APPEAL NO. 92639

This appeal arises under the Texas Workers' Compensation Act of 1989 (1989 Act), TEX. REV. CIV. STAT. ANN. arts. 8308-1.01 through 11.10 (Vernon Supp. 1992). On April 24 and October 23, 1992, a contested case hearing was held in (city), Texas, with (hearing officer) presiding, to determine whether the doctor for (claimant), the claimant, could "decertify" that the claimant had reached maximum medical improvement (MMI). The hearing officer determined that the agreed designated doctor, (Dr. G), certified that MMI was reached on December 23, 1991, but, based upon new and additional medical evidence obtained after this date, reconsidered his earlier opinion on January 22, 1992, and issued a report stating that the claimant had not, in fact, reached MMI. He held that the doctor had a right, based upon new and additional evidence constituting a material change in circumstances, to decertify his prior finding.

The carrier appeals this determination, arguing that there is no statutory provision for decertification of MMI. The carrier further argues that Dr. G could not change his assessment because he was an agreed designated doctor. As part of this second argument, the carrier notes that Dr. G acted as treating physician when he "revoked" his opinion rendered as designated doctor. The claimant responds, essentially, that the appeal of this issue is frivolous because a doctor may change his certification when it is erroneous.

DECISION

We affirm the hearing officer's decision and order that stated that the claimant has not reached maximum medical improvement, and further ordered payment of applicable temporary income benefits. We modify his opinion as stated in the last paragraph of this opinion.

The claimant was injured in a fall on (date of injury), while employed by (employer). According to the sparse record before us, (Dr. O), of (city), (state), who may or may not have been the claimant's treating doctor, sent a three page letter to (Dr. D) on October 8, 1991. Dr. D's relationship to the claimant was not explained. In this letter, Dr. O opined that the claimant had reached MMI, and, according to the AMA Impairment Guides, had a 4% whole body impairment, related to her physical problems from arthritis and carpal tunnel syndrome. However, Dr. O asserts that neither condition could have developed in the month that claimant worked for the employer, and notes that her carpal tunnel syndrome does not appear to be traumatic in origin. He expresses various opinions about the claimant's need for psychiatric consultation. Dr. O does note an injury to the wrist, with resultant weakness of grip. However, the fact of injury was not disputed by the carrier in this case, and Dr. O's letter does not address injury through aggravation of a preexisting condition.

Apparently, a benefit review conference was held on December 23, 1991; regrettably, the entire report is not contained in the record. However, three agreements executed by claimant, her attorney, and the carrier's attorney on that date are in the record. First, concerning a disputed issue over the claimant's choices of doctor, the parties agreed

that Dr. G would be the claimant's treating doctor. Second, concerning a dispute over Dr. O's certification of MMI, the parties agreed that Dr. G would examine claimant and determine "if" MMI had/had not been reached. Parenthetically, this agreement refers to "Commission Rules 130.5 and 130.6." Third, the parties agreed that if Dr. G determined that MMI was reached, he would assign an impairment rating that would be final. (This agreement also parenthetically references "Commission Rule 130.5 and 130.6.") The benefit review officer appears to have approved the first agreement on January 2, 1992 and the second and third agreements on January 10, 1992 (although we would note that all three agreements carry a Commission date stamp of January 6, 1992).

Dr. G, an orthopedic surgeon, examined the claimant on December 23, 1991, although the record does not indicate whether this occurred before or after the benefit review conference. Dr. G indicated in a letter of that date that the 4% impairment rating given by Dr. O was generous. Dr. G diagnosed bilateral carpal tunnel syndrome and chondromalacia of the patella. He stated that while the most common cause of carpal tunnel is repetitive use syndrome, that a contusion to the wrist can result in carpal tunnel symptoms. His letter ended with the note that he would review, in the future, the results of an MRI examination, but that "at this point, I do agree with the impairment rating." The letter no where states that the claimant has reached MMI.

On January 8th, a short letter was sent by Dr. G to (G.A.B.):

> This patient has reached her maximum healing period and I would estimate that it was reached December, 1991. A specific date of December 23, 1991 was the day that I saw her for evaluation.
>
> I feel that she does have a carpal tunnel syndrome, but at the present time, I do not feel that surgery is indicated, but I think is [sic] should be kept in perspective because she could require surgery at a later date.

