APPEAL NO. 93710

This appeal arises under the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq*. (1989 Act). A contested case hearing was held in (city), Texas, on July 14, 1993, before hearing officer (hearing officer). The issues were the time period during which the respondent, hereinafter claimant, has experienced disability; the date the claimant reached maximum medical improvement (MMI); claimant's correct whole body impairment rating; and whether claimant's "current condition" is due to an intervening injury. The appellant, hereinafter carrier, appeals the hearing officer's determination that the claimant reached MMI by operation of law on April 12, 1993, and with a five percent whole body rating as found by the designated doctor and that claimant has not experienced any intervening injury which is the sole cause of his current limitations. The carrier also urges error in the hearing officer's refusal to grant carrier's request to subpoena records of the ombudsman of the Texas Workers' Compensation Commission (Commission). The claimant essentially responds that the decision of the hearing officer should be upheld.

DECISION

The decision and order of the hearing officer is affirmed in part and reversed and remanded in part.

The claimant was employed as a carpenter by (employer) on (date of injury), when he injured his lower back dismantling a scaffold. That day he received first aid at the location where he was working, and the following day was seen by (Dr. Wi), employer's doctor, who x-rayed him, prescribed medication, and returned him to light duty work. The claimant said he attempted to work for a couple of days, but returned to Dr. Wi because he "couldn't take it." Five days after the injury he began treating with (Dr. F), who admitted claimant to the hospital and administered therapy, traction, and anti-inflammatory drugs. Claimant said he was released after about five days, but was not returned to work. Dr. F also referred claimant to (Dr. Wa) for work hardening. Claimant said at the end of work hardening he still had pain and that he continued to treat with both Drs. F and Wa for a period of time. In an undated Report of Medical Evaluation (Form TWCC-69) Dr. F stated that an MRI showed degeneration of the last two discs of the lumbar spine, but no protrusion; that a myelogram and CT scan were fairly normal; that he ordered EMG studies and asked for a second opinion from a Dr. K, who recommended conservative measures; and that claimant was not a surgical candidate. Dr. F did not certify MMI but found claimant to have zero percent impairment, "neurological standpoint."

On November 12, 1991, claimant was seen by Dr. M (Dr. M) for an independent medical evaluation requested by the carrier. By letter of that date, Dr. M reviewed claimant's tests, including the MRI which he said showed degenerative disc disease with mild bulging at the L4-5 level, and stated that the claimant had reached MMI with "no permanent impairment." Thereafter, by letter of January 6, 1991 (sic; should have read "1992"), Dr. Wa wrote that he examined claimant on December 18, 1991 and reviewed Dr. M's report, that claimant's test showed "no significant findings" and "no objective findings to explain his discomfort," and that

he concurred with Dr. M's opinion that "everything has been done for this patient." Dr. Wa agreed that he had not found any objective findings to explain the claimant's continued discomfort, and he certified MMI as of December 18th, with a zero percent impairment rating.

The claimant contended that he was not aware that Drs. M and Wa had found MMI and impairment until a benefit review conference was held in February of 1992.[1] At that time he said he was told by the benefit review officer that he had to go to a doctor and get further information to contest "what the carrier had on paper." However, he said it was his understanding that his benefits had been cut off, so he did not see another doctor until October 1992, when he learned he could do so. In an October 13, 1992, letter to the carrier, claimant gave notice that he was changing doctors from Dr. Wa to Dr. D (Dr. D) because, among other things, Dr. Wa "has not been able to diagnose, nor relieve my problems, has not confirmed MMI, and has not set an impairment rating to my knowledge."

Dr. D first saw claimant on December 8, 1992, noted a posterior protrusion at L4-5, and stated his disagreement with Dr. F's opinion that claimant's MRI was normal. Dr. D recommended a new MRI, possibly a discogram, and while he did not certify MMI he stated that claimant's impairment, based on the MRI alone, "would be in the 5 to 10 percent per level, of the spine, or a total of 10 to 15 percent of the body, according to AMA criteria." On January 26, 1993, Dr. D stated that it was "relatively certain" claimant would not have surgery for the bulge, and said he believed claimant "is reaching" MMI and that "a physical impairment for his lumbar spine and intermittent radiculitis, is 5 percent." That report also stated that claimant had done some sheetrock work at home, which caused increased pain; claimant denied that he said this, and said he had only been present while his brother (who concurred by written statement) did sheetrock work. Claimant also denied stating, as Dr. D said in his December 8 report, that he had changed a tire and "was crippled for four days." Claimant and his wife said claimant only bent to remove the center cap and to glue it. He denied that he has re-injured his back since the time of the first injury.

