APPEAL NO. 931046

This appeal arises under the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act) (formerly V.A.C.S., Article 8308-1.01 *et seq.*). On September 8, 1993, a contested case hearing (CCH) was held in (city), Texas, with (hearing officer) presiding as hearing officer. At the CCH the parties agreed to waive four of the nine unresolved issues identified at the benefit review conference (BRC). The parties agreed the following five issues were before the hearing officer at the CCH:

Did Ms. H's (date of injury) injury cause her to be unable to obtain and retain employment after 16 February 1991 at wages she earned before (date of injury);

Did Ms. (H) reach maximum medical improvement from a (date of injury) injury, and, if so, on what date;

What is Ms. (H)'s impairment rating, if any;

May carrier reduce the amount of impairment income benefits for a prior compensable injury; and

Is Ms. (H) entitled to continued medical treatment for her (date of injury) injury.

The hearing officer determined that Ms. (H)'s, claimant herein, injury of (date of injury), caused disability from February 16, 1991, to August 24, 1992, did not cause disability (as defined by the 1989 Act) after August 25, 1992, that claimant reached statutory maximum medical improvement (MMI) on February 23, 1993, that claimant was not eligible for temporary income benefits (TIBS) after August 25, 1992 (presumably because claimant did not have disability after that date), that the record "is incomplete" regarding claimant's entitlement to impairment income benefits (IIBS) and the case is referred back to the Disability Determination Officer (DDO) for further development of those issues. The hearing officer further determined that "the reasonableness and necessity of medical treatment is not appropriately before the hearing officer in this proceeding."

Both parties, being the claimant and carrier, timely appeal various aspects of the hearing officer's decision not favorable to that party and request various portions of the decision be reversed. Both parties timely file responses to the other party's appeal.

DECISION

Having considered the appealed issues and the record developed at the CCH we reverse the decision of the hearing officer and remand this case for further consideration and development of the evidence necessary to resolve the presented issues.

The hearing officer's statement of the evidence is a fair and accurate recitation of the evidence and we adopt it for purposes of this decision. It is undisputed that claimant

sustained a work related back injury in (month year), returned to light duty as a "packaging helper" and on (date of injury), while trying to "unjam" an assembly line conveyor belt, she injured her right arm and back. After reporting the injury, claimant saw (Dr. G), M.D. Dr. G initially treated claimant primarily for a back condition, noting in a February 18, 1991, report "[p]ossible lumbar disk bulge versus herniated nucleus pulposus." After seeing claimant several more times in March 1991, claimant was seen by (Dr. P) M.D., who in a report dated April 17, 1991, noted "some problems with her right arm recently and the possibility of a reflex sympathetic dystrophy (RSD) in her right upper extremity." Claimant continued to be seen by Dr. G, who in various reports noted "significant pain . . . in the right upper extremity . . . ." Dr. G then referred claimant to (Dr. C), M.D., who has been claimant's treating doctor since April 1991. Dr. C in a letter dated April 25, 1991, agreed with the diagnosis of RSD of claimant's right extremity (arm). Dr. C proceeded on a long course of treatment for the RSD, including a series of stellate ganglion blocks. Both claimant's documentary evidence, in the form of medical articles, and carrier's testimonial evidence, identify three stages of RSD. Stage I is the acute stage with changes in temperature of the affected member, Stage II is the dystrophic stage where there is skin and hair change with constant pain associated with severe depression, and Stage III, the atrophic stage with irreversible skin, cartilaginous muscle and bone damage. Dr. C in a report dated May 22, 1991, had the "impression" that claimant's RSD had advanced to Stage II. Claimant continued to receive stellate ganglion blocks and axillary sympathetic blocks as well as other surgical intervention. Throughout this course of treatment there were references to claimant's back condition and possible herniated disc. Claimant was also receiving physical therapy (PT) and was seen by (Dr. R), who in a September 18, 1991, report states the RSD is causing "ischemia and aggravating the condition of vascular insufficiency." Dr. R recommended aggressive PT. Dr. C in a report dated March 30, 1992, states claimant's "prognosis is very poor." During this time frame, claimant testified she has been treated with whirlpool, heat packs, TENS unit and PT, and states she has no feeling in her hand, and she is unable to cook or clean or do laundry. Claimant testified she was only able to drive short distances and that some days were better than other days.