On January 22, 1992, Dr. G wrote to G.A.B. again, and noted that he examined the claimant that date and referred her to a neurosurgeon for cervical spondylosis and carpal tunnel syndrome. He closed by stating that "[a]t the present time, she has not reached her maximum medical improvement."

The only Report of Medical Evaluation, [Commission Form TWCC-69], that is contained in the record from any doctor was completed by Dr. G, stating that claimant had not reached MMI, and giving an estimated MMI date of May 1, 1992. It is impressed with a mark that reads: "REC'D GAB Feb 07 1992". (We would note that the signature on this form appears to be different than the one on the Dr. G letters dated December 23, 1991 and January 22, 1992; the January signature is illegible on the copy of that letter in the record).

Dr. G's oral deposition was taken on June 11, 1992. Some of the questions, and

some of the answers, are convoluted and not clear. Dr. G stated that, if he had been asked to fill out a form TWCC-69 on January 8, 1992, he would have given an MMI date of December 23, 1991 and a 4% impairment rating. Asked to assume the definition of MMI from the 1989 Act, he stated that as of January 8, 1992, it was his opinion based upon reasonable medical probability that claimant had reached MMI as of December 23, 1991. When asked by the carrier whether he had certified MMI in his report of January 8, 1992, as the term "certification" was used in rules of the Commission, he stated "yes" but this was objected to by the attorney for the claimant as requesting the witness to testify to a legal conclusion. The carrier then proceeded to lead Dr. G through the requirements of Rule 130.1 by asking whether his "certification" included such items as a narrative history of claimant's condition, the onset and course of her condition, a description of the results of the most recent clinical evaluation, or findings of previous examinations and treatments and responses to treatments. Neither the questions nor the "yes" or "no" answers to these questions specified the dates of documents that either did or did not contain such information.

Dr. G testified that his earlier "certification" did not "include things I later learned". Dr. G's deposition indicates that he discussed an MRI with the claimant on December 23, 1991, but that he did not actually see it until later. When asked by the carrier if his changed opinion was based upon symptoms that developed in the claimant after certification of MMI, Dr. G replied: "Well, it was more that after I reviewed some of the results that I changed my mind, but not here. She still had symptoms of carpal tunnel, she had it proven by EMG, and we are still left with the problem of how she would do." This followed the claimant's line of hypothetical questioning that elicited answers from Dr. G that, with respect to other patients in general, his assessment of MMI could change based upon further signs and symptoms after he opined that MMI had been reached.

On March 2, 1992, the carrier asked to proceed directly to a contested case hearing without a benefit review conference on the "critical question" of whether "a treating physician can decertify maximum medical improvement after it has once been established and after impairment benefits have been paid and in spite of the agreement. . . ." An interlocutory order for payment of temporary income benefits was issued by the Commission on March 4, 1992.

I.

WHETHER THE DOCTOR "CERTIFIED" THAT THE CLAIMANT HAS REACHED MMI

The casting of the issue as one involving the rights of Dr. G is somewhat unfortunate, because the real issue here was the entitlement, or the "right", of the claimant to receive temporary income benefits. For a person who has disability[1], that entitlement continues

[1] As defined in the 1989 Act, Article 8038-1.03(16).

until the injured employee reaches MMI. Article 8308-4.23(b). The applicable definition of MMI for this case is Article 8308-1.03(32)(a): "the point after which further material recovery from or lasting improvement to an injury can no longer be reasonably anticipated, based on reasonable medical probability." For purposes of resolving disputes over the existence of MMI, the Commission shall give the report of a designated doctor presumptive weight unless the great weight of medical evidence is to the contrary. Article 8308-4.25(b). Although the report of an agreed designated doctor has conclusive weight for impairment rating, Article 8308-4.26(g), the threshold of the existence of MMI must first be crossed. *See* Articles 8308-1.03(24); 1.03(25); 4.26(c); and 4.33(c).

