APPEAL NUMBER 94953
FILED SEPTEMBER 1, 1994

This appeal arises under the Texas Workers' Compensation Act of 1989, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act). On June 26, 1994, a hearing was held in (City), Texas, with (hearing officer) presiding. He determined that respondent (claimant) had not reached maximum medical improvement (MMI) consistent with the opinion of the designated doctor. Appellant (carrier) asserts that claimant violated the 1989 Act by contacting the designated doctor, states that a video of claimant should be included in medical evidence, and argues that the great weight of other medical evidence is contrary to the designated doctor. Claimant replies that the hearing officer should be upheld.

DECISION

We affirm.

The compensable injury was not discussed at the hearing. The only issue was whether claimant had reached MMI. The designated doctor, Dr. T, does recite that claimant, who worked for (employer), hurt his back when a pallet of frozen meat fell on him on _____. Claimant's doctor was Dr. L. The medical documents introduced at this hearing do not include records prior to September 1993. Carrier's Exhibit No. 1 is an incomplete Report of Medical Evaluation (TWCC-69) signed by Dr. P on September 3, 1993, in which MMI is stated to have occurred on August 27, 1993, with eight percent impairment rating (IR). Dr. P examined the claimant on behalf of the carrier. The admitted form is without the "attached report" it incorporates, and gives no explanation or basis for the conclusion set forth that claimant had reached MMI. *See* Texas Workers' Compensation Commission Appeal No. 93119, decided March 29, 1993, which said that medical evidence should be considered with regard to the basis provided for opinions asserted. Thereafter Dr. L on October 25, 1993, stated on a TWCC-69 that MMI was reached on September 7, 1993, with eight percent IR. This report does provide some explanation in its observation that claimant has improved range of motion (ROM) and no spasm, with reflexes referred to in a positive manner. Thereafter Dr. L, on November 9, 1993, provided another TWCC-69 which again filled in the MMI blank as having been reached on September 7, 1993, with eight percent IR; the report mentioned that claimant had been referred to Dr. D for a possible fascial hernia and then stated that Dr. D repaired the hernia.

Claimant provided a letter from Dr. D dated December 6, 1993, which said that he repaired a "left lumbar hernia" on claimant on September 20, 1993. Dr. D said claimant had recovered well from the surgery; he would know more after seeing claimant again on December 9, 1993. He gave no opinion as to MMI.

Dr. T's TWCC-69 is dated May 20, 1994, and finds that MMI has not been reached; it refers to a visit of December 1, 1993, and, in item 15, states "see attached." Attached to the TWCC-69 is a narrative, also dated December 1, 1993, which states that claimant

underwent a "fairly extensive procedure" to repair a lumbar muscle herniation. Dr. T says that while claimant has recovered from the original strain, he has not recovered from the surgery, and "clearly has not reached MMI." With no medical evidence in the record to indicate any change in claimant from December 1993 to May 1994, no basis was shown to attack Dr. T's opinion in May 1994, when a TWCC-69 was finally provided, for reflecting the same opinion Dr. T expressed in his narrative of December 1993, which said that MMI had not been reached. Even in instances wherein MMI has been certified as having been reached on a certain date, Texas Workers' Compensation Commission Appeal No. 91083, decided January 6, 1992, and Texas Workers' Compensation Commission Appeal No. 92628, decided January 4, 1993, indicate that the form is not necessary when requirements are met in the narrative. In this case, the effect at hearing would have been the same if Dr. T had filled out a TWCC-69 in December 1993 instead of May 1994. MMI had simply not been certified as being reached by the designated doctor at the time of the hearing, with no indication that such designated doctor had disregarded any reports or studies provided him, or additional examinations he or others conducted of claimant.

Carrier indicates in its appeal that the surgery Dr. D performed on claimant "may or may not have been associated with the original injury." There was only one issue at the hearing, IR; extent of injury was not an issue nor was it litigated at the hearing. With no issue as to extent of injury, the weight given the designated doctor's opinion that MMI has not been reached does not have to be decreased just because it was based on the effects of surgery.

