APPEAL NO. 931047

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*.). At a contested case hearing held in (city), Texas, on August 2, 1993, the hearing officer, (hearing officer), considered the following disputed issues: 1. Had respondent (claimant) reached maximum medical improvement (MMI) on June 29, 1992, from his (date of injury), injury; 2. Is claimant entitled to choose (Dr. MGB), the designated doctor, as his third treating doctor; 3. Does claimant's carpal tunnel injury result from his (date of injury), tendon injury; and 4. Did claimant's (date of injury), injuries cause him, after June 29, 1992, to be unable to obtain and retain employment at the wages he earned prior to (date of injury). Based on a number of factual findings, the hearing officer determined that because the designated doctor's report was not against the great weight of the other medical evidence, claimant had not reached MMI as of September 16, 1992, and should not therefore be evaluated for an impairment rating (IR). The hearing officer also concluded that claimant showed by a preponderance of the evidence that his carpal tunnel syndrome (CTS) resulted from his (date of injury), injury and from the treatment of that injury and, thus, was a compensable injury. The hearing officer further concluded that claimant had disability from June 29, 1992, until the date he reached statutory MMI (Section 401.011(30)(B)) on or about May 14, 1993, and that he was entitled to temporary income benefits (TIBS) for such period from the respondent (carrier). The hearing officer also determined that there was not good cause to add a disputed issue concerning whether (employer) was claimant's employer for purposes of workers' compensation and concluded that employer was claimant's employer on (date of injury). Finally, the hearing officer concluded that because the Texas Workers' Compensation Commission (Commission) approved claimant's change to the designated doctor as his treating doctor before December 31, 1992, the issue was not appropriately before the hearing officer for determination.

In its appeal the carrier asserts error by the hearing officer in giving presumptive weight to the opinion of the designated doctor that claimant had not reached MMI as of September 16, 1992, and should not be assigned an IR, not only because other doctors felt claimant had either reached MMI or was about to, but also because the designated doctor "overstepped his authority" and was "biased" in that once selected by the Commission he undertook to become claimant's treating doctor. The carrier also asserts error in the hearing officer's determinations that claimant's CTS was compensable, that he had disability, and that good cause was not shown for adding a disputed issue concerning whether claimant was employed by the department store or was an independent contractor. Finally, the carrier seeks clarification of the finding that the Commission permitted claimant to change his treating doctor to the designated doctor in October 1992 when the evidence showed the approval was by an Interlocutory Order filed December 12, 1992. The carrier also asserts that on September 16, 1992, the date that claimant was examined by the designated doctor, the latter "was already aligned with the Claimant." In its response, the claimant asserts the sufficiency of the evidence to support the challenged findings and conclusions as well as the absence of reversible error.

DECISION

Finding the evidence sufficient to support the challenged findings and conclusions and further finding no reversible error, we affirm.

Before discussing the evidence relating to whether claimant had reached MMI and should have been assigned an IR by the designated doctor, whether his CTS resulted either from his (date of injury), injury or its treatment, whether he had disability after June 26, 1991, and whether he could change to a third treating doctor, we will first dispose of the other issues. Section 410.151(b) provides that an issue not raised at the benefit review conference (BRC) may not be considered at the contested case hearing unless the parties consent or the Commission determines that good cause exists for not raising the issue at the BRC. Claimant made clear at the hearing that he was not consenting to the addition of a disputed issue regarding whether he was an employee or an independent contractor of the employer on (date of injury), and the carrier early in the hearing indicated it wished to make an offer of proof on the issue. This issue was not one of the unresolved disputed issues stated in the BRC report (*See* Section 410.031(b)), nor was there in evidence a response by either party to the BRC report. *See* Tex. W. C. Comm'n, 28 TEX. ADMIN. CODE § 142.7 (Rule 142.7) for the procedures for responding to a BRC report and adding disputed issues after the BRC. The carrier did not request, either before or at the hearing, that the issue be added, upon a showing of good cause, to the list of unresolved disputed issues, nor did the parties make good cause arguments for and against the addition of the issue at the hearing. The carrier did state, however, its desire to make an offer of proof at the close of the evidence and the hearing officer permitted the carrier to do so. In this regard, the carrier introduced documents purporting to be an undated, unsigned "invoice" in the amount of $1,400.00 from claimant to the person who apparently managed employer's photo studio where claimant was doing some carpentry work when he was injured; an employer's form entitled "Independent Contractor Agreement" ostensibly signed on April 12, 1991, by claimant and the person who managed employer's photo studio; and an Employer's First Report of Injury or Illness (TWCC-1). After the parties rested and prior to their closing arguments, the carrier also took testimony from employer's risk manager, (Ms. A), to the effect that to her knowledge claimant was hired as an independent contractor, not as an employee. Since this issue was not before the hearing officer as an unresolved disputed issue, we do not consider it on appeal. *See* Texas Workers' Compensation Commission Appeal No. 91057, decided December 2, 1991, and Texas Workers' Compensation Commission Appeal No. 91100, decided January 22, 1992. While the parties did not attempt to add the issue on the basis of good cause, as above noted, the hearing officer nevertheless made a factual finding that there was not good cause to add the issue. We regard that finding as surplusage and disregard it.

