APPEAL NO. 93763

On June 3, 1993, a contested case hearing was held in (city), Texas, with (hearing officer) presiding. The record was reopened after that date for the purpose of allowing the designated doctor to sign his reports, and to consider the admission of more evidence submitted by the claimant. The record closed on July 19, 1993.

The issues to be determined at the contested case hearing were whether claimant, RV (also referred to in the record as RV), had reached maximum medical improvement (MMI) and, if so, his correct impairment rating. A third issue was also considered as to whether claimant should be permitted to change his treating doctor. Claimant sustained an injury to his back on (date of injury), while employed as a maintenance worker by (employer).

The hearing officer adopted the report of the designated doctor that claimant reached MMI and had a zero percent impairment rating, and that the great weight of medical evidence was not to the contrary. The hearing officer also found that claimant should be permitted to change his treating doctor, in accordance with criteria for allowing a change set out in the Texas Workers' Compensation Act, TEX. REV. CIV. STAT. ANN. art. 8038-4.63(d)(4) (since recodified as TEX. LAB. CODE ANN. § 408.022(c)(4)) (hereinafter 1989 Act).

The claimant has appealed the determinations relating to MMI and impairment, arguing that the report of the designated doctor was not based upon medical considerations but generated only to stop his benefits. The claimant argues the other medical evidence as proving that he has an impairment. The claimant complains about the hearing officer's refusal to accept certain evidence submitted by him while the record was held open (Claimant's Exhibit No. 14). The claimant outlines the evidence he feels is in his favor. The carrier filed no response.

DECISION

After reviewing the record, we reverse and remand the case for further development of the evidence in accordance with this opinion, specifically for clarification of aspects of the designated doctor's report.

FACTS

The claimant was injured (date of injury), as he assisted a coworker with carrying a refrigerator down a flight of stairs an apartment complex to the first level. He stated that he worked another two weeks on light duty, and then stopped working. Although he worked briefly in August through October 1992 part-time delivering pizzas, it was his testimony that he was unable to work and had to quit that job for reasons relating to his injury. Claimant stated that prior to July 1991 he was completely healthy and did not have back trouble, but that since then, he had been troubled by back pain radiating down to his feet, and numbness.

Claimant was represented by an attorney until May 6, 1992. He stated that his first doctor was (Dr. H).

Medical evidence relating to the appealed issues of MMI and impairment is briefly summarized here:

-A July 31, 1991 MRI of the lumbar spine diagnosed degeneration of L5-S1 with associated mild spondylosis.

-A September 16, 1991 CT of lumbar spine found a mild left lateral disc bulge at L5-S1, at least in part due to developmental asymmetry. Moderate bulge was also present at L4-5, with some encroachment into the adjacent neural foramen. Lumbar and thoracic myelograms of that same date found "considerable deformity of the lower dural sac at L4-L5 level, significance uncertain."

-A September 23, 1991 report by (Dr. S) to Dr. H stated that claimant had subjective complaints of pain with no objective abnormality, based upon MRI and myelogram. Dr. S completed a TWCC-69, Report of Medical Evaluation, stating that claimant would reach MMI by October 14, 1991, with no comment, one way or the other, concerning impairment.

-On September 26, 1991, claimant began treating with (Dr. W). Dr. W's letterhead indicates specialties in neurology and pain management. Dr. W gave claimant pain injections, and also suggested a back rehabilitation program through Work Well which claimant stopped attending after two weeks.

-On March 17, 1992, claimant consulted with (Dr. L), an orthopedic surgeon. Dr. L noted a normal neurological examination. Dr. L noted that MRI indicated some degenerative change at L4-5 with some significant prolapse changes, and diagnosed degenerative disc disease L5-S1, with predominantly mechanical symptoms.

-March 20, 1992, Dr. L commented on additional records from September 1991 that were provided to him. Dr. L confirmed posterior lateral encroachment of the thecal sac at L4-5 with some suggestion of central prolapse lesion at L5-S1. Dr. L said his re-review of the MRI indicated that the latter condition was probably ligamentous rather than cystic density. He then stated: ". . . basically short of surgical intervention we feel that the patient has probably reached [MMI] at the current time." Dr. L then proposed three options: return to work hardening, return to work at light or medium duty (which he noted claimant was "unanxious" to pursue), and further investigation for the possibility of surgery. The report indicated that claimant would have discography and be seen again afterwards.

-Dr. W reported on a March 20, 1992, examination that claimant had a normal

neurological exam, with subjective, myofascial pain. Dr. W noted that a videotape he reviewed showed claimant working on his car without significant difficulty.

-Dr. W discharged claimant from treatment, and completed a TWCC-69 stating that claimant reached MMI on April 3, 1992, with a 20% impairment. The basis of the rating is described only as lumbar spine (myofascial pain). It recited various tests (myelogram, MRI and CT scan) which indicated moderate pathology at L4-5 and L5-S1. Mild degenerative changes were noted, with no evidence of herniation.

