APPEAL NO. 93723

This appeal arises under the Texas Workers' Compensation Act, TEX. LAB. CODE. ANN. § 401.001 *et seq*. (1989 Act). On July 8, 1993, a contested case hearing was held in (city), Texas, before hearing officer (hearing officer). The three issues for resolution were as follows: whether or not the problems the claimant currently has with her neck and right wrist were caused by the acknowledged injury suffered on (date of injury); whether or not the claimant is suffering disability as a result of her injury; and whether claimant has reached maximum medical improvement (MMI) under Rule 130.4 (Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 130.4, entitled "Presumption that Maximum Medical Improvement has been Reached and Resolution when MMI has not been Certified.") The carrier, who is the appellant in this action, contends that the hearing officer erred in concluding the claimant injured her right wrist and neck on (date of injury). It also alleges error in the conclusions that claimant has sustained disability since August 4, 1993, and that she will reach MMI on August 4, 1993. The claimant filed no response to carrier's appeal.

DECISION

We affirm the hearing officer's determination on the extent of claimant's injury. We affirm the hearing officer's determination of disability, as reformed; however, we reverse his determination with regard to statutory MMI and remand for appropriate findings of fact and conclusions of law as to whether the claimant has reached MMI pursuant to Rule 130.4

The claimant testified that she had been employed by (employer) for about one month when, on the morning of (date of injury), she tripped while coming out of a cooler with a box of lettuce in her hands. She said she was opening the door with her back at the time when she tripped, almost fell, but never let go of the box which she said weighed about 45 to 50 pounds; she said it "jerked me" and that about 30 to 40 minutes later she began experiencing numbness in her hands. Later that evening she said she had pain in her left side and her hand was tingling and numb. She was seen in an emergency room on (date).

The report from the emergency room states the complaint as "pain to the L arm from the shoulder to hand c thumb, index & middle finger numbness for 2 weeks." It also says the claimant "states has been lifting heavy boxes @ work and that's when pain started." While two portions of the admission form refer to left arm pain, the notes of the physical exam state the claimant has "pain and cramping in. . .L arm & some in R arm." At the hearing the claimant denied saying she had pain for two weeks, but rather that she said she had been at her job for about two weeks. The admission form also said "denies weakness, neck pain, injury."

The claimant was taken off work for two days, then returned, although she said her hands were numb, she had headaches, and she did not feel right. After she awoke with severe pain on August 1st she began treating with (Dr. H). Dr. H's records indicate he first saw her on August 2nd for complaints of tender neck and numbness of the fingers of her left hand; he diagnosed a cervical strain and ordered tests of the cervical spine, gave claimant an arm sling, prescribed medication and took her off work. On a Specific and

Subsequent Medical Report dated October 2, 1991, Dr. H continued to give a diagnosis of "strain/cervical" (although some earlier off-work slips contain a diagnosis of brachial plexus injury) and stated claimant had "possible bilateral carpal tunnel syndrome, still has neck pain and numbness." He scheduled claimant for physical therapy and referred her to (Dr. L), a neurologist.

On September 20th Dr. L wrote that claimant had "numbness in both hands particularly on the left side and also pain in the neck." Dr. L ordered an EMG and nerve conduction studies and stated his impression that the claimant had bilateral carpal tunnel syndrome. However, he said that diagnosis explained the claimant's numbness but not her neck pain, stating his belief that the neck pain was secondary to muscle spasm.

Claimant was also referred to (Dr. D) in October 1991; his records show that he discussed treatment options with claimant, including splinting, injection of the carpal tunnel with steroid, and surgery. On November 27th Dr. D wrote that claimant had not been helped by medication and that he planned to go ahead with carpal tunnel release for "the most bothersome hand first and a couple of weeks later do the other one and see how she does with that." Records show that the release was performed on her left hand on December 4, 1991.

On January 20, 1992, Dr. L noted that claimant had told him carrier wanted to wait three to four months before the second surgery to make sure that the first surgery was successful. The claimant testified that Dr. L scheduled her for the second surgery in April of 1992 but that just prior to surgery she found out that the carrier would not pay.