The carrier asserts the hearing officer erred in neither finding the appropriate MMI date nor allowing TIBS to cease. At the hearing the carrier argued that claimant had reached MMI on June 29, 1992, as determined by its doctor, (Dr. RK). In evidence was a Commission Interlocutory Order of December 10, 1992, ordering the carrier to resume the payment of TIBS, permitting the carrier to take credit for impairment income benefits (IIBS) already paid, and further ordering the carrier to provide reasonable and necessary medical benefits at the direction of claimant's third treating doctor, Dr. MGB, who had been selected

by the Commission as the designated doctor. The carrier also put into evidence a Summary Judgment Order signed on March 5, 1993, by the presiding judge in Case No. 92-11978 in the District Court, 134th Judicial District, (city) County, Texas, styled Employers Casualty Company vs. MD. (We note that in its appeal the carrier has attached the entire summary judgment file including pleadings and an affidavit. Since these additional documents were not introduced below, they will not be considered on appeal. *See* Texas Workers' Compensation Commission Appeal No. 92459, decided October 12, 1992.) According to the summary judgment order, the carrier in that case was entitled to immediately stop paying TIBS once the claimant was certified as having reached MMI by "any doctor," and an Appeals Panel decision to the contrary was said to be erroneous and inconsistent with Articles 8308-4.23(b), 8308-4.26(d), and 8308.-4.26(e) (now Sections 408.102(a), 408.123(a), and 408.121(b).) On this point, the carrier also adduced testimony from (Mr. N), a former member of the Commission's predecessor, the Industrial Accident Board, who stated he had closely followed the passage of the 1989 Act in his role representing employer and carrier groups, and that in his opinion the legislative intent was that a carrier could suspend paying TIBS to an injured employee when any doctor certified that such employee had reached MMI. Also, claimant and his wife testified to the varying amounts and periods of income benefits he received from the carrier. However, similar to the employee/independent contractor matter, there was no discrete, unresolved disputed issue below concerning the carrier's suspension of TIBS and payment of IIBS. The matter was involved in the hearing below only peripherally insofar as the hearing officer might determine that MMI had in fact been reached. Since the hearing officer determined that claimant had not reached MMI, and since we find the evidence sufficient to support that determination, we need not further consider the matter of the suspension of TIBS and payment of IIBS.

Claimant testified that he had worked as a carpenter since 1969 and had not performed clerk typist duties since completing his military service in 1968. On (date of injury), he was working as a finishing carpenter at the photo studio in employer's store in (city), Texas, and while cutting a board on a table saw, a coworker fell against the board resulting in claimant's left index finger being cut and the board jamming in the saw, striking his left arm, and knocking him to his knees. Claimant was taken to a hospital where his finger was sutured by (Dr. HS) to whom claimant said he had been referred by employer. Claimant said that the next day his left arm began to hurt and his left arm muscle "bottled up." Claimant was seen again by Dr. HS on May 10th. Dr. HS removed the sutures, noted that claimant had swelling and pain in his left articulated area with an "apparent tear of biceps tendon," and diagnosed "injury to finger & biceps."