Claimant was referred by Dr. C to (Dr. RC) who is the vice-chairman of the Department of Physical Medicine and Rehabilitation, assistant professor of neurosurgery at the UT Health Sciences Center at (city). Dr. RC holds a number of appointments, is board certified in physical medicine and rehabilitation and is a fellow of the American College of Sports Medicine. Dr. RC conducted a two hour examination of claimant and by report dated February 21, 1992, after taking an extensive history, noted as problems:

1. Right frozen shoulder with reflex sympathetic dystrophy by history with apparent good response to sympathectomy. The patient has no current signs of reflex sympathetic dystrophy.
2. Chronic pain syndrome with exaggerated pain behavior and functional status which is far superior than formal testing will show.
3. Probable conversion reaction with on-the-job injury on same date as child's death some ten years previously.
4. Ineffective physical therapy program.

Dr. RC noted certain inconsistencies such as that the claimant stated she could not raise her right arm but yet the armpit was shaved and had deodorant, that the claimant was able to button and unbutton her shirt and was able to sign her name with a pen, "however when the patient was asked to make a fist or straighten her hand she demonstrated inability to do so." Dr. RC recommended that the claimant have "[p]sychotherapy with a very strong female psychotherapist." Dr. RC examined claimant a second time in April 1992.

Carrier retained a private investigator who videotaped claimant on August 24, 25, 30, September 3, October 8, 10 and 15, 1992. Carrier contends the activities showing claimant drinking with her right hand, shopping, unloading a shopping cart, shading her eyes with her right hand, getting out of a dump truck, sweeping and using a dust pan, carrying a trash can, engaging in normal activities, and closing an overhead garage door with her right arm are totally inconsistent with what claimant had told her doctors and testified she could do. Dr. RC saw the videotapes of claimant's activities of August through October 1992 and testified at the CCH, providing a "frame-by-frame commentary" of the medical significance of claimant's actions as shown on the videotape. Dr. RC testified that claimant exhibited no loss of range of motion, no back problems, that claimant's activities were inconsistent with RSD and that based on the tape, and on her examinations of claimant, Dr. RC testified she believes claimant had normal functional capacity with no impairment. Dr. RC by Report of Medical Evaluation (TWCC-69) and narrative report dated February 11, 1993, certified MMI on 8/25/92 with 0% whole body impairment. In the narrative report, Dr. RC matches claimant's videotaped actions with what claimant was telling her doctors during the same time frame. Dr. RC wrote Dr. C ad vising her of the videotape and of Dr. RC's report of February 11, 1993. Dr. C responded by letter dated February 12, 1993, to carrier's attorney, stating "I agree with [Dr. RC's] conclusion that [claimant] falsely stated her physical capacities, degree of pain and disability to me." However by affidavit dated September 8, 1993 (some seven months after Dr. RC certified MMI with 0% impairment), Dr. C stated her opinion that claimant "had an impaired rating of 100% in February 1992 . . .," that claimant's injury was independently confirmable, that "by February 1992, [claimant] had probably reached [MMI]," that despite a series of stellate ganglion blocks, claimant's RSD had not been resolved in her right extremity, that claimant "had an impairment rating of 100% . . independently confirmable by objective findings . . .," and even after seeing the videotape of claimant "[i]n my opinion [claimant] is <u>not</u> faking her injury." Dr. C stated RSD can be episodic or intermittent and "[t]he fact that she is seen in the films moving her arms does not negate my diagnosis (of RSD) nor my prognosis that she could not return to any type of job which required any type of lifting or repetitive movement of her arms or back."

Claimant attempts to rebut the video by stating she had been told to use her arm as much as possible for therapy and that is what she was doing when she was sweeping the driveway. Claimant testified that in the scene where she had her arms outstretched dismounting from a dump truck she was actually reaching up to keep herself from falling. Claimant had no specific response for scenes where she was carrying a trash barrel or closing an overhead garage door with her right arm.

