APPEAL NO. 950123

This appeal is brought pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq*. (1989 Act). A contested case hearing was held in_____, Texas, on October 21, 1994, with _____presiding as hearing officer. The record was left open to seek clarification from the designated doctor and was closed on December 14, 1994. The issues at the hearing were: (1) has the respondent (claimant) reached maximum medical improvement (MMI), and if so, on what date; (2) if the claimant has reached MMI, what is the impairment rating (IR); (3) was the designated doctor influenced by the presence of the claimant's treating doctor at the examination, and if so, should the Texas Workers' Compensation Commission (Commission) appoint another designated doctor; and (4) has the claimant sustained disability as a result of the injury of _____, and if so, for what period or periods. The hearing officer determined that (1) the claimant has not reached MMI; (2) it is premature to assign an IR; (3) the designated doctor was not influenced by the presence of the claimant's treating doctor at the examination of the claimant; and (4) the claimant had disability from March 9, 1994, through March 14, 1994 and from March 29, 1994, through the date of the hearing on October 21, 1994. The carrier appealed arguing that the hearing officer erred in determining that the claimant had not reached MMI as reported by the designated doctor and requesting that the Appeals Panel reverse the decision of the hearing officer that the claimant has not reached MMI and render a decision that the claimant reached MMI on May 26, 1994. The claimant responded urging that we affirm the decision of the hearing officer.

DECISION

We affirm.

The claimant injured his low back on _____ , while moving furniture in the course and scope of his employment. The claimant testified that he was treated first by Dr. M (records reflect that he is a physician's assistant) and Dr. P. He said that both doctors were company doctors. Dr. P reported that the claimant could return to full duty on March 18, 1994. The claimant continued to complain of pain, and Dr. P referred the claimant to Dr. G, a neurosurgeon. In a report dated April 19, 1994, Dr. GO stated that he did not have x-rays to review, that sensory testing shows a subjective hypesthesia consistent with an L5 root distribution on the right, that his impression is "PROBABLE RADICULAR SYNDROME RIGHT LOWER EXTREMITY, L4-5 SUSPECT," that arrangements will be made to have a lumbar CT scan, and that it is unknown when the claimant could return to work. On April 25, 1994, Dr. GO reported that he reviewed the x-rays, that they were normal, and that the CT scan shows no evidence of disk protrusion or nerve root impingement. A report shows that the claimant received physical therapy from April 22, 1994, through May 9, 1994. The claimant said that in May 1994 the employer went bankrupt and that he got a letter from the employer advising him that he

was laid off because of lack of work. The claimant testified that in May 1994 Dr. P told him that he could return to work; but that he, the claimant, was still having pain in his back and numbness in his right leg and did not agree with Dr. P; that he went to an attorney, and was advised to change treating doctors to Dr. C, a chiropractor. The claimant said that he first saw Dr. C on June 13, 1994, and that Dr. C took him off of work. Dr. P completed a Report of Medical Evaluation dated June 7, 1994, in which he certified that the claimant reached MMI on May 26, 1994, and assessed a zero percent IR. The claimant disputed the report of Dr. P, and Dr. S was appointed the Commission-selected designated doctor. Dr. S examined the claimant on August 22, 1994. The claimant testified that his wife and Dr. C attended the examination by Dr. S. He said that Dr. C observed the examination, did not discuss his case with Dr. S, and had no conversation with Dr. S. Dr. S had available a report of a MRI of the lumbar spine dated June 29, 1994, in which Dr. G reported that his impression was "AT L4-5 AND L5-S1 THERE ARE APPROXIMATELY 2 MM. ANNULAR BULGES THAT TOUCH THE THECAL SAC WITHOUT EFFACEMENT AT EITHER LEVEL." On the TWCC-69 dated August 22, 1994, Dr. S indicated that the claimant had not reached MMI and estimated that he would reach MMI in approximately two months unless he is proven to be a candidate for surgery. In the narrative report she stated that the claimant was accompanied by Dr. C. She noted that the claimant is five feet nine inches tall and has a reported weight of 265 pounds, and diagnosed:

1.Lumbar strain with biochemical myofascial pain.

2. Degenerative disc disease with symptoms and suggestions diagnostically of an L5 radiculopathy with sensory and motor involvement.

3.Urologic symptoms of incontinence, etiology unclear but possibly secondary to spine injury.

4.Sacroiliac joint dysfunction with gait abnormalities.

5.Disuse weakness, deconditioning and loss of range of motion exacerbating all of the above.

Dr. S also reported:

It is not felt that [claimant] is at [MMI] as he does not appear to have had all appropriate diagnostic and therapeutic interventions. It is felt that prior to a declaring him as being at [MMI] and performing an [IR], several other interventions need to occur.

Dr. S recommended additional diagnostic intervention including a discogram and urologic workup; trial of epidural steroid injections; tricyclic antidepressant; and if surgery is not

recommended, continued conservative therapy including mobilization for conditioning, myofascial release for desensitization and spinal endurance, and stabilization exercises. The record does not contain any medical records dated after August 22, 1994. In a letter dated August 3, 1994, Dr. C stated that the claimant had not reached MMI, that he would not reach MMI until he completed a comprehensive work conditioning and retraining programs, and that these programs would come as soon as they are approved and the claimant can tolerate the work load. On cross-examination when asked whether the things Dr. S had recommended had been accomplished, the claimant said that Dr. F gave him a shot in his back but does not state when. The record was left open to seek clarification from Dr. S concerning possible influence by Dr. C. In a letter dated November 11, 1994, Dr. S stated that Dr. C did not attempt to communicate with her or influence her evaluation or examination results and that she was not influenced by the physical presence of Dr. C during her evaluation and examination of the claimant.