Claimant said that he spoke to carrier's adjuster, (Mr. W), who told him to find an orthopedic specialist for his arm and that he selected (Dr. MB) who, claimant said, twice operated on his left arm. Claimant demonstrated surgical scars on his left wrist and elbow and right knee areas stating his understanding that Dr. MB first tried, unsuccessfully, to locate a tendon in his wrist to graft in repairing claimant's left biceps tendon rupture but had to take one from his leg. Claimant's wife testified that Dr. MB told her after the surgery that he cut into claimant's left wrist to get a tendon for grafting into claimant's arm, could not

obtain one, and had to then cut into claimant's leg to get one. Dr. MB's records indicated that on May 30th he diagnosed not only a left finger laceration and fracture but a left biceps tendon rupture, and that on June 3rd claimant underwent a left biceps tenodesis with grafts. According to a record of June 19th, claimant's splint was noted to be broken and his surgical wound pulled slightly apart. On June 20th he underwent further surgery to debride and reclose the wound. According to the medical records, a slamming door had jarred and apparently partially opened the wound.

According to Dr. MB's records, following surgery claimant was started on a course of physical therapy (PT) and was apparently progressing satisfactorily when, on November 16, 1991, he was noted to have "developed a new problem with his therapy" involving tingling in his thumb and index finger. Dr. MB ordered an EMG to rule out CTS and in his report to the carrier of December 9, 1991, advised that the EMG showed bilateral mild CTS. An EMG report of December 3, 1991, was introduced which appeared to show early CTS on the right. In his report Dr. MB also stated: "This is a mild carpal tunnel condition that is secondary to his intensive physical therapy." Dr. MB further stated that he anticipated that claimant would reach MMI at the first of the year and that his IR could be ascertained at that time. Claimant said he underwent an intensive course of PT for nearly a year which, he said, did not restore the strength to his arm.

Claimant said he changed treating doctors from Dr. MB to (Dr. GD). Dr. GD's Initial Medical Report reflected that he first saw claimant on December 17, 1991. Claimant stated that after seeing Dr. GD on April 23, 1992, the latter left on a four month summer vacation referring claimant to (Dr. JH) in his absence. Dr. GD's records indicate that at the initial visit claimant complained of weakness and numbness in his left hand, burning pain in his left elbow, swelling in his left hand, and swelling in his left upper extremity, and that these problems prevented his returning to work as a carpenter. Dr. GD's exam noted that a test showed claimant to have more CTS symptomology on the left than the right and Dr. GD indicated that an earlier EMG report with the apparent opposite finding appeared to be a typographical error. Dr. GD diagnosed claimant as having undergone the biceps tendon tenodesis with graft on June 3, 1991, and the further surgery on June 20, 1991, as having CTS with "left more symptomatic than right," atrophy of the left upper extremity, lack of full range of motion (ROM) of the wrist and swelling of his arm and hand. Dr. GD planned additional PT and functional capacity testing. Dr. GD also noted that claimant was "anxious to return back to work" but felt that with the weakness in his left hand he could not perform all of his carpenter tasks, and that claimant stated there was no light duty at his place of employment.

Another EMG, done for Dr. GD on January 14, 1992, evidenced a "borderline left [CTS.]" In a February 20, 1992, report stating he had cautioned claimant concerning activities that could rupture his biceps, Dr. GD stated: "I am not sure of what type of insertion there is in this surgery or the viability of that tissue that was taken as a graft and how strong it really is." Dr. GD felt that lifting excessive weights would present the possibility of rupture. Dr. GD said he told claimant that he would have to determine whether he could return to work as a carpenter which involved lifting sheets of plywood and so on,

and that if he could not do so he would have to find another job or undergo retraining.

