APPEAL NO. 94214

This appeal arises under the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act). On December 21, 1993, a contested case hearing (CCH) was held in (city), Texas, with (hearing officer) presiding as hearing officer. The issues presented to the hearing officer for resolution were:

1.Was the TWCC-69 of Dr. P, dated January 7, 1993, a proper certification to start the designated doctor process?

2.Has the Claimant reached maximum medical improvement, and if so, on what date?

3.What is the Claimant's impairment rating?

The hearing officer determined that the Report of Medical Evaluation (TWCC-69) completed by (Dr. P) certifying the claimant reached maximum medical improvement (MMI) on January 7, 1993, with a zero percent impairment rating (IR) and claimant's dispute thereof was a proper certification and that claimant reached MMI on August 3, 1993, with a zero percent IR, in accordance with a designated doctor's report.

Claimant contends that the hearing officer erred in her decision, as discussed later, and requests that we reverse the hearing officer's decision and render a decision in his favor. Respondent carrier responds that the decision is supported by the evidence and requests that we affirm the decision.

DECISION

The decision of the hearing officer is affirmed.

No witnesses were called at the CCH and the parties submitted the case based on documentary evidence and argument. The background facts are not in dispute and are recited to establish a foundation and frame of reference for this dispute. Claimant sustained a compensable back and perhaps left hip injury, on (date of injury), lifting some aluminum bundles while employed as a welder by (employer). Claimant initially sought treatment with Dr. P who saw him one or more times. Claimant was last seen by Dr. P on January 7, 1993 (all dates here on will be 1993, unless otherwise noted). Dr. P referred claimant to (Dr. JP) for a "second opinion." Dr. JP in a comprehensive three page report dated January 7th concluded:

<u>Impression</u>:

1.Pre-existing discogenic disease L4-L5 and L5-S1, prior to June of 1992.

2.Chronic low back pain with acute exacerbation.

3.Tiny HNP at L4-L5 without any significant neurological involvement.

Disposition: I have recommended to the patient that he resume his daily low back exercise program and I have emphasized the usual conservative therapy. The patient may continue with light duty. Medications were discussed; however, the patient wants to stay off medication at the present time. Certainly the patient does not need any surgery at the present time for his HNP. The patient was advised to see [Dr. P] in follow-up in one week. Return to see me p.r.n. at the request of [Dr. P].

By TWCC-69, dated March 17th, Dr. P certified MMI on January 7, 1993, with zero percent IR. The blocks for a narrative history and documentation of objective laboratory or clinical finding of impairment are blank but in block 17 Dr. P notes "[n]o impairment or disability." On May 18th, claimant submitted a request to change treating doctors, listing Dr. P as the initial treating doctor and (Dr. S) as the alternate treating doctor. The request was approved by a Texas Workers' Compensation Commission (Commission) disability determination officer (DDO) on June 11th, and claimant began treatment with Dr. S.

On June 14th, claimant contacted the Commission and disputed Dr. P's assessment of MMI and IR (we note this was within 90 days of the initial impairment rating). The parties were unable to agree on a designated doctor and claimant requested the Commission select a designated doctor. The Commission, by letter dated July 15th, selected (Dr. D) as a designated doctor to examine claimant to determine MMI and IR. Dr. D examined claimant on August 3rd and in a comprehensive nine page report (which includes testing results and range of motion evaluation) dated August 17th and accompanying TWCC-69 dated August 3rd, certified claimant as MMI on "8-3-93" with a zero percent IR. Claimant disputed Dr. D's assessment and requested a benefit review conference. On September 24th, claimant submitted a second request to change treating doctors (no medical reports other than an off work note from June 30th to July 30th, from Dr. S, a chiropractor, and the second treating doctor are in evidence). Claimant requested (Dr. G) as the alternative treating doctor listing Dr. P as the initial treating doctor. This request was approved by a Commission DDO on October 8th.

As noted previously, the hearing officer determined the certification of MMI on January 7th, by Dr. P was sufficient to start the designated doctor process and that claimant reached MMI on August 3rd with an IR of zero percent, in accordance with the designated doctor's assessment. Claimant specifically contests the following findings of fact and the conclusions based on those findings.

FINDINGS OF FACT

5.In regards to his compensable injury of (date of injury) or thereabout, the Claimant's treating doctor, [Dr. P], examined the Claimant on January 7, 1993 and certified that the Claimant reached [MMI] on January 7, 1993 with a whole body impairment rating of 0%.

6.[Dr. P's] Report of Medical Evaluation, TWCC-69 form, certifying [MMI] on January 7, 1993 with a 0% impairment rating was signed by [Dr. P] on March 17, 1993.

7.The Claimant contacted the Commission on June 14, 1993, to dispute the certification of maximum medical improvement and assigned impairment rating by [Dr. P].

9.On August 3, 1993, [Dr. D], examined the Claimant and certified that the Claimant had reached maximum medical improvement on that date with a whole body impairment rating of 0%.

10.[Dr. D's] findings are not against the great weight of the other medical evidence.

