APPEAL NO. 93720

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 held on July 16, 1993, in (city), Texas, (hearing officer) presiding. The issues at the CCH were: 1. whether or not the respondent (claimant herein) timely disputed the first finding of maximum medical improvement (MMI) and impairment rating assigned, and 2. what is the claimant's correct percentage of permanent whole body impairment. The hearing officer found that the claimant had not disputed the first finding of MMI and impairment rating; found that the appointment of a designated doctor selected by the Texas Workers' Compensation Commission (Commission) was a nullity; and found that the claimant attained MMI on January 6, 1993, with a 14% whole body impairment.

The (carrier herein), a statutorily self-insured political subdivision, who was claimant's employer, filed a request for review contending that the hearing officer erred in finding a date of MMI when MMI was in fact not an issue before the hearing officer and requests that we either reverse and render a new decision, reform and affirm the decision of the hearing officer, or reverse and remand for the taking of further evidence. The claimant did not file a response to the carrier's request for review.

DECISION

After reviewing the evidence we reverse the decision of the hearing officer and remand for further consideration and development of the evidence in order to resolve the issues in this case.

It is undisputed that the claimant was employed by the (employer) from February 1955 to March 11, 1991, as a street sweeper. It is also uncontested that the claimant suffered a compensable injury in the course and scope of his employment on (date of injury), when he slipped and fell to the ground when climbing into his sweeper.

Both parties submitted only a portion of the claimant's medical records and in fact certain medical records were marked but not offered by the carrier. The claimant, who was the only witness at the hearing, was not questioned concerning the history of his medical treatment. From the records which are in evidence it appears that at least as of May 7, 1991, the claimant was treating with (Dr. M).

Medical records in evidence from (Dr. T), a doctor the claimant later saw, summarize some of Dr. M's treatment. These records state that on June 6, 1991, Dr. M indicated that the claimant had a 20-25% impairment rating; that on October 24, 1991, Dr. M indicated that the claimant had a 15-20% impairment of the whole body; that on April 23, 1992, Dr. M sent the claimant to a (Dr. N) for a second opinion; that on July 2, 1992, Dr. M reported that Dr. N had rated the claimant's impairment at 20%; and that on January 6, 1993, Dr. M had stated that the claimant had a permanent impairment of 20%.

Only a few of Dr. M's records were offered into evidence. In his April 23, 1993, report

Dr. M reported referring the claimant to Dr. N for a second opinion. In his July 22, 1992, report Dr. M stated:

> I had alluded to a 14 percent impairment rating. I think with three level disease with herniations which are symptomatic, this is probably understated. Regardless of his impairment, he is 100 percent disabled from any manual type labor. He will only be fit for sedentary employment. With his age, background, training and geographic locality, it is unlikely he will be fit for any employment. [Dr. N] alluded to a 20 percent impairment and I feel that this is probably appropriate in general.

A September 3, 1992, report discussed a follow-up visit by the claimant with Dr. M. In a January 6, 1993, report Dr. M expressed the opinion that the claimant had an impairment rating of "20 percent of the whole body." Finally, in his report of April 7, 1993, Dr. M stated:

> He has been seen by [Dr. N] at the insurance company's request and was given a 20% impairment rating. I had a very formal impairment rating done at South Texas Work Assessment and Rehabilitation Center [Assessment Center], including significant supportive documentation based on AMA guidelines and his impairment equated to 28%. Much of this was for loss of motion, which was accurate. He can only bend his fingertips to about mid-shin level. This was done with an inclinometer and more accurate devices. I would concur with this impairment rating, as it was done very professionally and accurately.

On a signed but undated Report of Medical Evaluation (TWCC-69), Dr. M certified the claimant reached MMI on January 6, 1993, with a 28% whole body impairment rating.

The claimant testified during the CCH that Dr. M had rated his impairment at 14% in April 1992, and conceded he had failed to dispute this rating within 90 days. The claimant also testified that he received a letter from the Commission to report to Dr. T and he did so. Dr. T, who all parties seemed to assume was selected by the Commission to be a designated doctor, certified on a TWCC-69 that the claimant had reached MMI on January 6, 1993, with seven percent impairment. None of the parties seemed to know what had triggered Dr. T's appointment as the designated doctor and the only evidence in the record concerning this is a statement from Dr. M in his report of April 4, 1993, where he said: "Apparently, the carrier is requesting another [impairment rating] from [Dr. T], which is fine."

