APPEAL NO. 92643

On September 15 and 23, 1992, a contested case hearing was held in (city), Texas, with (hearing officer) presiding as the hearing officer. The hearing officer determined that the claimant had not reached maximum medical improvement (MMI). The carrier, who is the appellant on appeal, does not disagree with the determination regarding MMI, but contends that the issue to be resolved at the hearing was disability, which it states was not addressed by the hearing officer, and requests that we reverse the hearing officer's decision. The claimant, who is the respondent on appeal, responds that he agrees with the hearing officer's decision.

DECISION

The decision of the hearing officer is reversed and remanded.

The claimant claimed he sustained a work-related back injury on (date of injury). The carrier accepted liability and the employer contested compensability under Article 8308-5.10(4). In a decision dated September 23, 1992, the hearing officer determined that the claimant did sustain a work-related back injury on (date of injury). We affirmed that decision in Texas Workers' Compensation Commission Appeal No. 92583, decided December 7, 1992. At the hearing held on September 15 and 23, 1992 where evidence was received from the claimant and the employer on the issue of whether the claimant sustained an injury in the course and scope of his employment, the carrier and the claimant agreed that the issue of disability was also to be resolved. It was the carrier's position that the claimant did not have any "current" disability, and that the claimant and the carrier were bound by the May 18, 1992 opinion of the designated doctor, (Dr. K), that the claimant was able to do "modified work." The carrier conceded that the claimant had not reached MMI because the designated doctor had reported that he had not on a TWCC-69 form. The carrier had paid the claimant temporary income benefits from (month year) to sometime in April 1992.

The evidence showed that in December 1991, the carrier's doctor, (Dr. Ku), reported that the claimant could return to regular work. In March 1992 the claimant's treating doctor, (Dr. P), reported that the claimant could return to light duty work. On March 20, 1992, the claimant returned to work for two hours but said he had back pain and left. On April 6, 1992, a benefit review conference (BRC) was held to determine the issues of "whether disability still exists" and "whether the employee sustained an injury in the course and scope of his employment on (date of injury)." The claimant, the employer, and the carrier were present at the BRC. The claimant was assisted by a Commission ombudsman as he was at the contested case hearing. A BRC agreement was entered into on April 6, 1992. It was signed by the claimant, the carrier, and the benefit review officer. It stated as follows:

Disputed Issue. Whether injury is compensable.
Resolution. Parties agree to shelve dispute on this issue until issue of disability is

resolved.

Disputed Issue. Whether disability still exists.
Resolution. An MEO with (Dr. Ku) has been done, Parties are awaiting form 69. Parties agree to have [the claimant] evaluated by a designated doctor, (Dr, K)., to resolve probable dispute between (Dr. Ku) (MEO) and (Dr. P) (treating).

A BRC report for the April 6, 1992 BRC was signed by the benefit review officer on July 22, 1992. The benefit review officer wrote in the report that the issue of whether disability still exists was resolved at the BRC. The resolution as stated in the BRC report was as follows:

A designated doctor was agreed on. (Dr. K) examined the employee on 05-18-92 and determined that the employee sustained a lumbar strain. Could return to modify (sic) type of work and be capable of returning to full duty work in four months.

The BRC report indicated that the issue of whether the claimant sustained an injury in the course and scope of his employment was not resolved at the BRC.

In evidence at the contested case hearing was a May 18, 1992 report from (Dr. K) wherein he diagnosed a lumbar strain, and recommended that the claimant undergo work-hardening, return to "modified type of work," and return to "full work" in four months. (Dr. K) reported in a TWCC-69 that the claimant had not reached MMI. (Dr. Ku), the carrier's doctor, reported in a TWCC-69 that the claimant had reached MMI on December 16, 1991. No report from the treating doctor concerning MMI was in evidence.

The claimant returned to work with the employer on May 20, 1992, and worked until August 25, 1992. The claimant testified that the employer had modified work available for him during this time period. Although there was no testimony or documentary evidence as to the claimant's wages during this period, we are led to believe from the absence of any assertion on the part of the claimant that he was due TIBS for this period, that his earnings were equivalent to his preinjury earnings. The claimant testified that on August 25, 1992, he had extreme back pain at work, called an ambulance, and was taken to a hospital. The emergency room doctor diagnosed "low back pain," prescribed medication, and referred the claimant to the claimant's treating doctor. In written statement, two witnesses stated that they saw the claimant working in his yard with a weed eater on August 26, 1992. (Dr. P) examined the claimant on September 1, 1992, and reported that he did not know what to do with the claimant, and that he did not find too many objective findings. (Dr. P's) treatment plan for the claimant was "light duty work but this is really up to him. He is to return to my office as appointed." (Dr. P) gave the claimant a prescription for medication for depression. However, in another report also dated September 1, 1992, (Dr. P)

indicated that the claimant was unable to return to work until further evaluation. The claimant did not return to work after August 25, 1992.

