APPEAL NO. 92257

A contested case hearing was held on May 20, 1992, in (city), Texas, (hearing officer) presiding. The issue as certified by the Benefit Review Officer and acknowledged by the parties as correct was whether respondent (claimant below) was entitled to more temporary income benefits (TIBs). Appellant (carrier below) contended that TIBs properly stopped on November 23, 1991, because in April 1991, two doctors found that respondent was capable of performing his regular duties, and released him to return to work. Appellant said that TIBs paid through November 1991 were an oversight.

The hearing officer made findings of fact that respondent's treating physician has on three occasions released respondent to light duty work, but that the employer has no such work, and that the respondent has not been released to full duty work by his treating physician. She also found that the doctor ordered by the Commission to perform a medical examination determined that respondent had reached maximum medical improvement (MMI) and had no impairment in a letter sent to appellant, but the doctor's report is not contained in a Report of Medical Evaluation (TWCC-69). The hearing officer made conclusions of law that respondent has disability in that he is unable to obtain or retain employment at wages equivalent to the pre-injury wage because of a compensable injury, and that he has not reached MMI.

Appellant contends on appeal that respondent reached MMI in April 1991, as determined by the doctor designated by the Commissioner to examine the respondent, and that presumptive weight should be given to this doctor's opinion. Appellant also states that the opinions of an orthopedic surgeon and a neurosurgeon, both of whom released respondent to full duty work, should be given more weight than the opinions of an osteopath and a chiropractor. Appellant says that the Texas Workers' Compensation Act, TEX. REV. CIV. STAT. ANN. Art. 8308-1.01 (Vernon Supp. 1992) (1989 Act) in Section 4.25(b) establishes guidelines for resolving disputes between doctors, and that the medical testimony provided by respondent does not carry the presumptive weight to meet respondent's burden of proof.

DECISION

We affirm the decision of the hearing officer on the issue of MMI, agreeing that the letter provided did not supply the information required of an MMI certification. However, we reverse and remand for reconsideration of the issue of disability.

There was no dispute that respondent suffered a compensable injury to his back on (date of injury), while in the course and scope of his employment as a carpet installer for (employer). He saw and was treated for the injury by several doctors. He was initially examined by a (Dr. S), who sent him to (Dr. C). On March 1st and 15th, he was seen by Dr. C, an orthopedic surgeon who examined him and ordered an X-ray of the low back. He diagnosed mild low back sprain, but ordered a CT scan because of leg numbness. His review of the scan found it "completely within normal limits." Dr. C returned respondent to

regular work as of March 18, 1991. A Specific and Subsequent Medical Report (TWCC-64) signed by Dr. C said that respondent had failed to keep an appointment on June 18th. Respondent said this was the result of a re-scheduling by the doctor's office, and not due to any fault on his part.

Respondent was seen by (Dr. P), a neurosurgeon, in a re-check on April 9th. (No earlier reports were included in the record.) Dr. P had referred him for a lumbar myelogram which was performed April 1st. The TWCC-64 completed by Dr .P on April 9th indicated low back pain, neuralgia, neuritis, and radiculitis. A letter from Dr. P the same day stated that respondent's neurological exam was normal, that his myelogram and post-myelogram CT scan findings were discussed with him, that he was instructed to wear a back brace, and that Dr. P released him to regular duty effective April 10th.

The parties stipulated that (Dr. B) was respondent's treating doctor. Respondent was seen by Dr. B on July 1, September 6, and December 10, 1991, and on February 5, 1992. TWCC-64s signed by Dr. B on those dates diagnosed lumbar strain with spasm, lumbar radiculopathy, and bulging L5-S1 disc anulus. These reports anticipated various dates for return to limited work, maximum medical improvement, and return to full time work. These dates included the following: July 1st report--return to limited work, August 26, 1991; maximum medical improvement, October 26, 1991; return to full time work, September 26, 1991. September 6th report--return to limited work, October 15, 1991; maximum medical improvement, January 15, 1992; return to full time work, December 15, 1991. December 10th report--return to limited work, October 21, 1991; maximum medical improvement, October 21, 1992; return to full time work, unknown (this report includes the notation, "[l]ight duty denied by current employer"). February 5, 1992 report--return to limited work, October 21, 1991; maximum medical improvement, October 21, 1992; return to full time work, June 21, 1992.

