APPEAL NO. 92526

This appeal arises under the Texas Workers' Compensation Act of 1989 (1989 Act). TEX. REV. CIV. STAT. ANN. arts. 1.01 through 11.10 (Vernon Supp 1992). On August 18, 1992, a contested case hearing was held in (city), Texas, with (hearing officer) presiding. She determined that respondent, claimant herein, has reached maximum medical improvement (MMI) with a 15% impairment rating, continues to have disability, and correctly chose a second treating doctor. Appellant, carrier herein, asserts that claimant did not timely contest the impairment determination of Dr. H, that the hearing officer was not asked to determine an impairment rating, and that the hearing officer made erroneous findings as to MMI, disability, and the claimant's second choice of a treating doctor.

DECISION

Finding that the decision is sufficiently supported by the evidence insofar as it relates to the claimant's second choice of doctor, we affirm that portion. We reverse and remand in regard to MMI and impairment, and while we find sufficient evidence to support a determination of disability, the period of disability may be affected by the remand.

Claimant is an electrician who worked for his employer for 16 years. At the time of his accident of (date of injury) he worked as a supervisor and was injured driving a company vehicle. He stopped when another car impeded his progress, but the car behind him did not stop. He asserts neck, shoulder, and back injuries as a result of the accident. No question has been raised as to the course and scope of the injury.

Claimant was sent to Dr. G by his employer. He found that claimant had a severe low back and cervical strain. After some therapy, he released claimant to work, on a trial basis, on September 7, 1991. Claimant never returned to Dr. G but went back to work for one day.

Claimant then began seeing Dr. H, an orthopedic surgeon who had treated his family in the past. His first visit was September 17th and his last was December 12, 1991. Claimant testified that he was not happy with this doctor, that he had moved from his previous location and did not seem to have time for him; claimant said Dr. H did not really try to see what was wrong. After Dr. H saw claimant on October 28th, he released him back to work. Claimant said this release was also on a trial basis with the understanding that he should try to work for one week and then could return to see the doctor in three weeks. When claimant returned on November 18th, Dr. H prepared an MMI report which included an impairment rating of five percent--claimant said he did not get a copy of this or learn that an impairment rating had been given until he received a letter from the carrier dated March 30, 1992. When claimant again returned to Dr. H on December 12th, Dr. H wrote, "(t)here is nothing further I can offer him, there is nothing I can do to change his situation." Dr. H's determination of MMI and impairment rating was made on a TWCC Form 69 which referred to an attached summary for matters requiring an explanation. Neither the form nor the summary appears to include what objective or laboratory findings were

made.

In January 1992, claimant testified that he went to see Dr. B, who his daughter had seen. He said that Dr. H said he could do nothing more for him, and he had a fever and was feeling bad so he saw Dr. B. Dr. B gave him some shots. He heard Dr. B call employer to see about insurance and says that employer appeared to say it was not responsible. Claimant testified that he paid Dr. B himself.

On February 1, 1992, claimant wrote to carrier after he said he could never get the adjuster by phone and his calls were not returned. He said in the letter that he tried to work for one week but could not tolerate it. He also said that Dr. H told him he could do no more for him. He also wrote that he went to see Dr. B and asked the carrier's help with a claim. On March 6th, claimant filled out a change of treating doctor notice. It named Dr. A as the new doctor, saying that Dr. H was no longer the treating doctor because he had not "used the right diagnosis for my injury."

On March 30th, a claims representative for the carrier wrote to claimant. That letter said that the Texas Workers' Compensation Commission (Commission) had called the carrier on March 6th and referred to the claimant by saying "you were wanting to dispute the maximum medical improvement date and percentage of impairment given to you by Dr. H." That letter then refers to the five percent impairment specified by Dr. H and agrees that claimant has chosen Dr. A as his second choice of doctors. The letter also says that claimant only had 90 days to dispute the MMI date and the impairment rating, which time had passed.

At the hearing, claimant testified that he never received any of Dr. H's reports in the mail after the carrier pointed out that Dr. H's reports showed a carbon copy going to claimant. Carrier introduced as Carrier Exhibit No. 6 a medical report of Dr. H with a checkmark by claimant's name at the bottom in an attempt to show that claimant received medical reports from Dr. H, including the TWCC Form 69. Claimant maintained that he received some reports from the carrier that originated from Dr. H and did not change his testimony that he received no reports directly from Dr. H. (The report offered with the checkmark by claimant's name was not the report of Dr. H that addressed MMI and impairment.) Carrier did not offer any evidence of the mailing practices of Dr. H's office or any other proof of mailing of the MMI report of Dr. H dated 11-18-91 to claimant.

