

## APPEAL NO. 92452

This appeal arises under the provisions of the Texas Workers' Compensation Act, TEX. REV. CIV. STAT. ANN. art. 8308-1.01 *et seq.* (Vernon Supp. 1992) (1989 Act). On July 28, 1992, a contested case hearing was held in (city), Texas, with (hearing officer) presiding as hearing officer. The parties agreed with the hearing officer's statement of the disputed issues, to wit: whether (claimant), appellant and cross-respondent (claimant) has reached maximum medical improvement (MMI) from a (date) injury or a (date of injury) injury; whether claimant's psychological problems are due to a (date) injury or a (date of injury) injury; whether claimant has disability due to either his (date) injury or his (date of injury) injury; what claimant's impairment rating is due to his (date) injury; and whether or not claimant was injured on (date), provided that that has been properly preserved by a proper dispute of claim. The hearing officer determined that claimant sustained a compensable injury to his back on (date of injury), and sustained a compensable aggravation of the previous injury to his back on (date); that (carrier), respondent and cross-appellant (carrier), waived its right to contest that claimant sustained a compensable injury on (date); that claimant's compensable injuries of (date of injury) and (date) resulted in a compensable aggravation of preexisting psychological problems; that neither of claimant's compensable injuries caused him to have disability at any time since December 30, 1991; that on October 10, 1991, claimant attained MMI with respect to his (date of injury) injury; that claimant has not attained MMI with respect to his (date) injury; and, that claimant has a five percent (5%) impairment as the result of his (date of injury) injury. In his request for review, claimant contests the determination that he had no disability after December 30, 1991, asserting that he was hospitalized for psychiatric treatment from December 26, 1991 to January 24, 1992, and from April 24, 1992 to May 16, 1992; that he cannot return to work because of depression and PTSD (post-traumatic stress disorder); and that his psychiatrist has not released him to return to work. He requests that carrier be ordered "to pay back benefits as far back as (date)." In its response, carrier maintains that claimant's insistence on his current psychological disability is contradicted by his hearing testimony to the effect that he could perform his work and do polygraph administration work, and that his psychological problems were caused not by his injuries but by his employer's refusal to allow him to return to work. In its cross-appeal, carrier challenges the hearing officer's Finding of Fact 14 that as a result of his (date) injury, claimant sustained psychological injury, and the related Conclusions of Law 6 and 7 that claimant's compensable injuries of (date of injury) and (date) resulted in a compensable aggravation of preexisting psychological problems. Carrier also challenged Findings of Fact 22 and 23 that neither (Dr. R) nor any other doctor has certified claimant as having reached MMI from his (date) injury, as well as the related Conclusion of Law 12 that claimant has not attained MMI with respect to the (date) injury. Claimant in his response urged our affirmance of those findings and conclusions.

## DECISION

Having considered the respective requests for review, the responses thereto, and the record developed at the contested case hearing, we reverse the decision of the hearing officer and remand this case for further consideration and development of evidence, and for

further findings, as discussed below.

In September 1990, claimant commenced employment with (employer), an auto parts store business, as employer's district loss prevention advisor. His duties entailed preparing incident reports on burglaries and thefts from employer's stores and performing safety inspections. On (date of injury), while en route to a business meeting at employer's corporate headquarters, claimant set down a 25 pound polygraph machine at an airline ticket counter and when he picked it back up, he felt a sharp pain in his lower back when he straightened up. He sat down, couldn't get back up, and was taken to (Hospital) where he stayed for five days. His treating doctor, (Dr. R), signed a return-to-work release on April 8, 1991, but with restrictions against prolonged sitting or standing. Dr. R also indicated that claimant, a 45-year-old man of large frame, should be provided with a larger company car. Dr. R's records indicated that tests revealed an anterior disc protrusion at L2-3 which he believed would resolve in time. An MRI of March 27th apparently disclosed a small, anterior herniation at L2-L3 and mild degenerative changes at L4-L5-L6.