On referral from Dr. L claimant saw (Dr. C), who on April 13, 1992 performed electrodiagnostic testing and stated his impression of right sided carpal tunnel syndrome and possible C-5 nerve root compression on the right side. He also recommended an MRI of the cervical spine, the May 29th report of which found evidence of disc herniation on the right at C4-5 and C5-6 levels. On June 4th Dr. D noted the cervical disc bulge and said he was going to transfer her treatment for that condition to Dr. C. On July 8th Dr. D reported that Dr. C felt that surgery would not be of any benefit and that the second carpal tunnel release should be scheduled. Dr. D then stated his plan to see claimant, pre-op, on July 16, 1992, which was the last date he saw claimant.

In an undated note to the carrier written sometime after claimant's surgery in December of 1991, Dr. D wrote that he had been informed by another patient that claimant actually fell while at a prior job and injured both wrists, but her prior employer told her they would not pay for her injury. He said, ". . .the impression I was led to have is that she went from this job to work for [employer] and started cutting vegetables and began to have wrists (sic) complaints and was referred to [Dr. H]." He also said he got the impression that claimant "is a lady who files suits," and mentioned that claimant suffered a fall in his office the day of her first appointment. The claimant contended the patient who talked to Dr. D was her aunt; she denied that she had been injured at either one of her previous jobs, one of which she had held (as a waitress in a restaurant) for eight years. The owner of that

restaurant, who is also claimant's sister, testified that claimant had not been injured while working for her; she agreed that their aunt had probably talked to Dr. D and that she was a person who "interferes in people's business."

The claimant stated at the hearing that she believed she could be working if she had been able to have the second carpal release surgery. At the time of the hearing she had moved to (city) (state), where her husband had opened a restaurant. Both she and her sister testified that claimant had not been able to help with preparation for the restaurant because of her physical condition. She was treating with a Colorado doctor, Dr. S, and had been seen in consult with a neurologist, (Dr. So). On June 23, 1993, Dr. So noted claimant's complaints of paresthesias involving her right hand and neck pain radiating into the left upper extremity to her wrist. Dr. So performed EMG and nerve conduction studies which were normal, and stated her impression as left upper extremity pain and paresthesias of uncertain etiology.

At carrier's request, (Ms. M), a nurse with Focus Healthcare Management, evaluated claimant's medical records with regard to whether claimant's right wrist and neck symptoms were causally related to the (date of injury) injury. Ms. M wrote in pertinent part, "According to the accident report, this patient was treated for a strain of her left arm following that. . .injury. There were never any complaints initially of any right upper extremity problems and there was certainly nothing to suggest that she had neck complaints involving her right upper extremity. It is difficult for me to attribute her right carpal tunnel syndrome and possible herniated disc with right radiculopathy to a left upper extremity injury which occurred on (date of injury)."

Pursuant to carrier's request because of claimant's apparent lack of improvement and/or apparent failure to attend two or more consecutive health care appointments, a Commission disability determination officer on December 22, 1992 made a medical status request of Dr. D. In response, Dr. D on a Report of Medical Evaluation dated January 11, 1992 (sic; should read "1993") noted that claimant's last appointment was July 16, 1992, and that an appointment had been missed on December 8th. He also stated that claimant had not reached MMI. At the hearing the claimant said she had stopped seeing Dr. D because he could do nothing else for her, and that her last appointment had been cancelled by the doctor's office.

The carrier's first point of appeal is that the evidence is insufficient to support the hearing officer's determination that the claimant injured her right wrist and her neck on (date of injury), citing evidence which supports its position. However, despite some evidence to the contrary, our review of the record discloses sufficient evidence to support the hearing officer's determination. Despite carrier's assertions, claimant's medical records contain references to complaints regarding claimant's right hand as early as the emergency room visit, and complaints regarding her neck which were recorded as early as August 2nd. Carrier also argues that the history and the condition itself tend to prove a repetitious trauma injury and are inconsistent with an accidental injury. While the history of the injury differs between some of the medical reports, the majority give a history of accidental injury (versus

the emergency room report, which can be read to indicate a gradual onset), but nevertheless go on to diagnose carpal tunnel syndrome; except for the report of Ms. M, none state that the carpal tunnel diagnosis is inconsistent with a traumatic event. Further, to the extent that there is conflict between the medical records, that is a matter for the hearing officer to resolve. TEIA v. Campos, 666 S.W.2d 286 (Tex. App.-Houston [14th Dist.] 1984, no writ). We will not overturn that decision where, as here, it is not so against the great weight and preponderance of the evidence as to be manifestly unjust. Cain v. Bain, 709 S.W.2d 175 (Tex. 1986).