Counsel for both claimant and carrier agreed at the beginning of the hearing that there was no issue as to what was the impairment rating at this hearing. There was some comment by counsel for claimant that the issue was not ripe, "depending on the findings today, we would still intend to pursue that issue, if necessary, after a designated doctor. . . ."

Carrier says that claimant has not met the provision of Tex W. C. Comm'n, 28 TEX. ADMIN. CODE § 130.5(e) which calls for an impairment rating to become final if not disputed

in 90 days. It says the issue was "whether the claimant timely disputed the 11/18/91 certification by Dr. H of MMI and impairment." The hearing officer did not directly address this issue in a finding of fact but apparently disregarded such impairment rating by saying in a conclusion of law that the first impairment rating was that of Dr. A in June 1992. As a result, the reason why the hearing officer disregarded the 11/18/91 opinion (the 11/18/91 opinion refers to both the TWCC Form 69 and the narrative summary attached to it) of Dr. H is unknown. Was the 11/18/91 opinion disregarded because the hearing officer found it did not constitute a certification of an impairment rating since it provided no documentation of objective laboratory or clinical finding of impairment called for by item 14 of the TWCC-69 (2/91), Articles 8308-4.25(a) and 8308-1.03(35) of the 1989 Act, and Rule 130.1(d)? (*See* Texas Workers' Compensation Commission Appeal No. 92132, dated May 18, 1992, which found that item 13 of the TWCC-69 was important and an absence of information therein amounted to a lack of certification; Texas Workers' Compensation Commission Appeal No. 92395, dated September 16, 1992, which addressed a blank item 13 in the same way; and Texas Workers' Compensation Commission Appeal No. 92335, dated August 28, 1992, which allowed range of motion findings of limited extent as within "objective findings" and said "a doctor must determine whether an objective clinical or laboratory finding of impairment exists and document same, before assigning an impairment rating.") Did the 11/18/91 opinion fail to trigger Rule 130.5(e) because communication to the claimant as required by Rule 130.2 was insufficiently shown? (This basis also requires the hearing officer to decide whether an impairment rating cannot be "assigned" until there is a communication to the claimant.) Or does the hearing officer view the 11/18/91 opinion as actually dating from some much later time after the rendering of an impairment rating by Dr. A in June because of a fax date that appears on the 11/18/91 opinion? Finally, is there some other basis that the hearing officer believes supports her conclusion of law that says the first impairment rating was given by Dr. A in June 1992?

The hearing officer did make Finding of Fact No. 10 that says the claimant notified the Commission on March 6th that he was disputing MMI. If the hearing officer finds that claimant's dispute was timely, the case appears ripe for the provisions of Article 4.25(b) to be applied naming a designated doctor. *See* Texas Workers' Compensation Commission Appeal No. 92176, dated June 10, 1992, which said that since designated doctor procedures were not used, the issue of whether or not MMI was reached was not ripe for determination; and Texas Workers' Compensation Commission Appeal No. 92392, dated September 21, 1992, which said that once a designated doctor addresses MMI and impairment, then the case is ripe for further dispute resolution.

Carrier also appeals the conclusion of law that there is no time limit for disputing a finding of MMI. While MMI does not have a limit set in either the 1989 Act or rules of the Commission, Texas Workers' Compensation Commission Appeal No. 92394, dated September 17, 1992, did acknowledge the link between MMI and impairment. We will not address this conclusion because the determination on remand could make the issue moot. Similarly, the determination that MMI was reached on June 29, 1992 with an impairment of 15% will not be reviewed until a decision is made as to whether a dispute was raised as to

MMI which should have invoked the procedures of Article 8308-4.25 of the 1989 Act.

The conclusion of law that claimant has disability is based on sufficient evidence of record, but we note that disability is tied to the payment of temporary income benefits and not to impairment benefits. There appears to be no necessity to address disability for the period after MMI has been reached. (We note that supplemental income benefits do refer to certain criteria that appear similar to, but not within, the definition of disability.) The period of disability would best be addressed after additional findings are made and additional procedures as to a designated doctor are possibly implemented.

The evidence that carrier agreed to naming Dr. A as the second treating doctor in its letter of March 30, 1992 provides sufficient evidence to support the decision that claimant properly exercised his second choice of a treating doctor.

The decision is reversed and 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.

Joe Sebesta
Appeals Judge

CONCUR:

Philip F. O'Neill
Appeals Judge

Lynda H. Nesenholtz
Appeals Judge