Claimant was examined at the request of the carrier by Dr. RK on June 29, 1992. Dr. RK determined that claimant had reached MMI as of that date with an eight percent IR. In his narrative report, Dr. RK stated that he did not feel claimant's CTS was related to his (date of injury), injury because "there is no report of these difficulties at the time of injury, and no injury in the region of the carpal tunnel." He felt the CTS was "probably secondary to chronic over-use associated with either his work or from a small canal, but not related to the injury." As for his examination by Dr. RK, claimant said that all Dr. RK had him do at the exam was squeeze a device; that Dr. RK did not examine his wrist; and that Dr. RK spent no more than five minutes with claimant. Claimant's wife, who was present for Dr. RK's exam, testified to the same effect. Incidentally, the carrier's evidence showed that based on Dr. RK's report, the carrier took action to begin the payment of IIBS.

Claimant's left shoulder was evaluated by (Dr. GG) on July 22, 1992, at the request of Dr. JH. Dr. GG's report characterized the results of claimant's biceps tendon rupture repair as "not good."

Claimant was examined on August 11, 1992, by (Dr. JB) whose stated impression was "[s]tatus left biceps reconstruction with fascial graft, residual weakness, pain and restriction of motion." Dr. JB felt no further surgery was indicated and also recommended job retraining stating: "I do not feel he may return as a carpenter." Dr. JB further stated that claimant's "permanent partial disability to the left upper extremity is 15% which converts to 9% to the whole body." Dr. JB's report did not mention MMI.

Claimant said he last saw Dr. GD on August 21, 1992, when the latter returned from vacation and that, in the interim, he twice saw Dr. JH who, on July 8, 1992, told claimant he could not return to carpentry work. Dr. JH's record of that date states that "[p]atient is not fit for regular duty." Claimant said that when he last saw Dr. GD, he was told that all Dr. GD could do for him was to refer him for more PT. In an October 28, 1992, report to the carrier, Dr. GD, having reviewed Dr. MB's notes, said he felt there was a "direct relationship between the chronology of the symptoms" and claimant's CTS, noting not only Dr. MB's notes suggesting the CTS arose from the PT, but also observing that claimant's post-injury and post-surgical swelling could aggravate the CTS symptoms. While further stating that claimant's left upper extremity was as improved as it was going to be and that he concurred in Dr. JB's "[IR] of 37% (sic) of the whole body." Dr. GD went on to state that if claimant's CTS symptoms became more pronounced and could not be resolved by conservative treatment, then surgery may have to be considered. Dr. GD also noted that claimant felt he could not return to his former job as a carpenter but "would happily consider light duty."

Claimant testified that he wanted to change treating doctors from Dr. GD because not only had Dr. GD been absent the entire summer of 1992 but he also was merely proposing more PT which, claimant felt, had not improved his arm condition after nearly one year of such treatment. Claimant testified that he changed his treating doctor to Dr. MGB after the latter examined him as the designated doctor, and he denied having heard of Dr.

MGB before the latter was selected by the Commission as the designated doctor. In evidence was an undated, unsigned "Employee's Request for Third or Subsequent Treating Doctor" which showed that claimant's first treating doctor was Dr. MB, his second treating doctor was Dr. GD, and that he was requesting that his third treating doctor be Dr. MGB. Facsimile transfer data at the top of this exhibit showed the Commission and the date "10/08/92." With this exhibit was a signed statement of claimant to the effect that the Commission originally sent him to Dr. MGB to settle a dispute about his IR, that Dr. GD and other doctors had told him he had not reached MMI, that when Dr. MGB examined him, Dr. MGB advised him he had not reached MMI and also informed him that treatment and further surgery would be beneficial in obtaining strength and mobility for his injured arm, and that since he was a carpenter he wanted every opportunity for his arm to be medically improved.

A Commission form dated August 28, 1992, ordered claimant to be examined by Dr. MGB on September 16, 1992, to resolve an IR dispute and Dr. MGB's Initial Medical Report was dated September 16th. However, Dr. MGB's narrative report of September 11, 1992, referred to his having examined claimant on that date and to his examination as being consistent with a median nerve entrapment neuropathy either at the wrist or at the elbow, which may or may not require surgery. He also stated his impression as "a 40 degree extension lag of the left elbow secondary to hypertonicity of the biceps muscle and secondary soft tissue and joint contracture" which he felt could be overcome to a large extent with appropriate serial casting and therapy. Dr. MGB further stated that claimant had not yet reached MMI and that he felt it would be erroneous and invalid to render an IR at that point. Dr. MGB's report concluded by saying he had outlined a treatment plan which the claimant apparently wished to pursue.

