APPEAL NO. 93702

This appeal arises pursuant to the Texas Workers' Compensation Act of 1989, TEX. LAB. CODE ANN. § 401.001 *et seq*. (1989 Act). A contested case hearing (CCH) was opened April 22, 1993, and continued on July 14, 1993, in (city), Texas, (hearing officer) presiding. The sole issue at the hearing was whether the appellant (claimant herein) had reached maximum medical improvement (MMI). The hearing officer found that the claimant had reached MMI on February 25, 1992, based upon the certification of a designated doctor selected by the Texas Workers' Compensation Commission (Commission). The claimant appeals arguing essentially that the great weight of the other medical evidence is contrary to the opinion of the designated doctor certifying MMI as of February 25, 1992, particularly in light of the claimant's post-certification surgery and the correspondence between the parties and the designated doctor. The respondent (carrier herein) responds contending that the need for finality under the 1989 Act precludes decertification or recertification of MMI.

DECISION

After reviewing the evidence, we reverse the decision of the hearing officer and render a new decision that the claimant reached MMI as a matter of law on the expiration of 104 weeks from the date on which income benefits began to accrue.

The facts of this case are essentially undisputed. The claimant was injured on (date of injury), in the course and scope of his employment. He was apparently injured when he was struck by a piece of metal on the left wrist and forearm. The claimant testified that he was originally sent by his employer to see (Dr. H), who treated him and then referred him to (Dr. N), an orthopedic surgeon. Dr. N performed an MRI and an arthrogram of the claimant's left wrist which did not show any obvious abnormalities. A bone scan, however, demonstrated "increased uptake, consistent with synovitis or a subacute fracture or other inflammatory change." Dr. N reported that after a course of anti-inflammatory medication and therapy the claimant still continued to have a great deal of pain and "about a 60% deficit, with regards to his strength.

In August 1991 Dr. N performed an arthroscopic evaluation of the claimant's left wrist, noting "a Grade II chondromalacia of the radial half of his left wrist joint, which was arthroscopically debrided." Dr. N then placed the claimant in a rehabilitation program where he reported the claimant did improve somewhat with regards to strength. Dr. N certified on a Report of Medical Evaluation (TWCC-69) that the claimant reached MMI on February 25, 1992. In a narrative report attached to his TWCC-69, Dr. N rated the claimant's whole body impairment at eight percent, released him from treatment on "an as-needed basis," and stated in part as follows:

> I believe that the patient will have problems with the left wrist, and should avoid repetitive assembly line type work, if possible. He should probably utilize a hand and wrist support, and should probably be maintained on a non-steroidal anti-inflammatory. He may certainly have future degenerative changes that

may require intervention, such as a partial fusion or implant.

The record reflects that a Commission-selected designated doctor, (Dr. F), an orthopedic surgeon, examined the claimant on July 16, 1992. Dr. F certified, on a TWCC-69, MMI as of February 25, 1992, with a 10% whole body impairment, stating in part as follows in an attached narrative report dated July 16, 1992:

> I do feel that [claimant] has certainly reached maximal medical improvement at this time. Due to his decreased motion, mild decrease in strength, and the chondromalacia found in arthroscopy, this constitutes a 16 percent impairment of the right (sic) upper extremity which is equal to a 10 percent impairment of the whole body. It may be possible to perform a limited wrist fusion (i.e. triscaphi-type) to help relieve some of the symptoms in his wrist and still maintain some motion. I feel that Dr. [N] could probably better evaluate this knowing exactly what the inside of the wrist looked like, however. In lieu of this, I would recommend that he try to work with his wrist brace in order to help give it support. The patient will be seen back by me on a p.r.n. basis.

The claimant testified that he looked for work in 1992, but had difficulty obtaining employment due to his limitations. He testified that beginning in the middle of 1992, a friend hired him intermittently as a painter and he worked two or three days every other month, earning a total of between $200 and $300 during calendar year 1992. A benefit review conference (BRC) was held on October 13, 1992, to determine whether or not the claimant had reached MMI. The BRC report indicates that at the time of the BRC the claimant was still treating with Dr. N and was in a long arm cast.