Pursuant to Dr. D's recommendation, claimant underwent a second MRI on February 25, 1993, which disclosed degenerative disk changes with narrowing of the disc space and posterior bulge of the disc amounting to 3 or 4mm at L4-5. On March 23, 1993, Dr. D stated his diagnosis as lumbar L4-5 contained disc herniation with right leg radiculopathy and proposed injections of morphine/epidural steroids to relieve claimant's pain. He also stated that claimant's "physical impairment is 15 percent of his body impairment," and said he "[did] not foresee him returning to a work state in the next twelve months."

On March 24, 1993, a Commission disability determination officer ordered claimant to be examined by Dr. S (Dr. S), a designated doctor, to determine "percentage of impairment only."[2] On April 13th Dr. S examined claimant, reviewed his medical records including the

[1]While claimant testified to a limited degree about what occurred at this conference and the report from the benefit review conference preceding this contested case hearing alludes to the prior conference, the report of the first benefit review conference was not made part of the record in this case.

[2]There is no evidence in the record to explain why the designated doctor was appointed so late after the first

most recent MRI, and found claimant to have reached MMI as of that date. He also assigned claimant a five percent whole body impairment rating.

The claimant testified that he has not returned to work for employer since the date he first saw Dr. F, which was April 9, 1992. However, he said he has done taxidermy work and is now part owner of a taxidermy business.

The carrier raises four points of error on appeal, as follows: the hearing officer erred by failing to grant the carrier's request for a subpoena directing the Commission's ombudsman to produce all written evidence relating to this claim; the hearing officer erred by assigning presumptive weight to Dr. S's opinion regarding MMI because Dr. S was designated only to address the issue of the appropriate impairment rating to be assigned to claimant; in the alternative, the opinion of the designated doctor regarding the date of MMI is clearly outweighed by the great weight of the other medical evidence to the contrary; and the hearing officer's finding that the claimant did not sustain any intervening injury or injuries which is the sole cause of his current impairment is against the great weight and preponderance of the evidence.

The carrier argues under its first point of error that documents from the ombudsman would have allowed it to refute the claimant's testimony regarding the date he first learned about the impairment ratings rendered by Drs. F and Wa. Our review of the record shows, however, that while carrier's request for subpoena was denied prior to the hearing, no complaint regarding that ruling was raised at the hearing. We have previously held that such failure to complain results in waiver of the issue. Texas Workers' Compensation Commission Appeal No. 92380, decided September 14, 1992.

Carrier's second two points of error concern the opinion of the designated doctor, Dr. S; it argues that Dr. S's finding of MMI is not entitled to presumptive weight because he was not appointed for the purpose of making that finding, or that, in the alternative, Dr. S's date of MMI is outweighed by the great weight of the medical evidence to the contrary. (We note, parenthetically, that the hearing officer stated in her discussion that "since claimant has disputed his alleged [MMI], and a dispute regarding [MMI] must be resolved with reference to the opinion of a designated doctor, it appears that the limited scope of [Dr. S's] designation as a designated doctor was merely a clerical error. However, we do not believe the evidence supports the conclusion that the Commission form indicating Dr. S was appointed to determine "percentage of impairment only" was a clerical error, especially given the lack of evidence of the circumstances surrounding the appointment.") In support of its argument, carrier references Texas Workers' Compensation Commission Appeal No. 93124, decided April 1, 1993, which involved the determination of MMI by a designated doctor who clearly had been appointed only to determine impairment. In that case we stated:

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benefit review conference, or indeed, after claimant's October 13, 1992, letter if that were considered to raise a dispute.

That the designated doctor addressed the issue of MMI was not improper or untoward, as this panel has previously held that ". . . the American Medical Association Guides to the Evaluation of Permanent Impairment . . . provide in pertinent part that '[i]mpairment evaluation should be performed when a person's condition has become static and well stabilized following completion of all necessary . . . treatment'" and 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 impairment rating." Texas Workers' Compensation Commission Appeal No. 92517, decided November 12, 1992. We have also held that, absent MMI by operation of law at the expiration of 104 weeks...the two issues of MMI and impairment may become somewhat "inextricably tied together," Texas Workers' Compensation Commission Appeal No. 92366, decided September 10, 1992, and that the existence of MMI cannot be "neatly severed" from the assessment of an impairment rating, Texas Workers' Compensation Commission Appeal No. 92394, decided September 17, 1992.[3]

The panel in that case also queried whether, under the circumstances, the designated doctor's determination of MMI was entitled to presumptive weight under the 1989 Act, citing Appeal No. 92517, *supra*; however, the hearing officer in that case determined that the great weight of the medical evidence indicated that the claimant reached MMI at a point prior to certification by the designated doctor, and the Appeals Panel found sufficient evidence to uphold that determination.