Carrier also presented testimony from a coworker of claimant who attended a wedding reception where claimant was seen dancing several times and changing clothes into a pair of tight pants without assistance on June 1, 1991. Claimant concedes she attended the wedding reception, only danced four or five dances, and had the assistance of her daughter in changing clothes.

The hearing officer made a number of Findings of Fact and Conclusions of Law, however only those that have been appealed are quoted as follows:

FINDINGS OF FACT

5.On (date of injury) [claimant] said that she was unloading boxes off a conveyor belt that jammed, as part of her job as packing assistant, when she caught her right hand in the conveyor belt, suffering an injury to her wrist, and that was the basis of her claim for workers' compensation underlying this matter.

17.[Claimant] began collecting temporary income benefits related to a (date of injury) injury on 23 February 1991. By 23 February 1993, the statutory 104 weeks had elapsed and [claimant] had reached [MMI] by operation of the Act.

18.As of 25 August 1992 [claimant's] (date of injury) alleged injury did not cause her to be unable to obtain and retain employment at wages she earned before (date of injury).

19.[Claimant's] alleged (month year) injury caused her to be unable to obtain and retain employment at wages she earned before (date of injury) from 16 February 1991 through 24 August 1992.

20.The record in this case in unclear whether [Dr. C] filed any response to [Dr. RC's] 11 February 1993 certification, filed with the Commission, or whether the parties have asked for a Commission designated doctor to resolve an issue about when [claimant] reached [MMI] and a correct impairment rating.

21.[Dr. C] has not certified if [claimant] reached [MMI] from a (date of injury) injury and has not assigned an impairment rating. There is no record in this proceeding that the Commission has requested [Dr. C] to do so.

CONCLUSIONS OF LAW

4.[Claimant] has shown by a preponderance of the evidence that her (date of injury) injuries caused her to be unable to obtain and retain employment at wages she earned prior to (date of injury), from 16 February 1991

through 24 August 1992, and she is eligible for temporary income benefits for such period.

5.Because [claimant] has failed to show by a preponderance of the evidence that her (date of injury) injuries caused her to be unable to obtain and retain employment at wages she earned before (date of injury), after 25 August 1992, she has failed to show she had disability beginning 25 August 1992 and is therefore not eligible for temporary income benefits beginning 25 August 1992.

6.Because [claimant] began accruing temporary income benefits as of 23 February 1991, for a (date of injury) injury, and 104 weeks passed as of 23 February 1993, [claimant] reached [MMI], within the meaning of the Act, on 23 February 1993.

7.Because a designated doctor has not certified that [claimant] reached [MMI] at any time before 23 February 1993, there is not a basis for the Commission to enter an order that [claimant] reached [MMI] before 23 February 1993.

8.Because no designated doctor has certified [claimant's] impairment from a (date of injury) injury, the Commission does not have a basis to enter an order for impairment income benefits and does not have a basis to enter an order, if any is appropriate, to order a reduction of carrier's liability because of an impairment from a prior compensable injury.

10.Because [claimant] has reached statutory [MMI], her treating doctor needs to provide an impairment rating based on her impairment as of 23 February 1993, or a designated doctor needs to give an impairment rating, but since neither are provided in the record of this case, the Commission cannot order impairment income benefits based on no impairment rating. The matter is sent back to the Disability Determination Officer for further Commission action to develop an impairment rating.

Claimant appealed Findings of Fact Nos. 5, 18, 19 and 21, and Conclusions of Law Nos. 4 and 5. Carrier appeals Findings of Fact Nos. 17, 19 and 20, and Conclusions of Law Nos. 4, 6, 7, 8 and 10.

Claimant's first point of appeal is in regard to Finding of Fact No. 5 contending the hearing officer omitted mentioning an injury to claimant's back. Claimant points out the Employer's First Report of Injury (TWCC-1) shows the "injury was to the right arm and back." We agree the TWCC-1 shows an injury to both members and the evidence from time to time referred to a possible herniated disc and back injury. We note the hearing officer in the statement of evidence recites claimant "said . . . she hurt her back . . . ." Also in Finding of

Fact No. 6 (not quoted) the hearing officer found Dr. G "diagnosed a bulging disc . . . ." Finding of Fact No. 8 also stated that "a 19 November 1991 MRI showed [claimant's] back condition to be no different than it was on 5 October 1990." Reading the statement of evidence and all of the determinations it appears to us that the hearing officer recognized that claimant complained of a back injury at the time and that doctors have commented on the back injury from time to time but that any back injury was due to the prior injury of 1990. In fact claimant in her testimony regarding her back complaints states that she believes the back injury was "from a prior injury in '90." The hearing officer's finding is supported by the evidence.

