APPEAL NO. 93970

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*.). On October 1, 1993, a contested case hearing (CCH) was held in (city), Texas, with (hearing officer) presiding as hearing officer. The issues to be resolved at the CCH were:

a.did the Claimant sustain a head injury in the course and scope of employment on (date of injury);

b.if so, has the Claimant reached maximum medical improvement [MMI];

c.if so, on what date did the Claimant reach [MMI];

d.if so, what is the Claimant's impairment rating; and,

e.has the Claimant sustained disability.

The hearing officer determined that the claimant had not sustained a head injury in the course and scope of employment on (date of injury), but that the carrier had accepted liability for a neck injury; that claimant had reached MMI on June 7, 1993, with an impairment rating of four percent as certified by a Texas Workers' Compensation Commission (Commission) designated doctor and that claimant sustained disability from April 5, 1993, through June 7, 1993.

Appellant, an agency of the (employer), a self-insured governmental entity, employer herein, appeals only the hearing officer's findings and conclusion regarding the date of MMI, contending that MMI should be February 1, 1993, as certified by the treating doctor and inferentially contending that the hearing officer abused his discretion in refusing to keep the record open, or reopen the record, to allow "clarification" by the designated doctor of a different MMI date. Respondent, claimant herein, did not file a response.

DECISION

The decision of the hearing officer is affirmed.

The facts are fairly and accurately set forth by the hearing officer in the statement of evidence and are adopted for purposes of this decision. As background, claimant was involved in a minor work-related vehicle accident on (date of injury). Claimant initially complained of a neck injury and saw (Dr. H) who diagnosed a neck strain. Subsequently, an MRI enabled Dr. H to diagnose a "subligamentous disc herniation" at C4-5. Dr. H, on a Report of Medical Evaluation (TWCC-69) certified MMI on "2-1-93" with four percent impairment. Because claimant continued to complain of pain, Dr. H referred claimant to a neurologist, (Dr. G). Dr. G may have been given some misleading information about the severity of the car accident and diagnosed a post-concussion syndrome. Dr. H, based on Dr. G's diagnosis of post-concussion syndrome, by letter dated April 7, 1993, stated that he

was "rescinding" claimant's "MMI status in order that this may be further investigated." Dr. G, on an undated TWCC-69, states MMI has not yet been achieved. Dr. G's opinion is supported by several notes and letters by Dr. G in the Spring and early Summer of 1993.

By letter dated May 17, 1993, the Commission appointed (Dr. Z) as a Commission-selected designated doctor to examine claimant to determine MMI, impairment and render an opinion on the "causal relationship between head injuries." By TWCC-69 and report dated June 7, 1993, Dr. Z certified MMI on June 7, 1993, with a four percent impairment rating.

A benefit review conference (BRC) was held on July 9, 1993, with the employer's position on MMI being, "[t]he Claimant has reached [MMI], according to the designated doctor [Dr. Z]." The benefit review officer's (BRO) recommendation was to accept Dr. Z's certification of MMI. As hearing officer exhibits, there is an order denying a request for continuance and another order granting a request for continuance resetting the CCH for October 1, 1993. The record is silent as to who requested the continuances or for what purpose.