-Dr. W completed a neurological clinical report on June 18, 1992, diagnosing plantar faciitis, lower back pain, cervical pain, and headaches. He recommended an EMG test. Even after discharge, it appeared from the record that Dr. W continued to prescribe pain medication for the claimant.

-An EMG test report completed on June 29, 1992, by (Dr. AS) concluded that there was no evidence of lumbosacral radiculopathy.

-An August 4, 1992 MRI of the lumbar spine found mild degenerative disc disease and spondylosis of L5-S1 without disc herniation or canal stenosis.

-An April 12, 1993 letter from (Dr. MB), (college), reports on a evaluation for the pain clinic. Dr. Dr. MB observed that he could not recommend his program for claimant because the claimant's opinion was that he "gets very sick" with activities of the nature used by the clinic.

-An employability status report from County Hospital, dated April 27, 1993, indicates no heavy lifting "forever."

-A May 25, 1993 report from (Dr. DB) diagnosed chronic severe IVD syndrome, radiculopathy L5 nerve root, and lumbosacral strain/sprain. The estimated date of MMI was December 1, 1993 (which is in excess of 104 weeks after the date that income benefits accrued).

The Designated Doctor. (Dr. P), an orthopedic surgeon, was appointed by the Texas Workers' Compensation Commission (Commission); he examined claimant October 23, 1992. Claimant stated that he brought his medical records to Dr. P's office the week before the examination. He stated that he discussed his past unsuccessful work hardening therapy with Dr. P at the examination.

That day, Dr. P issued a report that claimant had not reached MMI but would after a six week course of work hardening therapy. Dr. P referred to prior therapy with the observation that there was "no completed work hardening program." The diagnosis in the report was "chronic lumbosacral sprain syndrome superimposed upon underlying

spondylosis." Dr. P noted that his examination revealed full active range of motion in all planes. Dr. P stated that after work hardening claimant would be able to perform work with no restrictions. Although by completion of a TWCC-69 he determined claimant had not yet reached MMI from the compensable injury, Dr. P's narrative also stated: ". . . [Claimant] does indeed have a disability related to his underlying spondylosis. However, this is not a result of his work-related injury and as such, there is no partial permanent impairment as a result of his work-related injury."

On April 7, 1993, Dr. P wrote to the carrier.[1] He stated that since his October 23rd evaluation, "additional information" had become available:

> It appears that [claimant] did have a trial of work hardening in January 1992. In addition, it has been brought to my attention that he did not attend any work hardening program following my recommendations of 10-23-92 despite carrier approval. As such, [claimant] has reached [MMI] at this time. The date of [MMI] would be six weeks after his initial evaluation which would be 12-7-92. There is no partial permanent impairment.

The source of the additional information or what information was reviewed by Dr. P is not disclosed on the record beyond the letter above. Dr. P completed a TWCC-69 certifying zero percent impairment as of December 7, 1992. Claimant testified, and was not disputed, that he was not examined by Dr. P after October 23, 1992. He said he did not go through the work hardening as suggested by Dr. P because he had to go to (country) to attend to an ill family member.

GENERAL DISCUSSION OF DEFINITIONS

The claimant has charged the hearing officer with bad and prejudicial conduct. These charges are utterly without foundation. The record of the hearing indicates that in every way, the hearing officer was fair and courteous to the claimant. While we understand that claimant was disappointed with the outcome, expressing disappointment with such observations is ultimately unpersuasive.

Because the record indicates that claimant is confused about the meaning of MMI, disability, and impairment, as those terms are used in the 1989 Act, we will briefly review those matters.

"Disability," as defined in the Act, refers not just to an injured workers' physical condition but to the "inability because of a compensable injury to obtain and retain employment at wages equivalent to the preinjury wage." Section 401.011(16). If a claimant does not have "disability," then temporary income benefits (TIBS) are not due, even if the claimant had not reached MMI. A claimant has to have both "disability" and have not reached MMI in order to draw TIBS. *See* Section 408.101(a). During the hearing, when

[1]The reasons for the nearly 5½ month gap between these reports is not explained in the record.

the hearing officer indicated that disability was not an issue, she meant that there was no dispute over whether claimant continued to be out of work because of his compensable injury, or for other reasons.

"Maximum Medical Improvement" is defined as the earlier of the expiration of 104 weeks after the date on which income benefits begin to accrue,[2] or "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. . . ." Section 401.011(30). We have stated many times that the presence of pain is not, in and of itself, an indication that an employee has not reached MMI; a person who is assessed to have lasting impairment may indeed continue to experience pain as a result of an injury. *See* Texas Workers' Compensation Commission Appeal No. 93007, decided February 18, 1993. Consequently, the fact that claimant may present medical records that continue to document pain will not, on that fact alone, overcome a designated doctor's opinion that an injured workers has reached MMI.