Carrier states that the video should be "included in the medical evidence." The record shows that the video was discussed in the context of the sole issue of MMI, which generally requires evidence based on "reasonable medical probability." *See* Section 401.011(30). After ascertaining that no request had been made to show the video to the designated doctor, the hearing officer did not admit it. No authority is provided by carrier to support the assertion that a video of claimant should be considered to be "medical" evidence. Had the video been admitted, without an issue of disability, it is not apparent how the hearing officer could have given it any weight since questions of MMI are generally based on "reasonable medical probability." Compare this case to Texas Workers' Compensation Commission Appeal No. 92441, dated October 8, 1992, in which a video was provided to the designated doctor who had earlier said that claimant had not reached MMI; after seeing the video, that doctor changed his opinion and stated in another report that MMI had been reached. Consideration of the second report by the hearing officer was upheld on appeal. Any error in exclusion of the video would not constitute reversible error because it probably did not cause an improper decision. *See* Hernandez v. Hernandez, 611 S.W.2d 732 (Tex. App.-San Antonio 1981, no writ). In addition, the whole case did not turn on the admission of the video when MMI was the only issue. *See* Atlantic Mutual Insurance Co. v. Middleman, 661 S.W.2d 182 (Tex. App.-San Antonio 1983, writ ref'd n.r.e.).

The carrier states that claimant violated the 1989 Act because someone from claimant's attorney's office talked to the designated doctor about re-examining claimant under different "fee" guidelines. Claimant's attorney did not object to testifying and testified that he did not contact the designated doctor and knew of no one in his office that did. Claimant testified that when Dr. T saw that he recently had surgery when he disrobed, Dr. T indicated he was not ready to go back to work. Claimant never saw or talked to Dr. T again. Claimant did call Dr. T's office once to say that a TWCC-69 was needed, and later took a form to the doctor's office for use in his case, but was told that a form had already been received. Claimant did try to make an appointment to see Dr. T again but was not successful. Claimant did call an insurance adjuster and believes that someone from his attorney's office called an adjuster once. An adjuster for the carrier, Ms. M testified that Dr. T's office was told to disregard a request for another appointment for claimant unless it came from certain employees of the Commission. She received no copy of Dr. T's report before the benefit review conference.

Texas Workers' Compensation Commission Appeals No. 93762, decided October 1, 1993, and Texas Workers' Compensation Commission Appeal No. 94553, decided June 17, 1994, referred to criticism of unilateral contact of the designated doctor but considered such contact from a perspective of "prejudice, undue influence, or untoward action" or "bias, partiality or undue influence." Appeal No. 94553 stated, though, that the "designated doctor's report is not to be disregarded solely because a unilateral contact has been made." The hearing officer is the sole judge of the weight and credibility of the evidence. *See* Section 410.165. The testimony at this hearing sufficiently supports the hearing officer's finding of fact that any contact with the designated doctor was not prejudicial.

The hearing officer could consider that the opinion of Dr. P as to MMI was not supported by reference to any medical data, progression of treatment, or reference to other doctor's reports. The opinion of Dr. L could be viewed as not constituting the great weight of other medical evidence against that of the designated doctor, especially when Dr. L referred in his November report to the surgery of Dr. D but did not refer to having seen claimant since then, or to have seen the operative report of Dr. D, or to have talked to Dr. D about the outcome of that procedure, but still said that MMI had been reached. The finding of fact that the great weight of other medical evidence is not contrary to that of the designated doctor is sufficiently supported by the evidence.

The decision and order are not against the great weight and preponderance of the evidence and are affirmed. *See* In re King's Estate, 150 Tex. 662, 244 S.W.2d 660 (1951).

Joe Sebesta
Appeals Judge

CONCUR:

Susan M. Kelley
Appeals Judge

Gary L. Kilgore
Appeals Judge