

## APPEAL NO. 001959

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 on August 1, 2000. The hearing officer determined that the designated doctor's rescission of maximum medical improvement (MMI) was not against the great weight of medical evidence and the respondent (claimant) did not reach MMI on April 27, 1999. The appellant (carrier) appealed, contended that the hearing officer erred in admitting four pages of medical records because they were not exchanged as required by Texas Workers' Compensation Commission (Commission) rules, urged that the determinations of the hearing officer are against the great weight and preponderance of the evidence, and requested that the Appeals Panel reverse the decision of the hearing officer and render a decision that the claimant reached MMI on April 27, 1999, as certified by the designated doctor in his first report. A response from the claimant has not been received.

### DECISION

We determine that the hearing officer erred in admitting documents over the objection of the carrier, hold that that error was not reversible error, and affirm the decision and the order of the hearing officer.

We first address the carrier's contention that three pages of medical records from and a letter signed by Dr. CC were improperly admitted into evidence. The carrier objected to the admission of the four pages; the attorney representing the claimant said that they had not been exchanged; and the hearing officer admitted them, stating that the documents contain facsimile marks to indicate that they had been received by the third party administrator for the carrier. Section 410.159 provides that within the time prescribed by Texas Workers' Compensation Commission (Commission) rules, the parties shall exchange certain information, including all medical records. Section 410.161 provides that a party who fails to disclose information known to the party or documents in that party's possession, custody, or control at the time disclosure is required by the 1989 Act may not introduce the evidence at any subsequent proceeding before the Commission or in court on the claim unless good cause is shown for not having disclosed the information or documents. Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 142.13(c) provides that no later than 15 days after the benefit review conference (BRC), parties shall exchange with one another certain information, including all medical records. The Appeals Panel has held that if documents are exchanged at the BRC, they need not be again exchanged to be admissible at a contested case hearing. Texas Workers' Compensation Commission Appeal No. 941048, decided September 16, 1994. If one party exchanges documents with another party, the party receiving the documents in the exchange need not reexchange the documents to have them admitted into evidence. Texas Workers' Compensation Commission Appeal No. 93336, decided June 16, 1993. Comments in 1 JOHN T. MONTFORD, *ET AL.*, A GUIDE TO TEXAS WORKERS' COMP REFORM (1991) at pages 6-129 through 6-139 make it clear that documents in existence at the time of required exchange need be exchanged to be admitted into evidence unless good cause is shown

for not exchanging the documents. The exchange is to be made to put the other party on notice that a document may be offered into evidence. Receipt of a medical record from a health care provider does not meet the exchange requirements. The hearing officer erred in admitting the four pages of documents from Dr. CC.

In an undated letter, Dr. CC said that he was responding to a letter dated January 6, 2000, that contained six questions and states that in response to two of the questions, the cost of surgical treatment including hospitalization, physician fees, anesthetics, and rehabilitation during the first 90 days is likely to be \$20,000.00. In a note dated February 2, 2000, Dr. CC said that the cost of surgical intervention was discussed and that the claimant was concerned about not having sufficient help after surgery. In a report dated April 19, 2000, Dr. CC wrote:

As she is experiencing early myelopathy surgical indication (*sic*) are much stronger, she feels indecisive due to anxieties. Will refer to [Dr. B] for assessment of status as surgical candidate.

We have discussed how there is pressure on the spinal cord and there is the possibility of spinal cord damage.

A referral form dated the same day indicates that the claimant has clinical signs of mental distress and that the referral is needed to assess psychological suitability for surgery and risk of poor outcome.

Dr. T, the Commission-selected designated doctor rendered his Report of Medical Evaluation (TWCC-69) on August 27, 1999, and rendered an addendum dated September 21, 1999, in which he stated that the claimant had not reached MMI. The documents from Dr. CC were all written after January 6, 2000, several months after Dr. T amended his report concerning MMI. The record does not indicate that the error in admitting those documents was reasonably calculated to cause and probably did cause the rendition of an improper decision by the hearing officer. Texas Workers' Compensation Commission Appeal No. 92241, decided July 24, 1992. Admitting those documents was error, but not reversible error.