Claimant next contends error in Finding of Fact No. 18 that on August 25, 1992, claimant did not have disability. Nonetheless, claimant argues that Dr. C's letters of 9-4-92 and 10-29-92, Dr. R's letters of 9-17-92 and 10-15-92, and Dr. C's affidavit of 9-8-92 all prove otherwise. We agree that the cited reports do indicate that claimant was still unable to work after August 25, 1992. That evidence is countered by Dr. RC's testimony, narrative report of February 11, 1993, and the videotapes taken on August 24, through October 15, 1992. Dr. C in a letter dated February 12, 1993, also appears to agree that claimant has falsely represented her condition during the August-October 1992 period of time.

Claimant also contends error in Finding of Fact No. 19, quoted above, claiming the (date of injury), injury has caused her disability from that date to the present citing, "medical evidence cited above in regards to fact finding 18." We understand claimant's position, however the appeal is not responsive to the finding of fact's reference to an "alleged (month year) injury . . . ." Our reading of the hearing officer's Finding of Fact No. 19 is that it is inadvertently in error, as discussed later in this decision.

Claimant appeals Finding of Fact No. 21, which states that Dr. C did not certify MMI and has not assigned an impairment rating, by citing Dr. C's September 8, 1993, affidavit which "assigns a 100% impairment rating to [claimant] as of February, 1993." In fact, what Dr. C's affidavit says is "[i]n my opinion, by February of 1993, [claimant] had probably reached [MMI] . . . . In my opinion [claimant's] injury rendered her 100% impaired as of February, 1993." Claimant's appeal does not precisely track the hearing officer's finding which states that Dr. C "has not certified" MMI and has not assigned an impairment rating, emphasizing only that Dr. C assigned a 100% impairment in her affidavit. Whether the statements in Dr. C's affidavit constitute a certification of MMI is problematical. We have held that an impairment rating is not assessed until MMI is reached. Texas Workers' Compensation Commission Appeal No. 92517, decided November 12, 1992. While we have never required that the MMI certification be by means of a properly completed TWCC-69, the Appeals Panel in Texas Workers' Compensation Commission Appeal No. 92384, decided September 14, 1992, and Texas Workers' Compensation Commission Appeal No. 93753, decided October 7, 1993, went to some length to discuss what was meant by certification and what was critical to an effective certification of MMI. Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 130 (Rule 130) defines what constitutes certification of MMI. Further Rule 130.2(b)(2) provides, in addition to other requirements, that when MMI is certified by the treating doctor, (Dr. C in this case) that doctor shall send the completed

report within seven days to the Commission, the employee and the carrier. The hearing officer may well have concluded that Dr. C's September 8, 1993, affidavit, which merely stated that in Dr. C's opinion claimant had "probably" reached MMI by February of 1993, did not constitute a certification of MMI for purposes of determining claimant's benefits under the 1989 Act and as required by Rules 130.1 and 130.2. Nor is the hearing officer necessarily required to find a doctor's statement that claimant was "100% impaired," without discussion of how that 100% rating was determined, constituted a valid impairment rating. We note Dr. C used terminology of "an impaired rating of 100%" and "100% impaired" and the hearing officer could well have questioned whether that terminology, and rating, constituted a formal assertion of an impairment rating under the 1989 Act. Consequently, we find claimant's contention that the hearing officer erred in stating Dr. C had not certified MMI and has not assigned an impairment rating, because Dr. C had assigned an impairment rating, is not well taken.