Claimant returned to work on April 9th and performed his usual duties. However, he was sent home with pay on April 19th, and then was called a few days later and told he was being "put back on workers' comp." He testified employer took him off work pending its decisions on whether to accept Dr. R's restrictions and provide him a larger car. Claimant testified that while off work at this time, he became depressed, having heard nothing from employer about returning to work, and that (Dr. C), a psychiatrist, admitted him (May 19, 1991) to a psychiatric hospital for 15 days. He said he has a compulsive personality, is a workaholic, and that not being allowed by employer to work was very destructive. Claimant further testified to a history of psychiatric treatment at various intervals dating back to 1978 for anxiety, panic attacks, and depression related to several divorces, and to problems with his daughter's dating habits. Claimant, who had seen a psychiatrist, (Dr. M), monthly from November 1990 through April 1991, stated that his preexisting psychiatric problems were aggravated by his being kept from working by employer. Dr. C wrote carrier on May 17, 1991 stating that claimant was seen on May 16th, had severe and incapacitating anxieties, could not function outside his home, and that she had "no doubt that his current anxiety is directly related to his injury and the circumstances surrounding it." In a June 7, 1991 letter to carrier, (Dr. M) reported that his review of claimant's medical records supported the likelihood that claimant's "current psychiatric disability might have evolved even without the injury;" that "the degree and duration of the physical impairment and/or associated stressors due to the injury is most likely the precipitant or contributing factor in its occurrence/recurrence;" that as a result of the work-related injury, claimant has since faced unemployment or underemployment; and, that "unless the consequences of this are addressed, the likelihood exists that the psychiatric impairment will continue, and may worsen." Claimant testified that Dr. C released him to return to work on June 10, 1991, and that he was anxious to do so. He continued to see Dr. C monthly and an individual therapist (IP) weekly.

Claimant described the second work-related event involving his back as occurring on (date) when, en route to a business meeting, he had to push the car he was driving about

100 yards to a service station due to the radiator overheating. Claimant said that the next day, he noticed his back injury more and told Dr. R about it at his previously scheduled visit on July 22nd. He continued to work for employer until July 31, 1991, performing light duty with restrictions, but apparently has not worked since. He said Dr. R advised him he could return to work in six months. A myelogram, done for Dr. R on August 22, 1991, was normal. A CT scan report of that date stated that the herniated nucleus pulposus (HNP) at L2-L3, as reported in the MRI report of March 27th, was not seen and explained the apparent discrepancy with the prior MRI; the L3-L4 levels are normal; and the impression was mild posterior annular bulge at L5-S1, with no evidence of HNP, or of spinal or foraminal stenosis.

Dr. R signed a Report of Medical Evaluation (TWCC-69) stating that as of October 10, 1991, claimant had reached MMI and had a whole body impairment rating of 5%. This TWCC-69 stated the date of injury in block 7 as "(date of injury)," described the onset of claimant's medical condition as his hurting his back lifting a 25 pound polygraph machine on (date of injury), made reference to Dr. R's records, described the most recent clinical findings, documented the objective clinical finding of impairment as "bulging disc on myelogram - CT (plus) spur at L2-3 anteriorly (plus) documented L5-S1 radiculopathy on EMG plus NCVs." Dr. R listed the specific body part/system and rating on the TWCC-69 as "lumbar spine" at 5%. Dr. R signed another TWCC-69 stating claimant reached MMI on January 20, 1992, and assigning a 5% whole body impairment rating. The record contained no explanation for his second TWCC-69. This report referred to claimant's "lumbar 5-1 radiculopathy" and listed the body part/system involved in the impairment rating as the "lumbar spine."

An extensive and thorough report of an independent medical examination by (Dr. M) on October 10, 1991, mentioned the (date of injury) lifting incident, as well as the later event when claimant pushed the car about 100 yards and thereafter experienced left leg numbness. This report stated Dr. M's impression as (1) lumbosacral sprain, resolved, and (2) mild lumbar spondylosis. He said the CT scan of August 22nd does not show a disc herniation but a "very mild bulging of the disc at L5-S1 generally with no nerve root entrapment and no evidence of a herniation being noted at any level." His opinion was that claimant reached MMI as of October 10, 1991, "and that he is capable of returning to his usual occupation without any restrictions." Dr. M referenced the AMA Guides and assigned a whole body impairment rating of 5% upon an intervertebral disc or other soft tissue lesion. There was no indication in the record that claimant invoked the MMI dispute procedures provided for in Tex. W.C. Comm'n, 28 TEXAS ADMIN. CODE § 130.6 (TWCC Rule 130.6).

According to a Specific and Subsequent Medical Report (TWCC-64), claimant saw Dr. R on October 28, 1991, seeking surgery on the L5-S1 bulging disc and was advised a second opinion would be necessary. According to this TWCC-64, Dr. R maintained that claimant had reached MMI on October 10th, and that he could return to full-time work on October 28, 1991. In a November 21, 1991 report entitled Second Surgical Opinion, Dr. M stated that claimant was not a surgical candidate and felt he should not undergo a lumbar laminectomy of L5-S1.

Claimant testified that he felt he could not return to doing the type of work he did for employer, and that Dr. C suggested he pursue another line of work. He said he could do other work and is working with the Texas Rehabilitation Commission in that regard. He had previously been in business for himself as a polygraph examiner for about 16 years earning approximately \$2,400.00 per month, and he felt he could again do such work. We have previously observed that a finding of MMI will not, in every case, mean that the injured employee is completely free of pain, nor that such employee is able to return to the prior occupation. Texas Workers' Compensation Commission Appeal No. 92394 (Docket No. redacted) decided September 17, 1992.