At the CCH, employer urged the adoption of Dr. Z's certification of MMI, pointing out that the designated doctor's opinion has presumptive weight in accordance with Section 408.122(b) (formerly Article 8308-4.25), that the designated doctor's report was "complete in every way" and meets all the requirements of the statute, and asks the hearing officer to accept Dr. Z's opinion, citing Texas Workers' Compensation Commission Appeal No. 92686, decided February 3, 1993, for the proposition "that MMI does not amount to an absence of pain or an ability to return to work." It is only toward the end of closing argument that the employer's counsel cites Texas Workers' Compensation Commission Appeal No. 93377, decided July 1, 1993, and requests the hearing officer "to keep the record open in order to clarify the opinion of [Dr. Z] concerning the [MMI] date inasmuch as we believe [Dr. Z] offered that date of [MMI] based only on the date of his examination and will concur with [Dr. H] that the date of [MMI] was February 1, 1993. We make this request of the hearing officer not to unduly delay the rendering of a final opinion on this matter, indeed, the carrier [employer] has requested this information from [Dr. Z]." Employer's counsel then disclosed that employer's adjustor wrote Dr. Z on July 16, 1993, but had gotten no response from him. Employer then appears to reverse its position from the BRC regarding the MMI date and requests the hearing officer to anticipate that Dr. Z would "clarify" [meaning change] his MMI certification and asks the hearing officer to find MMI as of February 1, 1993. The hearing officer responds that he is going "to decline to get into a debate with [Dr. Z] about what he meant--there has been ample opportunity for the parties to determine that ahead of the hearing." The hearing officer comments that there has apparently been no effort to have the Commission find out what Dr. Z might have meant. Employer's immediate response to that ruling is incomplete in that the tape ends and the following tape begins, apparently after a brief discussion.

Employer appeals the hearing officer's determination of MMI on June 7, 1993, by

stating "[t]here is no medical basis to refute the opinion of the treating doctor that the claimant reached [MMI] on February 1, 1993." (Emphasis added.) Employer, after three pages of argument, adds "[n]o basis, that is, other than the opinion of the designated doctor." For the first time it is then disclosed that the employer had filed a Motion to Re-Open the Record on October 8, 1993, and the hearing officer had entered an Order on Carrier's (Employer's) Motion to Re-Open the Record on October 12, 1993, denying the motion. Neither pleading was contained in the record. We submit proper procedure would have been to admit those documents as hearing officer exhibits. It appears claimant was served with both pleadings.

We have, on a number of occasions, held that as a general rule, the Appeals Panel considers only the record developed below at the CCH, the request for review and the response thereto. Section 410.203(a) (1989 Act); Texas Workers' Compensation Commission Appeal No. 91121, decided February 3, 1992; Texas Workers' Compensation Commission Appeal No. 92417, decided May 29, 1992. Thus, we have declined to consider new evidence on appeal. *See* Texas Workers' Compensation Commission Appeal No. 92201, decided June 29, 1992; Texas Workers' Compensation Commission Appeal No. 92400, decided September 18, 1992. We have held that in determining whether evidence offered for the first time on appeal requires that a case be remanded for further consideration, we consider whether it came to employer's knowledge after the hearing, whether it is cumulative, whether it was through lack of diligence that it was not offered at the hearing, and whether it is so material that it would probably produce a different result. Texas Workers' Compensation Commission Appeal No. 93111, decided March 29, 1993; Black v. Willis, 758 S.W.2d 809 (Tex. App.-Dallas 1988, no writ). In the instant case, although the record below did not contain the formal Motion to Re-Open the Record and corresponding Hearing Officer's Order, it did contain a verbal motion to keep the record open on the same basis as the formal motion. Because the additional written motion and order, filed after the CCH was closed, merely articulated and detailed the verbal motion to keep the record open and the hearing officer's denial of that motion, we will consider the additional "exhibits" provided by carrier as merely elaboration of the motions made at the CCH. In fact, the hearing officer states that "[t]he Motion to Re-Open the Record is denied on essentially the same grounds that the motion to leave the record open was denied."

Employer argues that the hearing officer abused his discretion in failing to leave the record open or re-open the record to allow the employer to submit "clarification" from the designated doctor as to claimant's MMI date. We disagree. A hearing officer's discretion should not be set aside except when arbitrary or an abuse of discretion. Gerst v. Nixon, 411 S.W.2d 350 (Tex. 1966). Abuse of discretion has been found when one of the following occurs: (1) the decision omits from consideration a factor the legislature wanted the agency to consider in the situation, (2) the decision included in its consideration an irrelevant factor, or (3) the decision reached a completely unreasonable result based on weighing only relevant factors. Stateside Convey Transports v. Railroad Commission of Texas, 753 S.W.2d 800 (Tex. App-Austin 1988, no writ). We do not find that the hearing officer abused his discretion in this case where he accepted a designated doctor's MMI certification, which the employer described as "complete in every way" and a report and MMI date employer

