APPEAL NO. 92686

A contested case hearing was held on November 23, 1992, in (city), Texas, before (hearing officer). The hearing officer determined that the claimant reached maximum medical improvement (MMI) on October 4, 1991, with an eight percent impairment rating, as found by the designated doctor agreed upon by claimant and the carrier. In his request for review, the appellant in this case (hereinafter claimant) contends that the MMI date certified by the designated doctor is against the overwhelming weight of the medical and other evidence, and he urges that as a matter of law he did not reach MMI until March 30, 1992. The carrier, who is the respondent in this appeal, argues that there is no medical evidence in the record to contradict the designated doctor's finding of MMI, and that thus the hearing officer's decision should be affirmed.

DECISION

Finding no error on the part of the hearing officer, we affirm his decision and order. It was undisputed that the claimant, a floor hand employed by (company)., was injured on (date of injury), when he slipped and twisted his right knee while on the job. On March 21, 1991, (Dr. P) performed surgery and placed two screws into claimant's knee. Claimant testified that he continued to limp and to experience pain and that on September 16, 1991 another doctor, (Dr. O) removed one of the screws that Dr. O found had started to protrude. Because claimant continued to suffer pain, Dr. P removed the second screw in January 1992.

At the time he removed the first screw, Dr. O completed a Report of Medical Evaluation (Form TWCC-69) which found claimant to have reached MMI as of the date of surgery, September 16, 1991, with a 10% impairment rating. After removing the second screw in January 1992, Dr. P on March 30th completed (but did not sign) a TWCC-69 giving claimant a 0% impairment rating, although he did not certify MMI. Dr. P's report also stated the claimant could return to full time work. Because the claimant disputed Dr. P's impairment rating, claimant and the carrier agreed upon the appointment of (Dr. S) as designated doctor to examine claimant and render an opinion on MMI and impairment. Dr. S examined claimant on May 7, 1992, and prepared a written report on that date. The report, which summarized claimant's prior treatment , as well as the impairment ratings assigned by Drs. O and P, assigned claimant an 8% whole body impairment rating. However, it did not give a date for MMI. Sometime thereafter, Dr. S prepared a TWCC-69 which referenced his prior report and gave an MMI date of October 4, 1991.

The claimant testified that he did not work from the date of the injury until after the last screw was removed, although he stated that a portion of that time (from July to November 1991) he was in a rehabilitation facility for treatment of alcohol-related problems. He said that after Dr. P released him to return to work on March 30th, he tried to work for a couple of days but that he could not because of the pain. He went back to work around June 1st and has continued to work since that date, although he said he continues to have trouble with his knee.

Claimant contended at the hearing, and contends on appeal, that none of the factual or medical events support October 4, 1991 as an MMI date, and that in fact the great weight of the evidence indicates otherwise. As an example, claimant points to the fact that his treating doctor, Dr. P, removed the last screw and released claimant to return to work long after Dr. S's MMI date; further, claimant testified that he was not able to return to work until a point after that date because of the pain in his leg. Claimant urges that the MMI date selected by Dr. S is arbitrary and invalid and the hearing officer's decision deprives him of temporary income benefits from October 4, 1991 to March 30, 1992 without due process of law. He asks that this panel render a decision that the correct date of MMI is March 30, 1992.

The 1989 Act defines "maximum medical improvement" as the earlier of either

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

(B)the expiration of 104 weeks from the date income benefits begin to accrue.

Article 8308-1.03(32). The facts of this case come within the definition contained in (A), above.

We have previously held that the fact that an employee may have reached MMI does not mean, in every case, that the individual is free of pain or fully restored to his or her preinjury condition. Texas Workers' Compensation Commission Appeal No. 92270, decided August 6, 1992. As a recent opinion of this panel said, when a doctor finds MMI and assesses impairment he agrees, in effect, that the injured worker is likely to continue to have effects, and quite possibly pain from the injury. However, he has determined, based upon his medical judgment, that there will likely be no further substantial recovery from the injury. Texas Workers' Compensation Commission Appeal No. 92670, decided February 1, 1993. We have also held that a full release to normal duty does not equate to MMI. Texas Workers' Compensation Commission Appeal No. 91045, decided November 21, 1991.

While MMI can certainly be certified by either the claimant's treating doctor or a doctor selected by the carrier, the 1989 Act contemplates 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 (or, if the parties are unable to agree, a designated doctor selected by the Commission). The report of that doctor 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. Article 8308-4.25(b).

In this case, the claimant is challenging the date on which the designated doctor certified MMI. For purposes of reviewing the report of a designated doctor, however, we have held that both the date and the certification of MMI are entitled to presumptive weight under the Act. Texas Workers' Compensation Commission Appeal No. 92648, decided January 20, 1993. Further, we have noted in the past the "unique position" the designated doctor's report occupies within the scheme of the 1989 Act, and the fact that such report cannot be outweighed by a mere balancing of the evidence or even a preponderance of the evidence. Texas Workers' Compensation Commission Appeal No. 92412, decided September 28, 1992. The only other medical evidence in the record indicating a different date of MMI was Dr. O's September 16, 1991 certification. (It is not clear whether Dr. P intended by implication to find claimant had reached MMI in his TWCC-69 assigning a 0% impairment; however, this cannot be presumed in the absence of an appropriate certification from Dr. P). We accordingly find that the hearing officer did not err in holding that the great weight of the other medical evidence is not contrary to the hearing officer's decision that finds that MMI was reached on the date assigned by the designated doctor.

A portion of the claimant's argument concerns the fact that the date selected by Dr. S--October 4, 1991--is not mentioned in any medical record and is arbitrary for that reason alone. While it is not readily apparent why Dr. S chose this date, there is nothing in the 1989 Act that would prohibit a designated doctor, in the exercise of his professional judgment, from assigning a date of MMI that is retrospective. We note that there was no contention that Dr. S's narrative report and TWCC-69, when read together, did not contain all the elements required by law or rule for a designated doctor's report. *See* Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 130.1, 130.3 (Rules 130.1, 130.3). The fact that the TWCC-69 was completed sometime after the narrative does not mean that the two cannot be read as a single report, especially where the TWCC-69 references and adopts the May 7th narrative.

We affirm the hearing officer's determination that the claimant attained maximum medical improvement on October 4, 1991, with an impairment rating of 8%. Noting that Conclusion of Law No. 2 states that claimant had "an eight percent (9%) impairment rating," we reform the decision to reflect the parenthetical reference to the impairment rating as "(8%)."

Lynda H. Nesenholtz
Appeals Judge

CONCUR:

Joe Sebesta
Appeals Judge

Robert W. Potts
Appeals Judge