The carrier's position at the CCH was that the hearing officer should find that the claimant had failed to timely dispute Dr. M's 14% impairment rating given in April of 1992, but should give presumptive weight to Dr. T's seven percent rating since he was the designated doctor. The claimant's position was that Dr. T was not properly selected as a designated doctor as there was no dispute to trigger his appointment. The claimant argued that the hearing officer should adopt the 28% impairment rating given by Dr. M. The hearing officer's findings of fact and conclusions of law included the following:

## FINDINGS OF FACT

4.Claimant was certified by his treating doctor to have reached maximum medical improvement on January 6, 1993, with a fourteen percent (14%) impairment rating.

5.The Claimant knew of the certification of maximum medical improvement and of the impairment rating and did not dispute it within ninety (90) days.

6.There was no dispute about maximum medical impairment (sic) or impairment rating as contemplated by the Statute and Rules.

7.The Commission designated a doctor who certified maximum medical improvement to have occurred on January 6, 1993, and awarded a seven percent (7%) impairment rating.

8.Designation of a doctor by the Commission was inappropriate and a nullity.

9.Claimant's treating doctor, who had originally certified maximum medical improvement with a fourteen percent (14%) impairment rating, submitted another certification of maximum medical improvement and assessed a twenty-eight percent (28%) impairment rating.

10.There was no good cause for Claimant's failure to dispute the finding of maximum medical improvement and the impairment rating initially assessed by his treating doctor in April, 1992.

11.The original certification of maximum medical impairment (sic) effective January 6, 1993, with a fourteen percent (14%) impairment rating governs.

## CONCLUSIONS OF LAW

2.Claimant did not timely dispute the first finding of maximum medical improvement or the impairment rating assigned.

3.Claimant achieved maximum medical improvement on January 6, 1993, with a fourteen percent (14%) impairment rating.

The carrier on appeal challenges Finding of Fact No. 11 and Conclusion of Law No. 3, attacking the decision of the hearing officer that the claimant reached MMI on January 6, 1993, with a 14% impairment rating. The carrier argues that MMI was not an issue before the hearing officer and he should not have ruled on this issue. In the alternative the carrier argues that since the hearing officer ruled that the claimant did not dispute Dr. M's rating the correct date for MMI would be the date of that rating-- April 1992. The carrier argues in the second alternative that the case should be remanded to the hearing officer to take further

evidence on the issue of MMI since it had not been prepared to go forward on this issue at the CCH because it was not listed as a contested issue at the CCH.

Findings of Fact Nos. 4, 5, 10, and 11, and Conclusion of Law No. 3 are ambiguous and internally inconsistent. A review of the record shows the hearing officer's Finding of Fact No. 4 that the claimant's treating doctor certified that he reached MMI on January 6, 1993, with a 14% impairment rating is factually incorrect. Dr. M, the treating doctor, certified that the claimant reached MMI on January 6, 1993, with a 28% impairment rating as reflected on the TWCC-69. The carrier alleges that Dr. M originally certified that the claimant had attained MMI in April 1992, but the only evidence in support of this in the record is the testimony of the claimant that he received an 14% impairment rating from Dr. M on an unspecified date in April 1992, and the medical report of Dr. M dated July 22, 1992, which indicates he "had alluded to a 14 percent impairment rating," but felt in light of disc herniations at three levels that Dr. N's 20% rating was probably appropriate. In the report Dr. M never states **when** he alluded to the 14% rating or anything about **MMI**. Finding of Fact No. 5 states that the claimant knew of the certification of MMI and the impairment rating but did not dispute it within 90 days. It is unclear in light of the other findings whether this refers to Dr. M's certification on some date in April of 1992 or to the January 6, 1993, certification, and whether it refers to the 14% or the 28% impairment rating. Finding of Fact No. 10 adverts to a "good cause" exception not found in Tex. W.C. Comm'n 28 TEX. ADMIN. CODE § 130.5(e) (Rule 130.5(e), specifies merely April 1992" without a day, and does not state the impairment rating (14% or 28%). Finding of Fact No. 11 erroneously refers to "maximum medical impairment" and again references a 14% impairment rating of January 6, 1993, which the record clearly shows was 28%.

Before it can be determined whether the claimant failed to timely dispute the first MMI date and impairment rating assigned, the date of such and the rating must be determined. A crucial doctrine in conducting this inquiry is that MMI must first have been found to have been reached before an impairment rating is assigned. *See* Texas Workers' Compensation Commission Appeal No. 92517, decided November 12, 1992. Thus, even if there is evidence that an impairment rating was issued, it is not valid unless there has been certification of MMI. Any certification of MMI should comply with Section 408.123 and with Rules 130.1, 130.2., 130.3

We reverse and remand this case to the hearing officer for further development and consideration of the evidence so that the issues in this case can be properly determined.

Pending resolution of the remand, 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.

Gary L. Kilgore
Appeals Judge

CONCUR:

Robert W. Potts
Appeals Judge

Philip F. O'Neill
Appeals Judge