-69) which claimant asserts fails to meet the definition of MMI found in Section 401.011(32). The claimant also asserts error in the hearing officer's admission of a TWCC-69 from the carrier's doctor on the basis that the hearing record did not show that the report was sent for comment to claimant's treating doctor as required by Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 130.3(a) (Rule 130.3(a)). In its response the respondent (carrier) urges the sufficiency of the evidence to support the hearing officer's determinations, does not address the Rule 130.3(a) point, and requests our affirmance.

DECISION

Finding the evidence sufficient to support the challenged finding and conclusion respecting the date the claimant reached MMI and further finding no reversible error in the admission of the carrier's doctor's report, we affirm.

No testimony was offered at the hearing. However, according to the history contained in the medical records and reports in evidence, it appears that claimant, then 61 years of age, was employed as a parking lot attendant and was injured on (date of injury), when his left knee was struck by a door. He presented to an emergency room three days later complaining of pain and was found to have a small bruise without swelling. His x-rays were negative and he was diagnosed with a left knee strain and given medication. Claimant commenced treatment with (Dr. M) on January 3, 1992, which consisted of anti-inflammatory medication and physical therapy (PT). In June 1992, Dr. M added to his initial diagnosis of severe left knee contusion the diagnosis of femoro-patellar chondromalacia. Dr. M had claimant scheduled for surgery on July 29, 1992, for a lateral retinacular release and exploration of the patella. However, claimant cancelled the surgery on July 28th to obtain a second opinion and conservative treatment was thereafter continued by Dr. M through August 1993.

The Commission wrote Dr. M on November 16, 1992, asking him to determine whether claimant had reached MMI; what his whole body impairment rating was, if any; and whether he had missed two or more appointments. Dr. M was also requested to complete a TWCC-69. Also in November 1992, the carrier requested a Medical Examination Order (MEO). The Commission issued the MEO on December 2, 1992, requiring that claimant be examined by (Dr. S) for an opinion on MMI for the stated reason that there had been no

change in claimant's medical status since June 27, 1992.

In addition to the benefit review conference (BRC) report, the hearing officer admitted as hearing officer exhibits certain documents which the carrier, who did not appear at the hearing, sent to the hearing officer by electronic document transfer on the day of hearing, namely, the TWCC-69 (with accompanying narrative report) of Dr. S, the carrier's doctor, and the TWCC-69 (with accompanying narrative report) of (Dr. K), the designated doctor.

Claimant was examined by Dr. S on January 4, 1993, who in his narrative report of January 5, 1993, addressed to the carrier, noted that claimant never obtained a second opinion respecting surgery, that claimant did not want to undergo surgery, and that claimant still complained of pain and some swelling. Dr. S stated that claimant's left knee symptomatology appeared to be "secondary to degenerative osteoarthritis and chondromalacia patellar" which he felt to be a pre-existing condition. Dr. S opined in the narrative report that if claimant does not desire surgical intervention, "he has probably reached [MMI]." In his TWCC-69, Dr. S stated without qualification that claimant had reached MMI on January 5, 1992, with a whole body impairment rating of six percent.

On February 4, 1993, claimant's attorney wrote the Commission stating that while claimant had received a Commission notice of the receipt of Dr. M's report concerning MMI and impairment rating, claimant had not received Dr. M's report itself and thus could not dispute it before that date. However, the letter went on to state that Dr. M's report had been received on that date. At the hearing, the claimant, after first being assured by the hearing officer that Dr. M's TWCC-69 was not in evidence (though referred to in the BRC report) and would not be introduced by the hearing officer, declared "it makes no sense" for him to introduce the document. Accordingly, Dr. M's TWCC-69 was not in evidence.