Also in evidence was an apparent treatment plan for claimant's left arm, dated "9-16-92," and an EMG report for Dr. MGB, dated "9-17-92," which stated the examination was "consistent with mild to moderate degree of left CTS." According to claimant, Dr. MGB subsequently undertook the serial casting to try to straighten his arm, prescribed PT, and then scheduled claimant for surgery in January 1993 to repair his wrist and elbow. However, claimant said he has not yet had the proposed surgery since the carrier would not continue to pay Dr. MGB's charges. Dr. MGB's September 16, 1992, report released claimant to work so long as he did not use the affected extremity. A September 21, 1992, report stated claimant could return to limited type of work on November 21, 1992, and a January 6, 1993, report stated claimant could return to limited type of work on February 6, 1993. Many of the carrier's assertions about Dr. MGB's bias, loss of objectivity, and acquiring a financial stake in the claimant were raised against the designated doctor who subsequent to his examination began to treat the employee in Texas Workers' Compensation Commission Appeal No. 92240, decided July 20, 1992. The Appeals Panel there said: "We are aware of no provision, nor are we cited to any, which would prohibit a designated doctor from continuing to provide treatment to an employee originally referred by the Commission for examination pursuant to Article 8308-4.25(b)."

Claimant, who said he has not worked since the accident, denied having CTS or other problems with his left arm before his (date of injury), accident and the ensuing

treatment. He said that his left arm muscle is "still messed up" and "it still balls up and you go to your knees," that the insertion point of the biceps tendon appears the same as before Dr. B's surgery, that he still has pain at the collarbone and that his left hand still swells. He also stated that he could not operate a table saw nor lift objects weighing more than four pounds, that he cannot hold objects in his left hand for more than a few minutes, and that in his present condition, he cannot work as a finishing carpenter which is the only work he knows and the only job skill he has.

(Dr. MP), a specialist in physical medicine and rehabilitation, testified that at the carrier's request he reviewed claimant's medical records but did not himself examine claimant. He said he agreed with Dr. RK's opinion that claimant reached MMI on June 26, 1992, with an eight percent IR. He also felt claimant's CTS was not related to his (date of injury), injury because the December 1991 EMG showed the CTS was bilateral and worse on the right side, claimant's dominant side. He agreed with Dr. RK that it was more likely that the CTS resulted from trauma from claimant's carpentry work or from an anatomic narrowing of the carpal tunnel. He also thought claimant already had CTS when he was injured. Dr. MP also said it was possible that cutting into claimant's wrist to look for a tendon graft could cause the formation of scar tissue and result in CTS.

The hearing officer found that after Dr. MB's operations claimant began a course of PT and during such he complained of symptoms that were diagnosed as bilateral CTS, and further found that claimant's bilateral CTS was a natural result of the treatment for his (date of injury), injury. There is sufficient support for these findings in the PT records and in Dr. MB's notes. That Dr. MP and Dr. RK felt that claimant's CTS resulted either from his carpentry work or an anatomical narrowing of the carpal tunnel simply presented the hearing officer, as the fact finder, with a conflict in the medical evidence which, as with all evidentiary conflicts, he had to resolve. The hearing officer resolves conflicts and inconsistencies in the evidence. Garza v. Commercial Insurance Co. of Newark, N.J., 508 S.W.2d 701 (Tex. Civ. App.-Amarillo 1974, no writ). The hearing officer also judges the weight to be given expert medical testimony and resolves conflicts and inconsistencies in the testimony of expert medical witnesses. Texas Employers Insurance Association v. Campos, 666 S.W.2d 286 (Tex. App.-(city) [14th Dist.] 1984, no writ); Atkinson v. United States Fidelity Guaranty Co., 235 S.W.2d 509 (Tex. Civ. App.-San Antonio 1950, writ ref'd n.r.e.); Highlands Underwriters Insurance Co. v. Carabajal, 503 S.W.2d 336, 339 (Tex. Civ. App.-Corpus Christi 1973, no writ). We will not disturb the hearing officer's findings unless they are so against the great weight and preponderance of the evidence as to be manifestly unjust and we do not find them to be so in this case. In re King's Estate, 150 Tex. 662, 244 S.W.2d 660 (1951); Pool v. Ford Motor Co., 715 S.W.2d 629 (Tex. 1986).