Dr. B referred respondent to a chiropractor, (Dr. L), who saw him on July 12th. The Initial Medical Report (TWCC-61) diagnosed lumbosacral radiculitis, lumbar myofascitis, and lumbar disc syndrome. An August 6, 1991, letter from Dr. L stated his impression of lumbar radiculopathy complicated by lumbar muscle spasm. He recommended a treatment plan that included manipulative therapy, electrotherapy, trigger point therapy with massage, whirlpool, and exercise, and stated that the patient should be reassessed following a four to six week trial. In a January 30, 1992, TWCC-64 Dr. L's diagnosis and recommendations remained the same. Anticipated date of return to work was found to be "undetermined at this time." Respondent underwent therapy as prescribed by both Drs. L and B. Dr. B sent him to a work hardening program, five days a week for six weeks, which involved exercise and lifting and carrying weights. At the end of the six weeks, respondent said he had improved a little, but could not lift more than 15 or 20 pounds. He was continuing to have massage and whirlpool therapy.

Pursuant to a Request for Medical Examination order of the Texas Workers' Compensation Commission (TWCC-22), respondent was examined by (Dr. A). In a March

10, 1992 letter, Dr. A said he reviewed respondent's films, myelogram, and CT scan and found them normal. The letter also said Dr. A recommended an awake diagnostic discogram to rule out a ruptured L4-5 disc, and said respondent "was informed that if he doesn't decide within the next 24 hours or so what he is going to do, then he should go back to work . . . He's reached maximum medical improvement and there is no permanent physical impairment."

Respondent testified that he did return to work for employer for one day in April 1991. On that day, he worked from 8 a.m. to 4 p.m. on one job, then started another job at 8 p.m. and worked until 1 a.m. The following day, he said, "my back was killing me." It was then that he went back to Dr. P, who referred him to Dr. B. Dr. B did tests and found a bulging disc. He said he has not tried to work a regular eight hour day since that time.

He told employer he would do light duty work, such as measuring or selling carpet, but was told no light duty work was available. He said he has looked in the newspaper for jobs but has not actually applied for anything because he feels no one would hire him with a light duty restriction. He said he will start looking for work when he feels better, when the pain is gone. He testified that he still has pain, that it sometimes causes numbness in his leg, and that he takes Ibuprofen and Zantac and uses an ice pack on his back.

This case involves the concepts of "return to work," "disability," and "maximum medical improvement." We have previously held these are not the same. Texas Workers' Compensation Commission Appeal No. 91014 (Docket No. redacted), decided September 20, 1991.

The 1989 Act provides that "[a]n employee who has disability and who has not attained maximum medical improvement is entitled to temporary income benefits." Article 8308-4.23(a) (emphasis added). "Maximum medical improvement" is defined in the 1989 Act as "the earlier of:

(A)the point after which further medical recovery from or lasting improvement to an injury can no longer reasonably be anticipated, based upon reasonable medical probability; or

(B)the expiration of 104 weeks from the date income benefits begin to accrue." Article 8308-1.03(32).

Only (A) above is applicable in this case. Rules adopted by the Commission provide that a doctor who is required to certify, or who determines during the course of treatment, whether an employee has reached MMI, or has an impairment, shall complete and file a medical evaluation form (TWCC-69) as required by the rule. "Certify" is defined as "the formal assertion of medical facts or expert opinion by a doctor supporting or relating to . . . whether an employee has or has not reached maximum medical improvement; or . . . whether an employee has any impairment, and, if so, the employee's impairment rating."

Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE §130.1. Certification of MMI may be done either by the claimant's treating doctor, Rule 130.2, or by a doctor other than the treating doctor, Rule 130.3. If a doctor other than a treating doctor certifies MMI, the medical evaluation report must be sent to the treating doctor for his or her agreement or disagreement, as well as to the Commission, the employee or his representative, and to the insurance carrier. *Id.*

The 1989 Act provides that if a dispute exists as to whether the employee has reached MMI, the commission shall direct the employee to be examined by a designated doctor selected by mutual agreement of the parties. If the parties are unable to agree on a designated doctor, the Commission shall direct the employee to be examined by a designated doctor selected by the Commission. Article 8308-4.25(b). That section further provides that the designated doctor shall report to the Commission, and the report "shall have presumptive weight, and the commission shall base its determination as to whether the employee has reached [MMI] on that report unless the great weight of the other medical evidence is to the contrary." *Id*. We would note that Article 8308-4.16(a) says the Commission may require the employee to submit to medical examination "to resolve any question about the appropriateness of the health care received by the employee, the impairment caused by the compensable injury, the attainment of maximum medical improvement, or analogous issues."