Claimant also said the information that he had attained MMI on October 10th resulted in further psychological problems in December 1991 and that he was again hospitalized by Dr. C on December 26th for a month. He insisted that the initial "trigger" for his current spate of psychological problems was employer's refusal to allow him to return to work with the resultant idleness, and that his situation was not the equivalent of simply having been laid off. He did not indicate whether he ever sought employment after October 28th, the date Dr. R stated he could return to full-time work. In Dr. C's letter to carrier of February 25, 1992, she stated that on claimant's visit on December 18, 1991, he expressed paranoid, angry feelings about his work situation and felt stressed by his physician's limitations of his work duties. He also reported other feelings and problems. Dr. C admitted claimant to a psychiatric hospital on December 26, 1991, from which he was discharged on January 24, 1992. She noted claimant's continued treatment with medications and individual therapy, and requested reevaluation of the 5% impairment rating, noting that claimant's psychological problems were then disabling him to a far greater extent. In Dr. C's opinion, claimant's "emotional problems are directly connected to his work-related back injury and resulting change in job status." In her April 2, 1992 letter to carrier, Dr. C reported that claimant continued his weekly meetings with his IP and has made a lot of progress. In none of her reports, however, did Dr. C indicate that claimant could not work because of his psychological problems.

(Dr. F) reviewed claimant's medical records and reported to carrier on July 14, 1992, his opinion that claimant's complaints did not seem to be the result of his (date of injury) injury, noting that the same or very similar symptoms were present before that time. Dr. F said that while claimant's long term psychiatric problems continued, he agreed with the physicians who found claimant had attained MMI by October 10, 1991. He also noted that the psychiatric hospital records showed claimant was again admitted on April 24, 1992 apparently due to his anger at his family and his company, the same reasons for which he was admitted on December 26, 1991.

Claimant adduced two additional letters from Dr. C, dated May 29 and July 9, 1992, addressed to Utilization Review Reconsideration, Health Benefits Management, Inc., in (city), Texas, concerning Dr. C's appeal of the denial of continued psychiatric treatment for claimant. Upon carrier's objection, the hearing officer found that claimant had not shown good cause for his failure to exchange those letters with carrier prior to the hearing and excluded them from evidence. Claimant has not appealed that ruling and we are satisfied

the hearing officer did not abuse her discretion in making that ruling. Further, we have examined the excluded letters (attached to the record as appellate exhibits) and find no mention by Dr. C of claimant's being unable to work, notwithstanding his assertion in his appeal that he has not been able to return to work because of his depression and PTSD, and that he has not been released to return to work by Dr. C.

Articles 8308-4.23(a) and (b) provide that an employee who has disability and who has not attained MMI is entitled to temporary income benefits (TIBS), and that TIBS continue until the employee has reached MMI. In contrast, "[a]n injured employee is entitled to all health care reasonably required by the nature of the compensable injury as and when needed." Article 8308-4.61(a). In Texas Workers' Compensation Commission Appeal No. 91060 (Docket No. redacted) decided December 12, 1991, we stated that if a claimant has disability, such claimant is entitled to TIBS if MMI has not been attained; and, that if MMI has been reached, then obviously the payment of TIBS stops. Article 8308-1.03(16) defines disability as "the inability to obtain and retain employment at wages equivalent to the preinjury wage because of a compensable injury." The hearing officer found that claimant was not currently unable to obtain and retain employment at his preinjury wage rate due to the continued effects of his (date of injury) and (date) injuries; and, that at no time since December 30, 1991 has claimant been unable to obtain and retain employment at his preinjury wage rate due to the effects of his (date of injury) and (date) injuries. She thus concluded claimant did not have disability resulting from these injuries after December 30th. The burden of proof was on claimant to prove by a preponderance of the evidence that he had disability. He himself testified that he could do the polygraph examination work he had done in the past when he earned approximately \$2,400.00 per month. Prior to his injury he was earning \$32,000.00 per year, was provided a car, and had the prospect of bonuses. His treating physician, Dr. R, certified he had reached MMI as of October 10th, as did Dr. M, and Dr. R further stated on the TWCC-64 that claimant could return to full-time employment on October 28th. The several reports from his psychiatrist, Dr. C., do not establish that claimant cannot obtain or retain employment as a result of his compensable injuries. In fact, it was the lack of work, at the behest of employer, which claimant maintained aggravated his most recent psychological problems in the first place.