The hearing officer found that Dr. MGB's determination that claimant had not reached MMI from his (date of injury), injury as of September 16, 1992, was not against the great weight of the other medical evidence and further found that because of his MMI determination, it was appropriate for Dr. MGB not to have assigned an IR. While both Dr. RK and Dr. MP felt claimant had reached MMI on June 29, 1992, neither considered the CTS as related to the injury and such a limitation of the extent of the injury obviously affected

the validity of their opinions on MMI. Dr. MB stated he anticipated claimant would reach MMI early in 1992. The Appeals Panel has previously stated that "an anticipated date of MMI is not a statement or certification that MMI has been reached." Texas Workers' Compensation Commission Appeal No. 93259, decided May 17, 1993. While Dr. JB's report stated claimant had a nine percent "permanent partial disability" to the whole body, he did not state that claimant had reached MMI nor did his report otherwise indicate that further material recovery from or lasting improvement to claimant's injury could no longer be reasonably anticipated. *See* Section 401.011(30)(a) for the definition of MMI. Dr. JH did not state that claimant had reached MMI but referred him to Dr. GG feeling he might need further surgery. Dr. GD did state he believed claimant was "as improved as much as he is going to be, regarding his left upper extremity" and said no surgery was planned for the CTS at that time.

The Commission (for reasons not apparent on the record) did not ask Dr. MGB to resolve whether claimant had reached MMI. The Appeals Panel has previously considered cases where the designated doctor was appointed to consider only an IR dispute but nevertheless also stated an opinion on the MMI date. In Texas Workers' Compensation Commission Appeal No. 93124, decided April 1, 1993, we stated that it "was not improper or untoward" for the designated doctor to address MMI in view of provisions in the Guides to the Evaluation of Permanent Impairment, third edition, second printing, dated February 1989, published by the American Medical Association (AMA Guides) to the effect that an impairment evaluation should be performed when the condition has become "static and well stabilized" following completion of all necessary treatment. We went on to state that "[t]herefore it would seem prudent, if not essential, that a designated doctor would himself have to be satisfied that MMI had been reached before attempting to assess an [IR]," and that the existence of MMI cannot be "neatly severed" from the assessment of an IR. In that case, the hearing officer determined that the great weight of the evidence established that the claimant had reached MMI prior to the certification by the designated doctor and the Appeals Panel affirmed. *And see* Texas Workers' Compensation Commission Appeal No. 92517, decided November 12, 1992.

In Texas Workers' Compensation Commission Appeal No. 93710, decided September 28, 1993, the designated doctor was appointed only to decide the IR but in his report also stated his examination date as the MMI date. The hearing officer in that case stated that the designated doctor's certification of MMI and IR were both entitled to presumptive weight but she rejected the designated doctor's MMI date only because she determined that claimant had earlier reached statutory MMI. We said that "[c]onsistent with our language in Appeal No. 93124, *supra*, we find that the designated doctor's opinion on MMI was not entitled to presumptive weight, and thus should have been weighed against the other medical evidence in the record. (By contrast, where Dr. S was appointed designated doctor to resolve the issue of impairment, that determination would be entitled to presumptive weight and could not be overcome by a mere balancing of the evidence. Texas Workers' Compensation Commission Appeal No. 92412, decided September 28, 1992.)" We reversed and remanded for the hearing officer to determine the MMI date based on the medical records in evidence at the hearing and without the need to reconvene

the hearing or receive new evidence.