In this case, as the hearing officer correctly concluded, the procedures for certifying MMI were not complied with, as the record did not disclose the existence of a signed TWCC-69 containing the information required by Rule 130.1 or an exchange of the report to the treating doctor. We would further note that the letter is inadequate as a certification of MMI because all of the substantive information required to support a certification of MMI is not included. Dr. A's letter is not a designated doctor's report, and thus is not entitled to presumptive weight.[1] As we have previously held, a full release to normal duty is not equivalent to MMI. Texas Workers' Compensation Commission Appeal No. 91014 (Docket No. redacted), decided September 20, 1991.

As noted above, entitlement to TIBs is also predicated on the existence of disability lasting longer than one week. Article 8308-4.23(a). Therefore, once the employee no longer has disability, his entitlement to TIBs ceases. (We recognize, however, that the resumption of disability prior to attainment of MMI will renew entitlement to TIBs. *See* Article 8308-4.23(b)). "Disability" is defined in the act as "the inability to obtain and retain

[1]It is not entirely clear whether Dr. A was ordered to examine respondent pursuant to Article 8308-4.16(e) or 4.25 because the order recites Article 8308-4.16 as authority but calls Dr. A a "designated doctor." Under 8308-4.16, Dr. A would not have been a designated doctor and his findings would not have been entitled to presumptive weight. *See* Rule 126.6(f) However, this distinction is immaterial in light of the failure of the doctor's letter as a certification of MMI.

employment at wages equivalent to the pre-injury wage because of a compensable injury." Article 8308-1.03(16). As we have previously held, determining the end of disability can be a difficult and imprecise matter. As we said in Texas Workers' Compensation Commission Appeal No. 91045 (Docket No. redacted), decided November 21, 1991:

> [a]n unconditional medical release to return to full duty does not, in and of itself, end disability . . . [w]here the evidence sufficiently establishes an unconditional medical release to return to full duty status of the employee, the employee has the burden to show that disability is continuing. Evidence such as reasonable efforts made to secure employment, suitable to a person in his circumstances, the availability or unavailability of such employment, and the acceptance or rejection of any employment offer or opportunity, may be probative evidence in proving a case for temporary income benefits."

In factoring doctors' recommendations of return to work into the mix to determine disability, the hearing officer is not restricted to considering only the recommendations of the treating doctor. *See* Texas Workers' Compensation Commission Appeal No. 92259 (Docket No. redacted), decided July 31, 1992, which states that the hearing officer is to weigh all the evidence in determining whether disability has ended, including all the medical evidence and the testimony of the claimant, and that the hearing officer may decide which conflicting expert opinion weighs more heavily.

The Findings of Fact lead us to conclude that the hearing officer gave the treating doctor's opinion conclusive weight and gave no weight or consideration to the other opinions in the record. There were four Findings of Fact regarding the treating doctor's opinion on return to work,and one finding relative to the employer's lack of light duty work. There were no Findings of Fact on the opinions of other doctors, as well as no discussion of these releases in the statement of evidence. It was presumably these findings on which the hearing officer based her conclusion of law that the claimant has disability in that he is unable to obtain or retain employment at wages equivalent to the pre-injury wage because of a compensable injury. For that reason, the hearing officer should have considered the record evidence of Dr. C's and Dr. P's release to full employment, and not just that of Dr. B. In addition, Article 8308-4.16(e) prescribes procedures when the report of a doctor selected by the insurance carrier indicates the employee can return to work immediately. Thus, Dr. A's report may be considered in determining whether disability remains. We have held that whether disability has been removed under a particular set of circumstances is a factual question. A doctor's medical opinion that an individual is capable of working without restriction and is no longer disabled is probative evidence that disability, as defined in the 1989 Act, may have come to an end. Texas Workers' Compensation Commission Appeal No. 91060 (Docket No. redacted), decided December 12, 1991. We recognize, however, that a finder of fact may choose to give greater weight to one doctor's opinion over another.

We disagree, however, with appellant's contention that a medical doctor's opinion is per se entitled to greater weight than that of a doctor of osteopathy or a chiropractor.

Nothing in the statute supports giving greater weight to one health care practitioner over another based solely on different degrees or specialties. Article 8308-1.03(17).

We thus remand the decision of the hearing officer for reconsideration of the issue of disability in light of the return to work releases signed by other doctors. We affirm the hearing officer's decision on the issue of MMI.

Pending resolution of remand, final decision is not rendered.

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Lynda H. Nesenholtz
Appeals Judge

CONCUR:

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Robert W. Potts
Appeals Judge

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Susan M. Kelley
Appeals Judge