We are faced with somewhat the opposite situation here, where the hearing officer stated that the designated doctor's certification of MMI and impairment rating were entitled to presumptive weight, and she rejected Dr. S's date of MMI only because claimant reached statutory MMI prior to the date certified. *See* 1989 Act, Section 401.011(31), which states that MMI means the earlier of: 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 the expiration of 104 weeks from the date on which income benefits begin to accrue. But for the expiration of the 104 weeks, however, the hearing officer made clear that she would have accorded Dr. S's date of MMI presumptive weight, and it is that decision we will review.

The record in this case shows, as indicated above, that claimant was found to have reached MMI by at least Drs. M and Wa. (We note that Dr. F's TWCC-69, while assigning an impairment rating, did not state that claimant had reached MMI and appeared to limit that doctor's assessment to one from a neurological standpoint only, which may have rendered it insufficient even if a finding of MMI had been made.) *See* Texas Workers' Compensation Commission Appeal No. 93705, decided September 27, 1993. It does not appear that Dr. D formally certified MMI in compliance with Commission rules, *see* Texas Workers'

[3]The parties may of course agree to a date of MMI or otherwise indicate clear absence of dispute over the issue. *See* e.g., Texas Workers' Compensation Commission Appeal No. 92561, decided December 4, 1992.

Compensation Commission Appeal No. 91084, decided January 3, 1992, but stated in the report of a January 1993 visit that "I think he's reaching [MMI]. This does not mean he is well. This means that he is stable in his symptoms . . ." Finally, the report appended to Dr. S's TWCC-69 notes claimant's continued pain and the bulging disc on the February 25, 1993, MRI report, but stated, "[T]his man has had extensive conservative therapy including analgesic medications, muscle relaxants, and anti-inflammatory medications. He has had inpatient physical therapy. He has been through a Work Hardening Program. He has been determined by several surgeons not to be a surgical candidate. In light of this, I believe that he has reached [MMI]."

Consistent 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.) Further, under the facts of this case, we hold that acceptance of Dr. S's MMI date is against the great weight an preponderance of the evidence. Looking to the entire body of the medical evidence in this case, as well as the length of time which elapsed between the first reports of MMI and impairment to the designated doctor's report, we are compelled to conclude that such evidence establishes that "further material recovery from or lasting improvement to" claimant's injury was not demonstrated by expert medical opinion. *See* Section 401.011(30)(a), 1989 Act. What is clear is that claimant continued to experience pain, but this panel has determined that the achievement of MMI does not mean, in every case, that an individual will be pain-free. Texas Workers' Compensation Commission Appeal No. 92270, decided August 6, 1992. Reaching MMI also does not mean that an employee will not continue to be entitled to lifetime medical benefits under the 1989 Act for his compensable injury. We accordingly reverse the hearing officer's determination of MMI and remand for a finding as to the date in which claimant reached MMI, based upon the medical evidence in the record.

Carrier's final point of error concerns the hearing officer's determination that the claimant did not experience any intervening injury which is the sole cause of his current limitations. Contrary to carrier's assertion, our review of the record does not reveal that the hearing officer's determination of this issue was so against the great weight and preponderance of the evidence as to be manifestly wrong and unjust, requiring our reversal. In re King's Estate, 244 S.W.2d 660 (1951). Despite the fact that two reports of Dr. D indicate claimant experienced pain upon hanging sheetrock and changing a tire, claimant testified that Dr. D misinterpreted what he had said and that he in fact did not perform those activities directly. In addition, we note that the report that mentions the sheetrock goes on to say, "We've come down to the fact that if he's active, he hurts . . ." while the report mentioning the tire changing says the incident "prompted him to seek additional medical care." Thus, the medical reports do not unequivocally compel a finding that claimant's physical condition after the two events was due solely to those incidents. We also note that, contrary to carrier's contention, medical records showed evidence of a bulge both before and after the sheetrock

and tire incidents. Further, to the extent there is conflict between claimant's testimony and the plain language of Dr. D's reports, that is a matter for the hearing officer to resolve. Garza v. Commercial Insurance Company of Newark, N.J., 508 S.W.2d 701 (Tex. Civ. App.-Amarillo 1974, no writ).

We affirm the hearing officer's determination on the issue of intervening injury, and her denial of carrier's request for subpoena. We hold that the hearing officer's determination of the date of MMI, which applied the statutory date as a substitute for the date certified by the designated doctor, is against the great weight and preponderance of the evidence. We remand this case to the hearing officer to determine the date of claimant's MMI based on the medical records in evidence at the contested case hearing and without the need to reconvene this hearing or to receive new evidence.

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 hearing, pursuant to Section 410.202. *See* Texas Workers' Compensation Commission Appeal No. 92642, decided January 20, 1993.

Lynda H. Nesenholtz
Appeals Judge

CONCUR:

Stark O. Sanders, Jr.
Chief Appeals Judge

Philip F. O'Neill
Appeals Judge