In Texas Workers' Compensation Commission Appeal No. 93910, decided November 22, 1993, the designated doctor had been selected by the Commission to determine the claimant's IR and in his Report of Medical Evaluation (TWCC-69) stated an MMI date in addition to assigning an IR. While the hearing officer did determine that claimant's MMI date was the date determined by the designated doctor, the hearing officer did not accord presumptive weight to the MMI determination, as was done for the IR, because the designated doctor had only been asked to determine the IR. The Appeals Panel concluded that the hearing officer's determination of the MMI date in that case was supported by sufficient evidence and was not against the great weight and preponderance of the evidence. *And see* Texas Workers' Compensation Commission Appeal No. 93958, decided December 3, 1993, where the Appeals Panel affirmed the hearing officer's decision in which he gave presumptive weight to the designated doctor's determination of the claimant's IR but not to the determination of the claimant's MMI date since the designated doctor had not been asked to determine the MMI date.

In contrast with the cases discussed above, Dr. MGB did not determine an MMI date, as such, but rather determined that he could not assign an IR because in his judgment MMI had not been reached and the assignment of an IR would be premature. This is simply another way of coming at the IR determination which Dr. MGB had been asked to determine. Further, Dr. MGB's concern with not assigning an IR before he felt that MMI had been reached finds support in the AMA Guides as mentioned above. Accordingly, we find no error in these findings by the hearing officer.

With regard to the issue of claimant's disability after June 29, 1992, the hearing officer found that claimant's (date of injury), injury caused him to be unable, after June 29, 1992, to obtain and retain employment at wages he earned prior to his injury date and until the date he reached statutory MMI on or about May 14, 1993. *See* Sections 401.011(16) and 401.011(30)(B) for the definitions of disability and statutory MMI. Again, this was a fact question for the hearing officer and we find the find the evidence sufficient to support the finding. Claimant testified to how he lacked the strength in his left arm to carry plywood, to operate a table saw, and to perform his work as a carpenter. Further, Dr. JH and Dr. JB felt that could not return to his carpentry occupation and Dr. MGB only authorized claimant's return to "limited type" work. The Appeals Panel has observed that a claimant's testimony alone may be sufficient to prove disability. *See e.g.* Texas Workers' Compensation Commission Appeal No. 91083, decided January 6, 1992, and Texas Workers' Compensation Commission Appeal No. 92069, decided April 1, 1992. In this case, claimant's testimony was not only unrefuted but found support in the medical evidence.

Finally, we find no error in claimant's change of treating doctor from Dr. GD to Dr. MGB. The carrier introduced an exhibit showing that claimant requested a change from Dr. GD to Dr. MGB on October 2, 1992. The Commission's Interlocutory Order of December 10, 1992, directed the carrier to provide claimant's medical benefits at the direction of his third treating doctor, Dr. MGB. The carrier asserts that the hearing officer misstated in

Finding of Fact No. 17 that the Commission permitted claimant to change to Dr. MGB in October 1992 whereas the Interlocutory Order was dated December 12, 1992. However, the carrier points to no evidence that Commission approval of the change to Dr. MGB was not earlier obtained by the claimant and we note that the medical records show that Dr. MGB was treating claimant in October 1992. The hearing officer concluded that because the Commission approved claimant's change to Dr. MGB before December 31, 1992, the issue was not appropriately before the hearing officer for review. V.A.C.S., Article 8308-4.62(b), which expired on December 31, 1992, provided that a third or subsequent doctor selected by the employee is subject to the approval of the insurance carrier or the Commission; the provisions of Article 8308-4.63 (now Section 408.022) pertaining to an employee's selection of a doctor did not take effect until January 1, 1993.

After a careful review of the record we are satisfied that no reversible error was committed by the hearing officer and that the complained of findings are not based upon insufficient evidence and are not so against the great weight and preponderance of the evidence as to be manifestly unjust.

The decision of the hearing officer is affirmed.

Philip F. O'Neill
Appeals Judge

CONCUR:

Joe Sebesta
Appeals Judge

Lynda H. Nesenholtz
Appeals Judge