Dr. N stated in a report dated November 30, 1992, that an EMG showed "a continued problem with regards to the cubital tunnel at the left elbow" and that in regard to the wrist problem he would suggest a total wrist fusion using a bone graft from the claimant's hip. On December 15, 1992, the carrier's attorney wrote a letter to Dr. F which stated in part:

> Please assume that "maximum medical improvement" is defined in the Workers' Compensation Act as 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. Based on this definition, is it still your opinion that [claimant] reached MMI on February 25, 1992? If not, on which date has he reached it or do you anticipate he will reach MMI?
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> Further, is the proposed surgery to [claimant] solely to relieve some of the symptoms in his wrist or is it to further improvement (sic) from an impairment standpoint to the injury?

Dr. F stated in part in his reply dated January 12, 1993:

It is my understanding that on February 25, 1992, [claimant] had been dismissed from his treating physician, and there were no plans made at that time for any further care. Because of this situation, I feel that it was appropriate to assign him an impairment rating and to consider him maximally medically improved at that time. I feel that it was appropriate since no further treatment was being considered. The treating physician's final note, however, mentioned that it was possible that he could develop progressive problems with degenerative changes within the wrist which could require further surgical intervention in the future. I also mention this in my note of July 16, 1992. I do not feel that because of a possibility of future treatment that this means a patient has not reached maximal medical improvement.

I have not seen [claimant] since July 16, 1992. I was not aware until your letter that he had been scheduled for surgery. I do not know what type of surgery has been scheduled for him, and so I am unable to comment on the purpose of the surgery. I feel that it would be most appropriate for you to refer these questions to his treating physician.

On December 30, 1992, Dr. N performed surgery which is described in his operative report as "radiocarpal arthrodesis left wrist with autogenous bone graft from left ileum." In a letter to the claimant's attorney dated March 30, 1993, Dr. N stated in part as follows:

In response to your inquiry as to the status of [claimant], he has not reached maximal medical improvement. The patient has undergone a limited intercarpal fusion of his wrist which does not show full consolidation but early consolidation or early healing of the bone at this point. He has now started with the occupational therapist on a rehabilitation program which has only just now begun. I believe that he will require further therapy with regards to the wrist. Certainly, if his pain is still limiting, further consolidation or fusion of the wrist may be necessary. We have tried to preserve some motion in the wrist however so that he will remain somewhat more functional. Here again, I believe that the patient is not close to plateauing with regards to the wrist and therefore has not reached a level that would be considered maximal medical improvement in my opinion.

A CCH was scheduled on April 22, 1993, in this case. The hearing officer decided to write to the designated doctor after each side had an opportunity to submit any additional medical information from Dr. N to determine whether or not his opinion in regard to MMI had changed due to the surgery and to reset the CCH after a response was received. On June 15, 1993, the hearing officer wrote to Dr. F asking him whether his opinion had changed in light of medical reports from Dr. N, describing the surgery and post-surgery treatment. Dr. F responded in a letter of June 22, 1993, stating in part:

When I saw [claimant] in July of 1992, he was having some discomfort in his wrist. He did have some decreased motion and decreased strength in the wrist and

> this along with the chondromalacia of his lunate caused him to have impairment of his wrist. Again at that time no active treatment was being considered for his wrist, and since no treatment was being performed or being planned at that time, I felt that he had reached maximal medical benefit. I did mention in my note of July, 1992, that it may be necessary for the patient at some time in the future to have further surgery on the wrist. I did not feel at that time nor do I feel at this time, that because a prediction in regards to possible future symptoms, events and even surgery has been made that this means a patient has not reached maximal medical benefits. I feel that once a patient's care has been completed and he has been dismissed from the office, that the patient has reached maximal medical benefits. In many cases, there is a possibility of future treatment, including surgery, but if the maximal medical improvement date waited until it was absolutely not possible that any further treatment or surgery would be rendered, then an extremely large number of employees would never reach maximal medical improvement until they either retired or died, and there would be more problems and confusion in workers compensation cases than is already present.

Dr. F wrote another letter to the claimant's attorney dated July 1, 1993, which he stated was in reply to the attorney's letter of the same date and in which he stated in part:

> I understand that [claimant] has subsequently had surgery on his left wrist. This is for the same problem for which he was initially treated, and the surgery's purpose was to promote further material recovery from or lasting improvement to his wrist. He is currently recovering from this surgery and at this time is not at maximal medical improvement. As mentioned by Dr. [N] in his note of March 30, 1993, there is a slight possibility that even further surgery may be required on [claimant's] wrist, but at this time this is impossible to predict.
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> While it is easy to see retrospectively that [claimant] did require further intervention on his wrist, I do not feel that it is fair to retrospectively go back and say that he had not reached maximal medical improvement earlier when he had been dismissed from his treating physician's office and no further treatment was planned.