Carrier, on this same point, in its response, notes its objection to the admission of Dr. C's affidavit (on several grounds) and states that in any case, Dr. C's affidavit "is irrelevant, as [Dr. RC's] assessment became final on May 12, 1993." Carrier argues that Dr. RC, on a TWCC-69 certified "[MMI] as of August 25, 1992, and based on the AMA Guides, had a 0% impairment rating." Dr. RC's certification was sent to Dr. C on February 11, 1992, and Dr. C responded by letter dated February 12, 1992, confirming receipt of Dr. RC's correspondence and agreeing that claimant had falsely stated her physical capacities, degree of pain and disability. Carrier maintains that because Dr. C did not disagree with Dr. RC's certification under Rule 130.3, therefore under provisions of Rule 130.5(e) the first impairment rating assigned to an employee (Dr. RC's certification) is considered final if the rating is not disputed within 90 days (May 12, 1993) after the rating is assigned. Carrier maintains Dr. RC's rating became final on May 12, 1993. We note, however, that compliance with Rule 130.5(e) was not an agreed upon issue at the CCH, in fact was not even raised at the CCH, and is being raised on appeal for the first time. We note that carrier, by letter dated April 26, 1993, requested the addition of several issues and in a BRC on July 27, 1993, several issues requested by carrier were added. Compliance with Rule 130.5(e) was neither raised, requested, or added at the behest of carrier. We have early held that we will not consider issues first raised on appeal. Texas Workers' Compensation Commission Appeal No. 91100, decided January 22, 1992; Texas Workers' Compensation Commission Appeal No. 91057, decided December 2, 1991; and more recently Texas Workers' Compensation Commission Appeal No. 93786, decided October 19, 1993. Carrier's contention on this point is not well taken.

Claimant also appeals the hearing officer's Conclusions of Law Nos. 4 and 5, citing claimant's testimony and medical evidence. These conclusions are based on claimant's disputed findings of fact discussed previously. Suffice it to say that whether claimant had disability is a factual determination based on all of the testimony and medical evidence.

Carrier disputes the hearing officer's Finding of Fact No. 17 which found claimant reached statutory MMI on February 23, 1993, contending that Dr. RC certified MMI on August 25, 1992. As stated previously, the hearing officer is the sole judge of the weight

and credibility of the evidence and is not bound by Dr. RC's certification of MMI. In fact the claimant's own testimony, if believed, may be accepted over that of medical experts. Houston General Insurance Company v. Pegues, 514 S.W.2d 492 (Tex. Civ. App.-Texarkana 1974, writ ref'd n.r.e.). However, the hearing officer's finding of statutory MMI may well be premature, given the fact a designated doctor could find an earlier MMI date (such as August 25, 1992).

Regarding Finding of Fact No. 19, which finds that claimant's disability prior to August 25, 1992 relates to her "(month year) injury," we have concluded that an inadvertent error was made, because it is otherwise at odds with the conclusion of law that the (date of injury), injury caused the disability during this period. Accordingly, we correct Finding of Fact No. 19 to conform to the Conclusion of Law No. 4 (and the rest of the decision), and amend the (month year) injury reference to be (date of injury).

Carrier disputes Finding of Fact No. 20, and several Conclusions of Law, including Conclusion of Law No. 10, which recites claimant has reached statutory MMI, that her treating doctor (Dr. C) needs to provide an impairment rating as of February 23, 1993, "or a designated doctor needs to give an impairment rating" and refers the matter back to the DDO "for further Commission action to develop an impairment rating." Carrier in general objects to the inconclusive findings of an impairment rating, the payment of TIBS and IIBS, and emphasizes Dr. RC's testimony as a board certified expert, that claimant was "untruthful, dishonest and . . . wholly incredible." Carrier contends that there is no need for a designated doctor in the light of Dr. RC's certification and that certification should be final. Carrier urges that the hearing officer's decision relating to claimant's entitlement to TIBS from February 16, 1991 through August 24, 1992, be reversed, that claimant reached MMI as of August 25, 1992, with 0% impairment and that claimant is not entitled to any IIBS.