The carrier urges that the hearing officer erred in determining that the report of the designated doctor stating that the claimant had not reached MMI on the date she examined him is entitled to presumptive weight. It argues that the mere presence of the treating doctor is *res ipsa loquitur* for the harm created. As both parties indicated, Section 408.004(d) and Rule 126.6(c) provide that an injured employee is entitled to have a doctor of his or her choice present at an examination required by the Commission at the request of the carrier; however, neither the 1989 Act nor the Commission rules mention the presence of a doctor of the employee's choice at an examination by a designated doctor. Similarly, neither the 1989 Act nor the Commission rules mention unilateral contact by a party with the designated doctor; however, we have stated that unilateral contact by either party could undermine the perception that designated doctors are impartial arbiters called upon to finally resolve disputes over MMI and IR. Texas Workers' Compensation Commission Appeal No. 93586, decided August 26, 1993.

TWCC Advisory 94-02, dated March 14, 1994, provides in part:

> Since the Act gives the designated doctor's report presumptive weight and preferred status, all precautions should be taken to ensure the designated doctor's report is impartial and unbiased. Parties to a specific case, their representatives, and an Ombudsman assisting an injured worker or employer should communicate with a designated doctor only through appropriate Commission personnel.
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> This advisory does not limit the treating doctor's responsibility to provide the designated doctor with previous medical records as provided by 28 TAC, Rule 133.2, *Sharing Medical Records and Test Results*.

There is no other mention of treating doctor in TWCC Advisory 94-02. However, we have not held that mere contact with the designated doctor results in a report of a designated doctor that is not entitled to presumptive weight. In Texas Workers' Compensation Commission Appeal No. 93762, decided October 1, 1993, we reviewed several cases in which there had been unilateral contact with a designated doctor and wrote:

> . . . we have become increasingly critical of unilateral communications with the designated doctor by the parties in general. However, we observe . . . that there is no authority in the 1989 Act or the Commission rules which would prohibit or limit such contact by the parties. . . . Certainly we would not hesitate to take appropriate action were any prejudice, undue influence or other untoward action, to result from such a unilateral contact.

In Texas Workers' Compensation Commission Appeal No. 93888, decided November 12, 1993, the carrier provided the designated doctor a video that showed the claimant. In a deposition the designated doctor stated that the video did not cause him to be biased or partial in favor of either party. The hearing officer stated that there was no evidence of bias or prejudice on the part of the designated doctor. The Appeals Panel noted that whether the designated doctor had been prejudiced was a factual determination for the hearing officer citing Section 410.165(a). In Texas Workers' Compensation Commission Appeal No. 93286, decided May 28, 1993, the testimony of a treating doctor who observed the examination of the claimant by the designated doctor resulted in a reversal and remand to determine if the designated doctor complied with the Guides to the Evaluation of Permanent Impairment, third edition, second printing, dated February 1989, published by the American Medical Association (AMA Guides); however, there was no objection to the presence of the treating doctor at the examination of the claimant by the designated doctor. This case was decided prior to TWCC Advisory 94-02 being issued.

In Finding of Fact No. 8 in the case before us, the hearing officer found "Dr. [S], the designated doctor, was not influenced by the presence of Dr. [C], Claimant's treating doctor, during Dr. [S]'s examination of the Claimant." This finding is supported by sufficient evidence. This finding, the evidence supporting it, and other evidence in the record are sufficient to support the hearing officer's conclusion of law that the report of the designated doctor is entitled to presumptive weight. Likewise, the evidence is sufficient to support the determination of the hearing officer that the report of the designated doctor is not contrary to the great weight of the other medical evidence.

Just as unilateral contact with a designated doctor by the parties should be avoided, we believe it is inappropriate under our decisions and the TWCC Advisory 94-02 that a treating doctor, a required medical examination doctor or any other doctor involved in the treatment or evaluation of the injured party attend the examination and evaluation of a

claimant by a designated doctor. The potential for undue influence is too great and as we have stated, the designated doctor serves at the request of the Commission and comes under the responsibility of the Commission. Texas Workers' Compensation Commission Appeal No. 92595, decided December 21, 1992. As stated in the TWCC Advisory 94-02 "all precautions should be taken to ensure that the designated doctor's report is impartial and unbiased." Nothing in this decision should be interpreted to indicate that the designated doctor may not seek additional information or clarification from other health care providers. Nor are treating doctors, required medical examination doctors, and other doctors necessarily precluded from providing medical information to a designated doctor, particularly when requested by the designated doctor and deemed by him to be helpful in the performance of his responsibilities.. Texas Workers' Compensation Commission Appeal No. 941395, decided December 1, 1994. We would not hesitate to take appropriate action were any prejudice, undue influence, or other untoward action to result from the attendance of anyone at the examination and evaluation of the claimant by a designated doctor or any health care provider performing an examination or evaluation at the request of the designated doctor. *See* Appeal No. 93586, *supra*.

Having found the evidence to be sufficient to support the decision and order of the hearing officer and no reversible error, we affirm.

Tommy W. Lueders
Appeals Judge

CONCUR:

Stark O. Sanders, Jr.
Chief Appeals Judge

Gary L. Kilgore
Appeals Judge