At the CCH of July 22, 1993, the claimant testified that Dr. N had informed him that additional surgery would be needed on both his left wrist and elbow. He also testified that due to his financial circumstances he had continued to try to find work but had been largely unsuccessful due to his physical limitations and the fact that he remained in a brace. He did testify that in addition to the money he earned in 1992, discussed *supra*, since his operation in December 1992 he had earned approximately $350.

Section 401.011(30) states:

> "Maximum medical improvement" means the earlier of:

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

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

MMI and the assessment of an impairment rating may certainly become final due to operation of law if not contested within 90 days. *See* Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 130.5 (Rule 130.5); Texas Workers' Compensation Commission Appeal No. 92670, decided February 1, 1993. The carrier's reliance in the present case on our decision in Appeal No. 92670 is misplaced for two reasons. First, there is simply not an issue in the present case that the certifications of MMI were not contested within 90 days; and we have held that MMI, if properly contested, is not final even if certified by a designated doctor.

The real issue here is whether the designated doctor has amended his original finding of MMI, and if not, whether that original finding is contrary to the great weight of the other medical evidence in light of the subsequent surgery. One major barrier to a proper determination of this issue is that the parties through their unilateral communications with the designated doctor appear to have drawn him into a legal and political debate concerning both what the Texas workers' compensation law is and should be. This debate, and we cannot fault the designated doctor for entering it at the invitation of the parties, has managed to obscure the *medical* opinion of the designated doctor as to whether the claimant has reached MMI. This type of problem is one reason we have been so critical of unilateral communications between the parties and the designated doctor. *See* Texas Workers' Compensation Commission Appeal No. 93613, decided August 24, 1993; Texas Workers' Compensation Commission Appeal No. 93455, decided July 22, 1993.

It appears to us from a close reading of the various letters written by Dr. F--first in response to an inquiry by the carrier's attorney, then by the hearing officer and finally by the claimant's attorney--that Dr. F is basically saying that at the time of his examination of the claimant in July 1992 he believed finding MMI on February 25, 1992, was a fair assessment; he had no way at the time to know otherwise; and even though the claimant has not now attained MMI (or at least as of the date of Dr. F's last letter on July 1, 1993) as he is recovering from surgery, it would be unfair to the parties to change the date of MMI. The problem with deferring to the designated doctor regarding whether or not it is fair or appropriate to change an MMI date is twofold. It leaves a determination of a legal issue to the designated doctor, which we do not believe was intended by the 1989 Act, and the doctor's interpretation of the statute in this regard differs from our earlier decisions.

Section 408.122(b) states that the report of a designated doctor as to MMI is to be given presumptive weight "unless the great weight of the other *medical* evidence is to the contrary." (emphasis added). Clearly, the 1989 Act envisions that it is the designated

doctor's *medical* opinion that is given presumptive weight and not any other opinion he may hold. In regard to MMI we have long recognized that a designated doctor can change or amend his opinion because of matters coming to his attention subsequent to his determination of MMI and impairment rating. Texas Workers' Compensation Commission Appeal No. 92441, decided October 8, 1992. Further, we have held that subsequent surgery or the need for further surgery may show the earlier finding of designated doctor as to MMI to be against the great weight of the other medical evidence. *See* Texas Workers' Compensation Commission Appeal No. 93207, decided May 3, 1993; Texas Workers' Compensation Commission Appeal No. 93598, decided September 1, 1993; Texas Workers' Compensation Commission Appeal No. 93400, decided July 7, 1993.

In the present case we therefore reverse the decision of the hearing officer that the claimant reached MMI on February 25, 1992, finding that both the treating doctor and the designated doctor have amended their earlier certification to find that, medically, MMI has not been reached. While the designated doctor states in his letter of July 1, 1993, that the claimant "at this time is not at maximal medical improvement," we render that the claimant reached MMI by operation of Section 401.011(30)(B), on the expiration of 104 weeks from the date on which income benefits began to accrue. *See* Texas Workers' Compensation Commission Appeal No. 93628, decided September 15, 1993.

Gary L. Kilgore
Appeals Judge

CONCUR:

Stark O. Sanders, Jr.
Chief Appeals Judge

Philip F. O'Neill
Appeals Judge