APPEAL NO. 94059

This appeal arises under the Texas Workers' Compensation Act of 1989 (1989 Act), TEX. LAB. CODE ANN. § 401.001 *et seq.* On November 29, 1993, a contested case hearing was held in (city), Texas, with (hearing officer) presiding. He continued the hearing until December 9, 1993, to determine whether good cause existed for appellant's (claimant) and his attorney's absence from the hearing of November 29th. Good cause was not found, and the hearing officer determined that claimant reached maximum medical improvement (MMI) on April 8, 1993, with an impairment rating of seven percent. Claimant does not dispute the hearing officer's findings that good cause was not shown, but states that there is medical evidence contradicting the designated doctor's opinion as to MMI; he asks that the case be re-opened. Respondent (carrier) replies that the hearing officer should be affirmed.

DECISION

We affirm.

The two issues before the hearing when it convened on November 29, 1993, were whether (and when) MMI had been reached and, if reached, what was the correct impairment rating. Claimant and his attorney did not attend. After taking evidence presented by the carrier, the hearing officer adjourned the hearing to determine why claimant did not attend. On December 9, 1993, the hearing officer re-convened the hearing by telephone to consider only the question of whether the claimant had good cause for failing to attend the hearing. Claimant on December 9, 1993, agreed that he had received notice of the hearing but said his attorney told him that he did not need to attend because the attorney would attend and would get a continuance to another date. The hearing officer made eight findings in regard to whether good cause for failing to attend the hearing was shown. Claimant does not dispute any of these findings in his appeal. The findings included that claimant and his attorney had notice but did not attend the hearing, that the attorney did not follow procedures for asking for a continuance (no motion was filed prior to hearing but a message had been left by the attorney on a Texas Workers' Compensation Commission (Commission) answering machine late on Wednesday, November 24th, which asked that the "benefit review conference" for November 29th be cancelled), that the attorney did not have "good cause" for his advice to claimant not to appear, that the attorney did not have good cause for failing to appear, and that since good cause had not been shown, the case would be decided on the evidence in the record without claimant submitting evidence. As stated, the claimant does not dispute any of these findings.

By letter dated November 29, 1993, the hearing officer had given the parties notice that he would hear evidence as to whether good cause existed for the failure of claimant to appear at the November 29th hearing. This letter also indicated that if good cause were not shown, a decision would be rendered on the evidence already entered in the record. Prior to this case, Texas Workers' Compensation Commission Appeal No. 93554, decided August 18, 1993, found no error in the hearing officer reaching a decision on the merits after

claimant failed to appear at a hearing and thereafter did not show good cause for his absence.

The only evidence offered by the carrier was the Commission order, appointing (Dr. C) as the designated doctor to determine both MMI and an impairment rating, and Dr. C's resulting report. This report, prepared after examining claimant on September 14, 1993, contains copies of documents considered by Dr. C, however, and in so doing, provides many medical documents the claimant could have been expected to provide. (Dr. H), the treating doctor, in April 1992, operated on claimant's left arm to release certain nerves; his operative report and 24 of his other reports, memos, or letters are included. (Claimant worked for (employer); in (month, year), he had pain in his left shoulder at work after lifting - he had fallen on the same shoulder in (month, year). In addition, Dr. C's report contains copies of a report from (Dr. R) dated in December 1991, reports of (Dr. L) as to EMG studies provided in February and September 1992 and April and May 1993, a report of (Dr. D) in April 1992, a report of (Dr. P) in March 1993, and two reports of (Dr. De) dated June 1992 and April 1993. In addition to the reports of EMG made by Dr. L, there were several MRI reports also included in the report.

Dr. H, an orthopedic surgeon, referred claimant to Dr. D, a psychiatrist, who stated in April 1992 that he suspected an injury but "with very large psychological overlay." He suggested "objective evidence" be found prior to any surgery. Some EMG studies did show abnormality, and surgery, as stated, was performed in April 1992. Dr. De saw the claimant on behalf of the carrier in June 1992; she said that consideration of MMI should wait for recovery time after the recent surgery. She questioned whether further surgery would be advisable for this claimant. On April 8, 1993, Dr. De signed a TWCC form 69 (Report of Medical Evaluation) stating that claimant reached MMI on April 8, 1993, with seven percent impairment. Dr. De pointed out that claimant had not been to work since February 1992 so she questioned whether repetitive work could be causing claimant's continued shoulder problems after the April 1992 surgery. She recommended occupational therapy and advised against additional surgery. Dr. C, the designated doctor, in considering all these reports, also stated that Dr. P, another orthopedic surgeon, did not advise additional surgery. Dr. C observes that claimant is right handed. Dr. C agreed with Dr. De's assessment of MMI as having occurred on April 8, 1993, with a seven percent impairment.

Claimant states in his appeal that Dr. H does not think he has reached MMI yet. Claimant also indicates that Dr. P, by letter dated September 20, 1993, now agrees with additional surgery. There is no indication that this evidence was not available at the time of hearing, and it will not be considered as a basis for remand now. *See* Black v Wills, 758 S.W.2d 809 (Tex. App.-Dallas 1988, no writ). While the letter of Dr. P that claimant refers to was prepared after Dr. C examined claimant, the difference of opinion is reflected in the attachments to the designated doctor's report which include a copy of Dr. H's letter of May 10, 1993. In that letter Dr. H disagrees with the MMI opinion of Dr. De, pointing to the abnormal EMG. Although it is clear that the designated doctor did not agree with Dr. H as to a whether further surgery was needed and whether MMI was reached, he considered Dr. H's opinion and basis therefor when he formed his opinion that MMI had been reached.

The great weight of other medical evidence was not contrary to the designated doctor's opinion. (In concluding that the designated doctor's opinion was not overcome by the great weight of other medical opinion, we note that having reached MMI does not curtail further medical care that is based on the injury.)

Claimant asks that his case be reopened and allow him to "start from the beginning at a benefit review conference with competent representation . . . . " Even if the attorney was negligent, that does not provide a basis for granting the relief sought by the claimant. *See* Texas Workers' Compensation Commission Appeal No. 93605, decided August 26, 1993, which indicated that the acts of the attorney are considered as acts of the claimant.

Claimant also asks that psychological damage he encountered be considered. The record of hearing shows that the only issues at hearing were MMI and impairment rating. There was no issue as to extent of injury. An issue that could have been raised in the dispute resolution process will not be considered when raised for the first time on appeal. *See* Texas Workers' Compensation Commission Appeal No. 91100, decided January 22, 1992. We also note in this instance that the treating doctor did not refer the claimant for psychological treatment after the psychiatric review of Dr. D. Psychological injury was not part of the medical condition of claimant stemming from the (month year) compensable injury which the designated doctor then overlooked. Had the designated doctor overlooked an element of the injury, the hearing officer could have instructed the designated doctor to include the element, in this case psychological injury, in his rating. *See* Texas Workers' Compensation Commission Appeal No. 93735 decided October 4, 1993.

Finding that the decision and order of the hearing officer are not against the great weight and preponderance of the evidence, we affirm.

Joe Sebesta
Appeals Judge

CONCUR:

Robert W. Potts
Appeals Judge

Gary L. Kilgore
Appeals Judge