APPEAL NO. 950210

This appeal arises pursuant to the Texas Workers' Compensation Act of 1989, TEX. LAB. CODE ANN. § 401.001 *et seq*. (1989 Act). On August 8 and September 29, 1994, a hearing was held in (city), Texas, by telephone, with (hearing officer) presiding. The hearing officer recited on the record that appellant (claimant) asked for a hearing by telephone but at the time of the hearing on August 8th, claimant was not at the telephone number given. Another telephone hearing was held on September 29, 1994, with the claimant on line and testifying; the record was closed on October 1, 1994, to give claimant time to submit more evidence. The hearing officer then found that claimant had disability from July 28, 1993, to August 17, 1993. A conclusion of law was also made that claimant reached maximum medical improvement (MMI) on January 1, 1994. Claimant asserts that he was only returned to light duty by one doctor and another has not released him to work; he asks that the "decisions" of the hearing officer be reversed. Respondent (carrier) replies that the evidence supports the disability finding and argues that the conclusion as to MMI is not against the great weight of the evidence. Carrier also asks that evidence submitted with the appeal not be considered.

DECISION

We affirm the decision as to disability and reverse the conclusion of law that MMI has been reached.

Claimant worked for (employer) on (date of injury), when he fell from a ladder, hurting his back. The issue reported from the benefit review conference was whether and when claimant had disability. The carrier requested that the issue of "whether the carrier is allowed to presume, under Texas Workers' Compensation Commission rule 130.4, that the claimant has reached maximum medical improvement" be added for determination. This issue was so stated on the record but appears differently in the hearing officer's opinion, which writes it as follows: "Has the claimant reached maximum medical improvement pursuant to Texas Workers' Compensation Commission Rule 130.4(b) and (c)? (Has claimant abandoned medical treatment?)".

The hearing officer made findings of fact relative to Tex. W. C. Comm'n, 28 TEX. ADMIN. CODE § 130.4 which could have supported a determination that a presumption under Rule 130.4(b) could be made "to invoke this procedure." No finding of fact was made on the issue of whether the carrier could presume that MMI has been reached. *See* Texas Workers' Compensation Commission Appeals No. 92389 and No. 92456, decided respectively, September 16, 1992, and October 8, 1992, which state that abandonment of medical care does not warrant a finding that MMI has been reached. Rule 130.4 exists as a method for the carrier to "invoke the procedure" to obtain medical evidence as to MMI. The only way MMI is reached without medical evidence is through the statutory time period. *See* Section 401.011(30). *Also see* Texas Workers' Compensation Commission Appeal No. 92203, decided July 6, 1992, which questioned whether an ordered examination qualifies as "health care appointments" for purposes of determining whether health care

appointments have been missed. There was no issue as to whether MMI had been reached; there is no medical evidence to support a determination that MMI has been reached; January 1, 1994, is not 104 weeks after income benefits began to accrue. The conclusion of law that MMI was reached is reversed. Since there was no issue on this point, no decision is rendered as to whether MMI has been reached. There was no appeal of the hearing officer's apparent failure to determine whether the procedure under Rule 130.4 could be invoked.

Claimant presented no records to the hearing officer within the 10 days provided after the second hearing. Claimant attached several documents to his appeal, but only three address either issue before the hearing. One is a statement of (Dr. C) dated September 29, 1994, which states that claimant was unable to work from September 18, 1993, to June 23, 1994. This statement was read into the record at the telephone hearing on September 29, 1994; it was not formally offered into evidence and does not appear on the list of evidence provided by the hearing officer's opinion; the carrier did object at the time it was about to be read, but the hearing officer overruled that objection and the letter was read. No issue on appeal has been raised as to that ruling, so the content, as read, is considered part of the record. We note that this letter was written months after the period it purports to address and that other records of Dr. C do not indicate he treated claimant during the entire time covered by the letter. Finally, the letter gives an opinion as to ability to work; it does not say that Dr. C had taken claimant off work at the time and had not returned him to work. Another document merely affirms that one document of (Dr. A) in evidence, put claimant on light duty. The third document is a small note indicating that on September 21, 1993, Dr. C took claimant off work until October 12, 1993.

The final document discussed could have affected the outcome of the hearing relative to the time of disability if offered at the time of the hearing and if given more weight than other medical documents in the record. The note, by its date, was in existence at the time of the hearings in 1994, and no showing has been made that it was kept from or denied to claimant so that he, with reasonable diligence, could not have obtained it until this time. Claimant does not even offer a reason why he did not send it to the hearing officer during the 10 days he was given after the second telephone hearing to provide added evidence. Without a showing of due diligence and unavailability, as stated, it will not be considered for the first time on appeal. *See* Black v. Wills, 758 S.W.2d 809 (Tex. App.-Dallas 1988, no writ).

The medical records of claimant showed that Dr. A stated on August 27, 1993, that claimant could do light duty work as of August 17, 1993. Another note of Dr. A, however, shows that on August 9, 1993, Dr. A said that claimant could return to work without limitation on August 17, 1993. Neither of these notes are signed, but both are stamped with the same signature block of Dr. A. We note that on a line in which limitations would appear in this latter note, there appears to be a blemish across the document. Consideration of whether any change had been made to the document was for the hearing officer to weigh in assigning weight and credibility to it. As the hearing officer found, claimant appears to have

sought no medical care for an extended period of time. Dr. C, in a letter dated April 22, 1994, stated claimant, "discontinued treatment for personal reasons and then was involved in an automobile accident several months later." This comment obviously diminished whatever weight that could have been given to the September 1994 letter of Dr. C which purported to cover the period of September 1993 through June 23, 1994, in regard to claimant's ability to work. Texas Workers' Compensation Commission Appeal No. 950109, decided March 1, 1995, observed that a medical comment made months after the event it describes does not have to be given the weight that could be given a medical opinion rendered at the time of the incident and also pointed out that the hearing officer does not have to accept conclusions made by an expert.

While it would appear that the statement of Dr. A as to light work on August 17, 1993, could be assigned greater weight than his earlier statement that claimant could return to work on August 17th, the hearing officer determines the issue of disability on all the evidence. He could judge the claimant's testimony as not indicating an inability to obtain work after August 17th because of the injury. He could note that no medical study found any abnormality in the lower back; three radiologists in different groups all reported either a normal lumbar spine or negative studies on July 27th, 28th, and 30th. The conclusion of law that disability ended on August 17, 1993, is sufficiently supported by the evidence.

Finding that the decision and order stated at the conclusion of the hearing officer's opinion are sufficiently supported by the evidence, we affirm. In so doing, it should be noted that the decision and order do not refer to MMI or any effect of having reached MMI; the conclusion of law that claimant reached MMI is, as stated, reversed, but that determination has no effect on the decision and order as written. *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