In the Statement of the Case, the hearing officer stated that the issue was whether MMI had been reached. That statement is incorrect. The carrier conceded at the hearing, as it does on appeal, that the claimant has not reached MMI. At the hearing the carrier said that the issue for determination was whether the claimant had "current" disability, and the claimant agreed that disability was an issue. The claimant introduced evidence bearing on current disability and the carrier, through cross-examination of the claimant, questioned whether he had current disability. From the carrier's questions and argument at the hearing, it is apparent to us that the carrier was contesting that the claimant had any disability on and after August 25, 1992, the date the claimant left work and went to the hospital emergency room after having worked modified work for about three months. The claimant argued at the hearing that his disability on an after August 25, 1992 is established by (Dr. P's) report of September 1, 1992, in which he said that the claimant was unable to work.

The hearing officer made the following pertinent findings of fact and conclusion of law:

Findings of Fact

7.The claimant's treating doctor released him to light duty work on March 19 and July 10, 1992, took him off work on September 1, 1992 until further evaluation and has not certified MMI.

8.The designated doctor did not certify that the claimant had reached MMI.

Conclusion of Law

3.The claimant has had disability from November 18, 1991, when he was placed on two weeks light duty, was paid temporary income benefits until April 6, 1992 after his treating doctor put him on light duty on March 19, 1992, and again on July 10, 1992, and on September 1, 1992 when he was taken off work, and has not reached MMI.

On appeal, the carrier contends that the hearing officer did not address the issue of disability but limited his decision to the issue of MMI. While we do not totally agree with the carrier's contention, we are concerned that the hearing officer did not focus on the issue of current disability, that is, whether the claimant had disability on and after August 25, 1992. The reasons for our concern are that the hearing officer stated in his decision that the issue was MMI and did not mention any issue relating to current disability; Finding of Fact No. 7 recites that the claimant's treating doctor took him off work on September 1,

1992, but does not relate the claimant's off work status to his injury of (date of injury); and Conclusion of Law No. 3 is somewhat difficult to construe in light of the evidence at the hearing that TIBS were only paid until sometime in April of 1992 and that the claimant returned to modified work from May 20 to August 25, 1992, apparently without reduction of preinjury earnings. Considering our foregoing concerns, we believe that the case should be reversed and remanded to the hearing officer for further development of the evidence, as appropriate, and consideration of the evidence on the issue of whether the claimant has had disability from his work-related injury of (date of injury) on and after August 25, 1992. In doing so, we are aware that the "Decision and Order" by the hearing officer indicates disability at present when it uses the language "continue to pay temporary income benefits until the claimant's disability ceases . . ."

As concerns the issue of whether the claimant has had disability on and after August 25, 1992, we disagree with the carrier's argument on appeal that pursuant to the BRC agreement of April 6, 1992, "the claimant gave up his right to rely upon the opinion of his treating doctor or even his own opinion on the issue of disability." The BRC agreement is vague and indefinite as to what "probable dispute" between the claimant's doctor and the carrier's doctor the designated doctor was to resolve through an evaluation of the claimant. Under the 1989 Act, the function of a designated doctor is to help resolve disputes over MMI and impairment rating. *See* Articles 8308-4.25 and 8308-4.26. If the parties intended by their agreement that they would be bound by the opinion of the designated doctor as to any other matter, they should have clearly stated their intention, which we believe was not done. *See* Article 8308-6.15. "Disability" is defined as the inability to obtain and retain employment at wages equivalent to the preinjury wage because of a compensable injury. Article 8308-1.03(16). We have previously held that a finding of no disability during a specified time period does not preclude the injured employee from attempting to show disability during a future period. Texas Workers' Compensation Commission Appeal No. 92030, decided March 12, 1992. In other words, disability may recur after a period in which the injured employee does not have disability. If the parties intended by their BRC agreement to have (Dr. K) evaluate the claimant in regard to his ability to work, and to be bound by that agreement, we believe that (Dr. K's) medical opinion as to the claimant's ability to work would be binding only insofar as it related to the claimant's ability to work at the time of the examination and thereafter only if circumstances as to the claimant's physical condition and abilities remained as they were on the date of the examination. We see no intent by the parties in their BRC agreement to be forever bound by the opinion of (Dr. K) regardless of changes in the claimant's physical condition and abilities. We reserve any opinion as to whether the parties could bind themselves in regard to future developments of disability. We also do not find an intent by the parties to forever have (Dr. K) be the doctor to determine the claimant's work abilities from a medical standpoint. If anything, (Dr. K) was to examine the claimant and determine his ability to work at the time of examination. This he did and found that the claimant could do modified work which the claimant did for three months. The claimant is now asserting that his physical condition has deteriorated from the time of his examination and he is not

able to do the modified work. If the parties wish to have (Dr. K) examine the claimant again in regard to his ability to work, they may do so, but his opinion will only be evidence on the issue of current disability and will not be binding on the parties unless a new agreement to that effect covering the current examination is entered into.

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

Robert W. Potts
Appeals Judge

CONCUR:

Joe Sebesta
Appeals Judge

Thomas A. Knapp
Appeals Judge