In her discussion, the hearing officer states that "the evidence does not persuasively demonstrate that claimant continues to suffer any disability as the result of the physical or psychological symptoms he experienced as the result of either the March or the July injury." The hearing officer also recognized that claimant "continued to have psychological problems during this time period [after December 30, 1991] but it does not appear that the psychological problems have prevented him from working . . . ." We are unable to ascertain from her decision and findings how the hearing officer treated the two periods of psychiatric hospitalization, namely from December 26 1991 to January 24, 1992, and from April 24, 1992 to May 16, 1992, in terms of claimant's having disability during these periods; nor can we know why she also determined claimant had no disability after December 30, 1991, a date which, according to the discussion, the hearing officer related to the initiation of impairment income benefits. Further, we do not know whether the certification of MMI as of October 10, 1991, and the assignment of the 5% impairment rating, took into account

claimant's psychological problems which the hearing officer found to be "psychological injury" and compensable. Thus it would seem, absent additional evidence and findings, that if claimant was twice hospitalized, while unemployed, for a compensable aggravation of his preexisting psychological problems, he might well be regarded as having disability during those periods of hospitalization, and may not have reached MMI respecting his compensable psychological injury. We have previously had occasion to discuss disability in the context of a compensable mental trauma injury. Texas Workers' Compensation Commission Appeal No. 91122 (Docket No. redacted) decided February 6, 1992.

We disagree with carrier that the hearing officer erred in determining that claimant's compensable injuries of (date of injury) and (date) resulted in a compensable aggravation of his preexisting psychological problems. Not only do the several letter reports of Dr. C provide evidence in support of this determination, but so does (Dr. M) letter report to carrier of June 7, 1991. Article 8308-6.34(e) vests in the hearing officer the sole responsibility for judging the weight of the evidence and the credibility it is to be given. As the trier of fact, it was for the hearing officer to resolve the conflicts and inconsistencies in the evidence, including the medical evidence. Garza v. Commercial Insurance Company of Newark, New Jersey, 508 S.W.2d 701 (Tex. Civ. App.-Amarillo 1974, no writ); Texas Employers Insurance Association v. Campos, 666 S.W.2d 286 (Tex. App.-Houston [14th Dist.] 1984, no writ). See Texas Workers' Compensation Commission Appeal No. 92149 (Docket No. redacted) decided May 22, 1992, and Texas Workers' Compensation Commission Appeal No. 92242 (Docket No. redacted) decided July 24, 1992, discussing mental trauma injury.

We agree with carrier that the hearing officer erred in determining that claimant has not reached MMI with respect to his (date) back injury. As we pointed out above in reviewing Dr. R's TWCC-69 certifying that claimant attained MMI on October 10, 1991, the body part/system involved was the lumbar spine which, according to claimant's testimony and the medical evidence, was the body part/system involved in both the (date of injury) and (date) injuries. Although the injuries were treated as separate and distinct back injuries at the benefit review conference, Dr. R appears to have treated them as one continuing injury to the lumbar spine commencing with the (date of injury) polygraph machine lifting incident. We also note that the hearing officer found that on (date) the claimant aggravated his (date of injury) back injury. Thus, we do not believe that, under the circumstances of this case, Dr. R was required either to list both injury dates in block 7 of the TWCC-69, or sign another TWCC-69 referring only to the (date) injury date, because he was treating the same area of claimant's spine when he determined that as of October 10th claimant had reached MMI for his lumbar spine and assigned a whole body impairment rating of 5%. *Compare* Texas Workers' Compensation Commission Appeal No. 92433 (Docket No. redacted) decided September 28, 1992, where the claimant contended injuries to two different parts of the body were involved which should not have been treated as a single injury.

Assuming that the hearing officer found a compensable mental trauma injury consequent to the back injuries, and not some lesser condition, we are unable to determine from the record and the hearing officer's findings whether Dr. R's certification of MMI as of October 10, 1991, and his assignment of a whole body impairment rating of 5%, took into

account the compensable psychological injury which the hearing officer determined resulted from the back injuries. There was no indication in the records of Dr. R in evidence that, as the treating doctor for the two back injuries, he was aware of and considered claimant's psychological injury. Nor can we determine from the record and findings how it is that claimant had no disability during the two periods of psychiatric hospitalization when he was unemployed and being treated in a hospital for a compensable psychological injury.

The decision of the hearing officer is reversed and the case is remanded for the expedited development of further evidence, as appropriate, and for reconsideration and such additional findings as are appropriate and not inconsistent with this opinion. Pending resolution of the remand, a final decision has not been made in this case.

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Philip F. O'Neill  
Appeals Judge

CONCUR:

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Stark O. Sanders, Jr.  
Chief Appeals Judge

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Robert W. Potts  
Appeals Judge