In his TWCC-69 signed on May 24, 1993, Dr. K, the designated doctor, stated without qualification that claimant reached MMI on January 5, 1993, with a six percent whole body impairment rating. At the hearing claimant did not directly dispute the six percent rating but rather asserted it was invalid because Dr. K's determination of MMI was invalid. Claimant's theory was that notwithstanding the unqualified statement on the face of the TWCC-69 that claimant had reached MMI on January 5, 1993, Dr. K's narrative report contained a statement which did not meet the "reasonable medical probability" standard for MMI required by the 1989 Act. Dr. K's statement was as follows: "I would suggest that he has reached MMI. I think a 15% impairment of the lower extremity which would translate into 6% whole body impairment is quite fair and reasonable as previously offered." Claimant argued that such verbiage did not comport with the definition of MMI. Section 401.011(30)(a) defines MMI has "the earliest date after which, based on reasonable medical probability, further material recovery from or lasting improvement to an injury can no longer reasonably be anticipated; . . . " In the carrier's view, Dr. K's use of the word "suggest" fell short of the reasonable medical probability standard and should be read to mean only a "possibility." We disagree. The narrative report was incorporated by reference in Dr. K's TWCC-69 which, itself, contained an unqualified statement that claimant had in fact reached MMI. The face of the TWCC-69 requires an unqualified "Yes" or "No" answer to the

question whether MMI has ben reached. Reading the documents together, we do not view the complained of sentence as having somehow converted Dr. K's unqualified "Yes" answer to a mere "possibility," as claimant contends, nor do we find an indication that Dr. K's opinion on MMI was based on some standard less than a reasonable medical probability. We find no merit in this assertion of error.

With respect to claimant's appealed issue concerning the admission of Dr. S's TWCC-69, claimant asserts that the hearing record failed to indicate that this report was sent to claimant's treating doctor, Dr. M, as required by Rule 130.3(a), and thus that its admission was error. Claimant's assertion in this regard is not accompanied by the citation of any authority. Rule 130.3(a) requires that a doctor other than a treating doctor who certifies that an employee has reached MMI shall complete a medical evaluation report, send a copy not later than seven days to the treating doctor, and also send copies to the Commission, the employee or the employee's representative, and the insurance carrier. Rule 130.3(b) contains provisions for the treating doctor upon receipt of the report to indicate agreement or disagreement as the case may be so that Commission can, if necessary, initiate the designated doctor procedures to resolve the dispute.

Though later in the hearing observing that the record did not show that Dr. S's report had been sent to Dr. M, claimant did not object to the hearing officer's admission of Dr. S's report when it was offered or at any time during the hearing. We also note that claimant never asserted that the carrier was required to prove at the hearing that Dr. S's report had been forwarded to Dr. M as a condition to its admissibility. Ordinarily, as we have previously observed, evidence which is admitted without objection can not be complained of on appeal. *See* Texas Workers' Compensation Commission Appeal No. 92009, decided January 21, 1992, and Texas Workers' Compensation Commission Appeal No. 92047, decided March 25, 1992. While Section 415.003 provides for administrative penalties for health care providers who fail or refuse to file required reports, neither that statute nor Rule 130.3 provide a basis for the exclusion from evidence of Dr. S's report, even assuming it was not sent or timely sent to Dr. M. Further, Section 410.165(b) provides, in part, that a hearing officer "shall accept all written reports signed by a health care provider." We also find this assertion of error lacking in merit.

We will not substitute our judgment for that of the hearing officer where, as here, the findings are supported by sufficient evidence. Texas Employers Insurance Association v. Alcantara, 764 S.W.2d 865, 868 (Tex. App.-Texarkana 1989, no writ). The challenged findings and conclusions are not so against the great weight and preponderance of the evidence as to be manifestly unjust. In re King's Estate, 150 Tex. 662, 244 S.W.2d 660 (1951); Pool v. Ford Motor Co., 715 S.W.2d 629, 635 (Tex. 1986).

Finding no reversible error and the evidence sufficient to support the findings, the decision of the hearing officer is affirmed.

Philip F. O'Neill
Appeals Judge

CONCUR:

Stark O. Sanders, Jr.
Chief Appeals Judge

Gary L. Kilgore
Appeals Judge