The carrier here was not arguing facts relating to the actual status of the claimant, which is the basis for payment of benefits. It brought forward not one bit of evidence to show that Dr. G's correction, and the reasons for it, were medically invalid. Rather, it argued that its obligation to pay benefits should be based, essentially, upon an inaccurate assessment of MMI, rather than a true one.

We find the carrier's argument that there is no provision for a "decertification" process in the 1989 Act and Commission rules inapplicable to the facts of this case. No authority is cited by the carrier for the proposition that an expert requires statutory authority to correct errors. To the extent that the "report" of Dr. G was binding on the hearing officer because it was either presumptive or conclusive in this case, we would note that the Appeals Panel has held that two reports filed by the designated doctor may be reviewed together. Texas Workers' Compensation Commission Appeal No. 92469, decided October 15, 1992. Furthermore, a correction or amendment of the first report generated by a designated doctor, especially when the first document was based upon incomplete or erroneous facts, which is done fairly soon after the first report, may be given presumptive weight. Texas Workers' Compensation Commission Appeal No. 92441, decided October 8, 1992. Giving the entire "report" of Dr. G, application of a presumptive weight standard directs a finding that MMI was not certified.[2]

II.

WHETHER THE BRC AGREEMENT REQUIRES THE COMMISSION TO IGNORE A CORRECTED REPORT BY THE DESIGNATED DOCTOR

Ultimately, the determination of MMI in the case of a dispute is up to the Commission. Article 8308-4.25(b). A settlement or agreement "resolving" an issue of impairment may not be made before an employee reaches MMI. Article 8308-4.33(c). The BRC agreement is not an agreement or settlement on a specific impairment rating. Rather, the parties agreed that, <u>if</u> Dr. G determined that MMI was reached, his impairment assessment

[2] The validity of Dr. G's January 8, 1992 letter as a "certification" under Rule 130.1 at all is questionable. However, we need not address it given our holding here.

would be considered final. This is nothing more than an agreement to be bound by the conclusive effect of such an impairment rating as set out in Article 8308-4.26(g), contingent upon Dr. G's finding that claimant reached MMI. The agreement imposed no time limit on Dr. G for making this assessment.

As pointed out above, Dr. G has not certified that claimant has reached MMI, so the portion of the agreement regarding the "finality" of the impairment rating has not come into play. There has been no adoption under 4.26(g) by the Commission of an impairment rating. Under the facts here, only a duly executed and approved settlement on impairment under Article 8308-4.33 would have restricted the hearing officer's power to ultimately decide the issue.

Further, the carrier's argument that Dr. G somehow rendered his MMI assessment as a designated doctor, but revoked it as a treating doctor, is specious. Dr. G served as both from the inception of the agreement.[3] Carrier agreed to this. This is obvious to us from a review of the record. To argue that Dr. G "was initially agreed upon" to serve as designated doctor and only after this somehow became the treating doctor is completely unsupported.

If anything, we would note that the agreement that Dr. G would be the treating doctor was approved by the benefit review officer prior to the agreement that he would assess MMI and impairment. His opinion that claimant had reached MMI (January 8, 1992) was rendered prior to the date the benefit review officer approved him as a designated doctor. (January 10, 1992). Following the carrier's line of reasoning, it would be more cogent to argue that Dr. G's initial opinion that claimant reached MMI was rendered as a treating doctor, but revoked later by Dr. G as designated doctor.

[3] Although neither party disputed the BRC agreements on the basis that Dr. G acted in a dual capacity from the beginning, we would observe that such agreements would seem to go against the clear intent of Articles 8308-4.25 and 4.26 that a designated doctor serve as the non-aligned expert used to resolve disputes.

The decision of the hearing officer is affirmed, but his reasoning that Dr. G certified MMI, and revoked it, is modified. We modify the word "certified" in the first line of Finding of Fact No. 4 to "found"; in Conclusion of Law No. 2, we modify the word "decertify" in line 3 to be "change". Finally, the first sentence in the decision and order should now read "Dr. Green amended his initial opinion that claimant may have reached maximum medical improvement, and determined that she had not."

Susan M. Kelley
Appeals Judge

CONCUR:

Joe Sebesta
Appeals Judge

Robert W. Potts
Appeals Judge