Carrier's second point is that the hearing officer erred in Conclusion of Law No. 3 stating that claimant "has suffered disability since August 4, 1993." As carrier correctly notes, this statement is in error, especially since the hearing officer made a finding of fact that the claimant has been unable to obtain or retain employment due to her injury since August 2, 1991. Reading the two together, it is obvious that Conclusion of Law No. 3 contains a clerical error and was intended to state, "Claimant has suffered disability since August 2, 1991" (emphasis added), and we so reform this conclusion.

Carrier also states it is "perplexed" by the findings and conclusions concerning MMI and disability, as the hearing officer's discussion of the case states that "I have elected not to rule on the issue of disability and [MMI] in this case. Just to make the record clear, however, if a ruling was necessary I would find that claimant had not reached [MMI] under Rule 130.4 [which requires] that a designated doctor be appointed by the Commission to resolve the issue of [MMI]. [Dr. D], in his Form TWCC-69 filed in response to the medical status request letter, stated Claimant had not reached [MMI]. A designated doctor was never appointed by the Commission, probably due to the closeness of statutory [MMI]."

Although confusing, we do not find error per se in the hearing officer's stated intent not to rule on the issues of disability and MMI, while proceeding to make findings of fact and conclusions of law on those issues. However, we are troubled by the hearing officer's Conclusion of Law No. 4, which states "Claimant will reach the point of statutory maximum medical improvement on August 4, 1993, and temporary income benefits cease from that date." Carrier argues in its final point of error that Conclusion of Law No. 4 is erroneous, stating that the hearing was conducted on July 8, 1993, and that a prospective determination of MMI for August 4, 1993, is inappropriate and unfounded. The carrier stated that it would not object to a remand to the benefit review conference level for determination of the issue of MMI, including the application of Rule 130.4; however, it continued to assert its position that MMI was reached no later than July 8, 1992, based on medical evidence and/or abandonment.

We agree with the carrier that it was error for the hearing officer to find MMI prospectively. See Texas Workers' Compensation Commission Appeal No. 92147, decided May 29, 1992, wherein the hearing officer's order that benefits be paid past the date of the hearing and up until the hearing officer's decision was received was reformed "[t]o allow for conditions that could affect a decision during the extended period after the date of" the hearing. (We also distinguish the determination of MMI in this case from those orders

in which a carrier is ordered to pay temporary income benefits until such time as the claimant reaches MMI or ceases to have disability.) Unlike Appeal No. 92147, however, we are unable to cure the error in this case by merely reforming the appropriate conclusion of law. We are also hesitant, despite the hearing officer's language in his discussion of evidence, to imply findings or conclusions with regard to the issue before him, namely, whether the claimant had reached MMI pursuant to Rule 130.4. We therefore reverse the hearing officer's determination of statutory MMI and remand the case to require the hearing officer to make appropriate findings and conclusions regarding the stated issue.

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.

Lynda H. Nesenholtz
Appeals Judge

CONCUR:

Stark O. Sanders, Jr.
Chief Appeals Judge
CONCURRING OPINION:

While basically in agreement with this opinion, I do not see a need to return it to the hearing officer. The conclusion of law that says claimant will reach the point of statutory maximum medical improvement on August 4, 1993, is nothing more than a conclusion that MMI has not been reached at the time of the hearing. As such, all issues raised at the hearing have been addressed. If the parties wish to litigate whether MMI was reached at some point between the date of the hearing and "the point of statutory MMI", they may do so.

Joe Sebesta
Appeals Judge