We have earlier discussed that the issue whether Dr. RC's first impairment rating of February 11, 1993, has become final, pursuant to Rule 130.5(e), was first raised on appeal and consequently will not be considered. The hearing officer's Finding of Fact No. 20 and Conclusion of Law No. 10 is much more troublesome. The hearing officer appears to be saying in Finding of Fact 20, that the record he is responsible for developing is unclear (Section 410.163(b) requires the hearing officer to fully develop "facts required for the determination to be made") and in Conclusion of Law No. 10 refers the case back to a DDO "to develop an impairment rating." First, we would question whether a hearing officer, as part of a final decision purporting to resolve the issues, can properly remand a case back to a DDO. This should not be read to preclude a hearing officer from returning the case to a lower level for further investigation prior to a final decision. *See* Texas Workers' Compensation Commission Appeal No. 91113, January 27, 1992. If the hearing officer thought a designated doctor should be appointed he should have kept the record open (or recessed the hearing) in order to allow the parties to agree on a designated doctor (Section 408.125) and failing that, to appoint a Commission-selected designated doctor, allowing the parties to respond to the designated doctor's report. If the record is not clear as to the evidence on the agreed upon issues it is the duty of the hearing officer, where reasonably possible, to develop such evidence and facts necessary to resolve the presented issues

(Section 410.163(b)). In Texas Workers' Compensation Commission Appeal No. 92074, decided April 8, 1992, the hearing officer ordered the payment of IIBS pending the referral to an appropriate doctor for an impairment rating. The Appeals Panel in that case reversed and remanded the case for the development of appropriate evidence to resolve the impairment issue. Similarly in this case we find some of the hearing officer's determinations to be unclear (Finding of Fact No. 19 referring to an (month year) injury), others do not resolve the issue of whether claimant had disability (defined as the inability because of a compensable injury to obtain and retain employment at the preinjury wage) due to the (date of injury), injury. If Dr. C had not been required to certify an impairment rating on the date the hearing officer found MMI to have occurred then she should have been requested to do so, and the hearing officer should have made a factual determination of impairment, based on what he believes the correct impairment rating to be. We note that the benefit review officer (BRO) in the July 27, 1993, BRC defined the MMI issue by stating that Dr. RC certified, on February 11, 1993, that claimant reached MMI on 8-25-92 and that Dr. C, the treating doctor "has not responded to [Dr. RC's] assessment." (The BRO is apparently disregarding Dr. C's letter of February 12, 1993, to the carrier or perhaps does not consider this a response.) The BRO then states "[u]nless the parties reach an agreement on this issue, a designated doctor must be obtained to facilitate resolution." (Emphasis added.) Further, in regard to the issue of an impairment rating, the BRO again recommends "a designated doctor must be obtained pursuant to Rule 130.6 to facilitate resolution of this issue." This would be within the hearing officer's authority, if he believes the supporting evidence, that claimant had disability from February 16, 1991, until August 25, 1992, due to her RSD or back or both. Under such a scenario if there are no IIBS due, there is no issue whether carrier may reduce IIBS due to the prior, (month year), injury. We are not holding that is the course of action the hearing officer should follow, but merely point out that is one of his options depending on the weight and credibility he gives to the evidence. The hearing officer needs to resolve the remaining issues (1. when did claimant reach MMI (statutory or other); 2. what is claimant's impairment rating; and 3. if claimant has impairment, is carrier entitled to contribution for the prior 1990 compensable injury) based on the evidence. If the evidence is unclear or additional medical reports or appointment of a designated doctor are required, the hearing officer should make arrangements to obtain that evidence. We agree that the issue of entitlement to continued medical treatment of the (date of injury), injury is not an issue to be appropriately addressed in the dispute resolution process. In any event the hearing officer's decision on that point has not been appealed and is a closed issue.

The decision of the hearing officer is reversed and the case is remanded for development of appropriate evidence, if any, and reconsideration not inconsistent with this opinion. A final decision has not been made in this case. However, since reversal and remand necessitate the issuance of a new decision and order by the hearing officer, a party who wishes to appeal from such new decision must file a request for review not later than 15 days after the date on which such new decision is received from the Texas Workers' Compensation Commission's division of hearings, pursuant to Section 410.202. *See* Texas Workers' Compensation Commission Appeal No. 92642, decided January 20, 1993.

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Thomas A. Knapp
Appeals Judge

CONCUR:

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Susan M. Kelley
Appeals Judge

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Lynda H. Nesenholtz
Appeals Judge