Claimant's appeal is based on a series of building blocks wherein he first states Dr. P's initial impairment rating certifying MMI on January 7th with zero percent IR is "not properly certified." Claimant argues that because the TWCC-69 did not have a narrative, and that blocks 15 and 16 were not completed, Dr. P's "TWCC Form 69 is invalid." From there claimant argues "Lacking proper certification, the [MMI] and [IR] assessed by [Dr. P] lack the basis to call the Commission's Designated Doctor into play. Lacking a basis to examine Appellant as a Designated Doctor, the opinion of the Designated Doctor is void." Claimant in essence argues that the appointment of Dr. D as the Commission-selected designated doctor was arbitrary given that Dr. P's assessment was "invalid." We would initially note that it is claimant that disputed his own treating doctor's certification, without any allegations at that time that the certification was improper, and requested a designated doctor. It appears incongruous to us that claimant requested a designated doctor and after obtaining the doctor's findings, challenged the doctor's appointment as being "invalid" or "void." If claimant believed the issue was not ripe for the appointment of a designated doctor, claimant should not have requested that a designated doctor be appointed. Even if the treating doctor's report does not constitute a proper certification, that fact does not render the entire proceeding "invalid" or "void."

Section 408.122(b) of the 1989 Act states: "If a dispute exists as to whether the employee has reached [MMI], the commission shall direct the employee to be examined by a designated doctor . . . ." (Emphasis added.) Similarly, Section 408.125(a) states "[i]f an [IR] is disputed, the commission shall direct the employee to be examined by a designated doctor . . . ." Tex. W. C. Comm'n, 28 TEX. ADMIN. CODE § 130.6(a) (Rule 130.6(a)) states:

(a)If the commission receives a notice from the employee or the insurance carrier that disputes either maximum medical improvement or an assigned impairment rating, the commission shall notify the employee and the insurance carrier that a designated doctor will be directed to examine the employee.

The cited provisions of the 1989 Act require only "a dispute" and Rule 130.6(a), cited above,

only requires "notice . . . . that disputes either [MMI or an assigned [IR] . . . ." to generate the mandatory appointment of a designated doctor. Neither the statute or the rules require that the dispute or notice be based on a "valid certification" of a report. At that stage of the proceeding, there is no process or requirement to assess whether the dispute or notice is based on a "proper certification" nor is there a provision that the Commission select a designated doctor only if the treating doctor's initial assessment constitutes a proper certification. We have previously held that certification by another doctor is not a prerequisite to the appointment of a designated doctor. *See* Texas Workers' Compensation Commission Appeal No. 93334, decided June 14, 1993.

A hearing officer is free to weigh and to disregard reports which are flawed or may not constitute proper certifications. However, even if a certification is not proper for failure to comply with each and every requirement, such does not render all subsequent proceedings "void" (being of no force or effect). We further note, again, that it is claimant that initiated the dispute process and once having been initiated, claimant is in no position to argue that his request for a designated doctor should have been ignored (contrary to the 1989 Act and Commission rules) because of some flaw in the treating doctor's initial impairment rating.

We reject claimant's argument that Dr. P's assessment of MMI and the IR " is invalid as to be void" and all of claimant's contentions that any proceeding after Dr. P's certification of MMI and IR is "void." Even if a TWCC-69 is flawed in some respect, that would not mean it and everything else that follows is "void" (being of no force and effect). There still existed a dispute and at claimant's request a designated doctor was appointed and the designated doctor rendered a report which was in general agreement with all the other medical reports in evidence, such as Dr. JP's report.

Claimant also contends that "there is no credible evidence that [Dr. P] examined Claimant on January 7, 1993." While generally that may be correct, the Appeals Panel has recognized that a doctor may certify MMI on other than a day when the doctor has actually performed the examination. *See* Texas Workers' Compensation Commission Appeal No. 92453, decided October 12, 1992, which held that there is nothing in the 1989 Act or Commission rules that specifically restricts a doctor to certify MMI only as of the date of claimant's examination. We note that Dr. P was claimant's initial treating doctor and as such was fully aware of claimant's condition. Furthermore, it would appear that Dr. JP who examined claimant on January 7th, on a referral from Dr. P (who received a copy of Dr. JP's report) provided a basis for Dr.P's subsequent TWCC-69.

We do not address claimant's contentions regarding "constitutionally protected due process and equal protection arguments" other than to note that the Appeals Panel of the Commission, and administrative agencies in general, have no power to rule on questions of constitutionality of statutes. *See* Texas Workers' Compensation Commission Appeal No. 92094, decided April 27, 1992; Texas Workers' Compensation Commission Appeal No. 93972, decided December 8, 1993.

In brief comment on the carrier's response which emphasized the deference the Appeals Panel gives to hearing officer's determinations on factual issues, we would note this case involves a question of law, rather than questions of factual sufficiency. We also reform what appears to be a clerical error in the hearing officer's Conclusion of Law No. 3 which should read that the claimant reached MMI on August 3, 1993 (instead of January 7, 1993), in conformance to the evidence and the hearing officer's Decision and Order. This correction is consistent with parts of the Decision and Order.

Upon review of the record submitted, we find no reversible error and we will not disturb the hearing officer's determinations unless they are so against the great weight and preponderance of the evidence as to be manifestly unjust. In re Kings 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 and Order of the hearing officer are affirmed.

Thomas A. Knapp
Appeals Judge

CONCUR:

Stark O. Sanders, Jr.
Chief Appeals Judge

Gary L. Kilgore
Appeals Judge