In a Report of Medical Evaluation (TWCC-69) dated April 27, 1999, Dr. HC, the claimant's treating doctor, certified that the claimant reached MMI on that day with a 29% impairment rating (IR). In a TWCC-69 dated August 27, 1999, Dr. T certified that the claimant reached MMI on April 27, 1999. In a narrative report dated August 26, 1999, and attached to the TWCC-69; Dr. T stated that he had been asked to determine the claimant's impairment rating (IR) only and that the Commission had advised him that the claimant reached MMI on April 27, 1999. In that narrative, Dr. T stated that he examined the claimant, reviewed medical records that were available, did not identify the medical records that he reviewed, and said:

The examinee is currently talking to a surgeon who is stating she will most likely need surgery in the near future. Therefore, as the degree of impairment is likely to change by more than 3% within the next year, the examinee will be seen after the surgery for an [IR].

In a letter to a Commission dispute resolution officer dated September 21, 1999, Dr. T stated that the original date of MMI was April 27, 1999; that both he and the surgeon agreed that the claimant would definitely benefit from a surgical option; and that he does not agree that the claimant had reached MMI. In a letter dated February 9, 2000, Dr. T responded to a letter from a Commission dispute resolution officer that apparently sent Dr. T questions asked by Dr. W. In that letter Dr. T stated that when he wrote the addendum in September 1999 he had information that the claimant was seeing a surgeon and anticipated having surgery to correct her problem; that he did not have that information available to him in August 1999 when he rendered the TWCC-69; that if there is a surgeon who thinks he can cure the claimant's problem with surgery, obviously she has not reached MMI; that when a surgeon states he anticipates surgery, he Dr. T would anticipate there will be surgery; and that if the claimant refuses surgery, her date of MMI can be April 27, 1999.

In Texas Workers' Compensation Commission Appeal No. 992815, decided January 31, 2000, the Appeals Panel held that when the designated doctor is appointed only to determine the IR, the designated doctor's opinion concerning the date the claimant reached MMI date is not entitled to presumptive weight on the MMI issue; however, the designated doctor's opinion may be considered by the hearing officer in determining the date the claimant reached MMI. The narrative of Dr. T dated August 26, 1999, makes it clear that he used the MMI date provided by the Commission and infers that he did not think that the claimant reached MMI because she most likely needed surgery in the near future and did not assign an IR. His statement that the claimant had "reached [MMI] per TWCC on April 27, 1999," would not be entitled to as much weight as his opinion that the claimant had reached MMI.

In August 1999, Dr. T accepted the information from the Commission that the claimant had reached MMI on April 27, 1999; apparently had information from the claimant that surgery was being considered; and determined that he could not assign an IR at that time. It appears that in September 1999, he received information for a surgeon that surgery was being considered and issued an addendum, stating that he did not believe that the claimant had reached MMI. The claimant was injured on October 20, 1998, and at the earliest, would reach MMI by operation of law in October 2000. (Section 401.011(30)(b).) In Texas Workers' Compensation Commission Appeal No. 990833, decided June 7, 1999, the Appeals Panel held that active consideration of surgery at the time of the first report of the designated doctor was not required for a designated doctor to amend a report, but that the active consideration of surgery must be before MMI is reached by operation of law. Dr. T amended his report on September 21, 1999, well before the claimant will have reached MMI by operation of law. It can be inferred that the hearing officer determined that Dr. T amended his first report for a proper reason and within a reasonable time. Those

inferred determinations are not so against the great weight and preponderance of the evidence as to be clearly so wrong or unjust. In re King's Estate, 150 Tex. 662, 244 S.W.2d 660 (1951). Pool v. Ford Motor Company, 715 S.W.2d 629, 635 (Tex. 1986).

We affirm the decision and the order of the hearing officer.

---

Tommy W. Lueders  
Appeals Judge

CONCUR:

---

Susan M. Kelley  
Appeals Judge

---

Thomas A. Knapp  
Appeals Judge