

APPEAL NO. 001948

This appeal arises pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act). A contested case hearing was held on July 20, 2000. With regard to the three issues before him, the hearing officer determined that 1) the respondent (claimant) had disability from August 24, 1998, through February 22, 1999; 2) the claimant reached maximum medical improvement (MMI) on March 9, 2000; and 3) the claimant has a two percent impairment rating (IR).

The appellant (carrier) appealed, contending that MMI was reached on August 24, 1998, with a one percent IR as certified by the first designated doctor, that a second designated doctor should not have been appointed, that the claimant did not have disability because he "was able to work for his wife's business and work on his own rental properties" and that the hearing officer's ruling excluding a videotape was in error. The carrier requests that we reverse the hearing officer's decision and render a decision in its favor. The claimant responds to the carrier's assertions and urges affirmance of the hearing officer's decision.

DECISION

Affirmed.

The claimant was a pipe fitter and on _____, was carrying a cast iron pipe when he slipped and fell on his left shoulder after hitting his right shoulder on a cylinder. The parties stipulated that the claimant sustained compensable bilateral shoulder injuries on _____. The claimant's initial treating doctor was Dr. RS, who initially diagnosed a shoulder strain but subsequently in a note dated July 14, 1998, was of the opinion that the claimant had a total right rotator cuff tear and a partial left rotator cuff tear. The claimant was seen by Dr. DC, who confirmed the bilateral shoulder tears (although he says the right was "chronic long standing"). The claimant was also seen by Dr. B, who confirmed the rotator cuff tears but who was of the opinion that they preexisted the date of injury.

Apparently the first doctor to certify MMI and assess an IR was Dr. WS, a required medical examination doctor, who, in a Report of Medical Evaluation (TWCC-69) with narrative dated August 24, 1998, certified MMI on that date with a zero percent IR (although finding a two percent loss of shoulder range of motion (ROM)). Dr. RS, the treating doctor, agreed with that assessment on the TWCC-69 on September 1, 1998. The claimant disputed the rating and Dr. L was appointed as the (first) designated doctor. In a report dated November 9, 1998, Dr. L certified MMI on August 24, 1998, with a one percent IR (based on loss of ROM).

The claimant filed an Employee's Request to Change Treating Doctors (TWCC-53) dated October 27, 1998, requesting a change of treating doctor from Dr. RS to Dr. M giving as the reason that Dr. RS has refused to see him (a Dispute Resolution Information System (DRIS) note of November 5, 1998, supports the claimant's testimony) and that several of the other doctors had recommended continued physical therapy. The claimant's

request was approved on November 5, 1998. Dr. M, in a report dated November 17, 1998, recited the claimant's history, was of the opinion that despite Dr. WS's and Dr. L's opinions, the claimant remained "temporarily totally disabled." Dr. M placed the claimant in the PRIDE rehabilitation program. The claimant testified the he began the rehabilitation program in December 1998 and completed the program in March 1999. (The PRIDE form indicates a date of discharge of February 5, 1999.) Dr. M, on a TWCC-69 dated February 23, 1999, and narrative dated February 19, 1999, certified MMI on February 19, 1999, with an 11% IR. In another report Dr. M released the claimant to return to work with normal activity on February 22, 1999.

In a letter dated August 6, 1999, the Texas Workers' Compensation Commission (Commission) wrote Dr. L enclosing "additional medical records for your review and consideration" (apparently Dr. M's records and reports) and ask if his opinion was changed, instructing that if it has to please file an amended TWCC-69 and "[i]f it remains the same, please explain." DRIS notes beginning March 29, 1999, indicate that Dr. L failed or refused to return calls on that date, April 13, 1999, April 20, 1999, May 20, 1999, and May 26, 1999, when a complaint was apparently lodged with the Commission's Compliance and Practices Division regarding Dr. L's refusal to respond to requests for clarification. (There were at least six additional DRIS notes regarding Dr. L's failure to respond to the Commission's inquiry.) Dr. L failed or refused to comply with the Commission's written August 6, 1999, letter and eventually Dr. RNS, was appointed as a second designated doctor.

Dr. RNS in a TWCC-69 dated March 27, 2000, and narrative dated March 21, 2000, certified MMI on March 9, 2000, with a two percent IR based on a one percent loss of ROM of each shoulder for a total two percent IR. The hearing officer accorded this report presumptive weight and adopted the MMI date and two percent IR.

The carrier first contends the MMI date should be August 24, 1998, as certified by Dr. L and agreed to by Dr. RS. The carrier's appeal makes it sound like there was only one inquiry made of Dr. L and "because the Commission did not receive a written letter in response from [Dr. L], the Commission appointed a second designated doctor." Although there may have been only one letter to Dr. L, the DRIS notes indicate there were at least nine other telephone inquiries and a complaint to the Commission's Compliance and Practices Division that went unheeded. The hearing officer's decision to disregard Dr. L's report because of his inability or unwillingness to answer any inquiries is supported by the evidence as is the hearing officer's decision to accord presumptive weight to Dr. RNS's report. The carrier argues that even if Dr. RNS's report has presumptive weight, Dr. WS's and Dr. RS's reports on the MMI date constitute the "overwhelming medical evidence" that the MMI date was August 24, 1998. We disagree. Section 408.122(c) gives Dr. RNS's report presumptive weight. See Texas Workers' Compensation Commission Appeal No. 92412, decided September 28, 1992, and decisions where that case is cited for the standard of what is necessary to overcome the designated doctor's opinion on MMI and IR.

Next, the carrier contends that the claimant did not have disability after August 24, 1998, because the claimant "was able to work for his wife's business and work on his own

rental property.” That is not the standard for disability, which is defined in Section 401.011(16) as the inability because of a compensable injury to obtain and retain employment at wages equivalent to the preinjury wage. The documentary evidence indicates that the claimant was earning \$800.00 to \$1,000.00 a week as a plumber/pipe fitter. The question for the hearing officer was whether helping in the claimant's wife's business and looking after his rental property enabled the claimant to earn his preinjury wage. This is not a supplemental income benefits total inability to work case. The hearing officer found that the claimant had disability from August 24, 1998, to February 22, 1999, when he completed the PRIDE program and Dr. M released him to return to work at normal activity. The hearing officer's decision is supported by the evidence.

Last, the carrier contends that the hearing officer erred in excluding a surveillance videotape made in 1998. The carrier argues that it did not have possession of the videotape, that they requested it from the investigator and exchanged it “only a few days after the 15 day deadline.” The hearing officer was obviously swayed by the fact that the carrier knew about the video for almost two years and made no attempt to obtain it until after the BRC. We have many times held that we review a hearing officer's rulings on the admission and exclusion of evidence on an abuse of discretion standard. See Texas Workers' Compensation Commission Appeal No. 941414, decided December 6, 1994; Hernandez v. Hernandez, 611 S.W.2d 732 (Tex. Civ. App.-San Antonio 1981, no writ); and Morrow v. H.E.B., Inc., 714 S.W.2d 297 (Tex. 1986) for what constitutes an abuse of discretion. We find none here.

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 clearly wrong or unjust. In re King's Estate, 150 Tex. 662, 244 S.W.2d 660 (1951). We do not so find and, consequently, the decision and order of the hearing officer are affirmed.

Thomas A. Knapp
Appeals Judge

CONCUR:

Philip F. O'Neill
Appeals Judge

Judy L. Stephens
Appeals Judge