had been urging until his final closing argument. The hearing officer had recited that the employer's attempt to obtain "clarification" had been made two and a half months prior to the hearing and that the employer had litigated the entire case before requesting that the record be left open, that the employer had not made efforts through the Commission to obtain its "clarification" and that in fact the designated doctor did not prepare and send his answer until the hearing and record were closed. Under these circumstances, the hearing officer did not abuse his discretion. The designated doctor's report was clear and, as the employer noted, complete in every way and required no clarification to perfect any discrepancy. It could be argued that there was really no need for clarification because there was no earlier date of MMI, the treating doctor having previously rescinded his MMI.

In Texas Workers' Compensation Commission Appeal No. 93762, decided October 1, 1993, we indicated that the Appeals Panel has become increasingly critical of unilateral communications with the designated doctor by the parties. Employer recognizes this fact and argues that it was such critical language about *ex parte* and unilateral communications that had a "chilling effect" on subsequent efforts by the carrier (employer) to communicate with the designated doctor. . . ." We note, however, that "chilling effect" did not stop employer's adjustor from apparently communicating with the designated doctor by letter dated July 16, 1993. (A copy of this letter was attached to the Motion to Re-Open the Record.) We note that letter sent Dr. Z a copy of Dr. H's TWCC-69 and impairment rating which had the February 1, 1993, MMI date, but did not refer to Dr. H's subsequent recision of that report. Nor does the request for "clarification" suggest there are doctors who are of the opinion that MMI had not yet been reached. In Appeal No. 93762, *supra*, we indicated 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 believe, by omitting to mention Dr. H's recision of his original MMI certification, that employer's July 16, 1993, letter to Dr. Z was an incomplete representation of Dr. H's position. Such an incomplete representation of Dr. H's position could well have tainted any reconsideration by Dr. Z.

Employer maintains it "had no reason to request clarification from the treating (sic) doctor prior to the July 9th, 1993, . . . [BRC]. . . . Thereafter, the carrier (employer) diligently sent a letter to [Dr. Z] within five days of the [BRC]." We note it was the employer's recorded position at the July 9th BRC, that claimant had reached MMI on June 7, 1993, "according to the designated doctor." Employer did not file any response to the BRC report.

Employer contends that the Appeals Panel "has acknowledged that it is within the hearing officer's authority to hold the record open in order to obtain clarifying information from a designated doctor." We do not retreat from that position but only point out that in this case, by employer's own argument, the designated doctor's report "was complete in every way" and in fact there was nothing to "clarify" and employer only seeks a more favorable, for it, MMI date. We also agree that a hearing officer should be "proactive in resolving disputes. . . ." This does not mean that if one party does not agree with a designated doctor's certification the hearing officer is obligated to allow an attempt post-hearing to modify that certification to accommodate the complaining party.

In summary, if the employer in this case, under these fact, felt that the designated doctor's report was in error, inaccurate or flawed, it should have made that fact known at the BRC, or if not discovered until after the BRC and before the CCH, to the Commission, for correction or resolution. We find the employer's contentions totally without merit.

Upon review of the record submitted, we find the hearing officer did not abuse his discretion and we will not disturb the hearing officer's findings unless they are so against the great weight and preponderance of the evidence as to be manifestly unjust. In re King's Estate, 244 S.W.2d 660 (1951); Pool v. Ford Motor Co., 715 S.W.2d 629, 635 (Tex. 1986).

We do not so find and consequently the decision of the hearing officer is affirmed.

Thomas A. Knapp
Appeals Judge

CONCUR:

Susan M. Kelley
Appeals Judge

Gary L. Kilgore
Appeals Judge