"Impairment" is defined in the 1989 Act as "any anatomical or functional abnormality or loss existing after [MMI] that results from a compensable injury and is reasonably presumed to be permanent." Section 401.011(23). Further, impairment must be based upon "objective clinical or laboratory finding." Section 408.122(a). Payment of impairment income benefits is made based upon an "impairment rating," which must be assigned by use of the American Medical Association Guides to the Evaluation of Permanent Impairment (AMA Guides). Section 408.124.

EXHIBIT NO. 14

Claimant complains that the hearing officer erred by not admitting Exhibit No. 14.[3] It was submitted while the record was reopened for the limited purpose of allowing Dr. P to sign his reports. Essentially the same exhibit, an Employability Status Report, was admitted at the hearing as part of Exhibit No. 11. Exhibit No. 14 contained one additional note that is cumulative of information already on the form in Exhibit No. 11. We do not agree that the hearing officer committed any harmful error by excluding Exhibit No. 14, which was submitted after the contested case hearing.

THE DESIGNATED DOCTOR'S REPORT

[2]Claimant stated that he worked for two weeks after his injury and then left work, which would indicate that income benefits accrued sometime in late July 1991; 104 weeks after this would be sometime in late July or, at the most, early August 1993. Because claimant's appeal indicates that he seeks a reinstatement of TIBS, we need to emphasize to him that even the most favorable decision in this hearing would not result in payment of TIBS beyond 104 weeks after income benefits accrued.

[3]The list of exhibits in the hearing decision is erroneous, in that it lists No. 13 as an employability report that was not admitted. Exhibit No. 13 was actually a medical report from Dr. B which was admitted. Exhibit No. 14 is the employability report which was not admitted. We believe this to be a clerical error.

The report of a Commission appointed designated doctor is given presumptive weight. Sections 408.122(b), 408.125(e). The amount of evidence needed to overcome the presumption, a "great weight," is more than a preponderance, which would be only greater than 50%. *See* Texas Workers' Compensation Commission Appeal No. 92412, decided September 28, 1992. Medical evidence, not lay testimony, is the evidence required to overcome the designated doctor's report. Texas Workers' Compensation Commission Appeal No. 92164, decided June 5, 1992.

We have noted before that aspects of a designated doctor's report or the circumstances under which it is rendered may be considered as part of the analysis of the "great weight" of medical evidence against the report. *See* Texas Workers' Compensation Commission Appeal No. 93706, decided September 27, 1993. An assertion that MMI will occur in the future is not a "certification" that MMI has been reached. Texas Workers' Compensation Commission Appeal No. 93725, decided September 28, 1993; *also* Texas Workers' Compensation Commission Appeal No. 93361, decided June 23, 1993. However, a doctor may certify that MMI was reached at a point earlier than his examination so long as this opinion has a factual basis. Texas Workers' Compensation Commission Appeal No. 92453, decided October 12, 1992.

Our concerns about the designated doctor's report in this case are three: 1) the inconsistency between the October 23rd report and the April 7th report; 2) possible confusion over the extent of the "compensable injury;" and, 3) the apparent equation of ability to return to work with MMI.

Inconsistency. On October 23, 1992, Dr. P opined only that MMI would be reached in the future, after work hardening was undertaken. However, in April 1993, Dr. P changed this assessment after the fact and, we believe, essentially converted his prospective MMI opinion into a retroactive certification. The recited basis for this was a finding that the therapy Dr. P said would result in MMI had not occurred. Although Dr. P's April letter infers that claimant's earlier course of work hardening was additional information, the October 23rd report supports the claimant's contention that this was known to Dr. P when he examined claimant at that time.

Before presumptive weight can be accorded to an opinion that appears to be internally inconsistent, it is our opinion that further evidence would have to be developed from Dr. P to clarify the additional information upon which he based his opinion, as well as to explain why the fact that claimant did not attend work hardening would result in MMI when it was the apparent reason for not finding MMI on October 23, 1992. If Dr. P also reviewed additional medical records pointing to December 7, 1992, as the date of MMI, this should be clarified. Otherwise, it would appear that the great weight of medical evidence would point against selection of the December 7, 1992, MMI date.

Possible confusion over "compensable injury." Although the attorney for the carrier argued during the hearing that any problems noted by Dr. P were "pre-existing," the record does not contain evidence that the carrier disputed that claimant injured his back. As we have stated many times, an aggravation of a pre-existing condition is an injury in its own

right. INA of Texas v. Howeth, 755 S.W.2d 534, 537 (Tex. App.- Houston [1st Dist.] 1988, no writ). A carrier that wishes to assert that a pre-existing condition is the sole cause of an incapacity has the burden of proving this. Texas Employers' Insurance Association v. Page, 553 S.W.2d 98, 100 (Tex. 1977); Texas Workers' Compensation Commission Appeal No. 92068, decided April 6, 1992. Dr. P's October 23, 1992, report could be interpreted as recognizing that claimant has an aggravation of spondylosis as part of his compensable injury (from which he did not reach MMI on October 23, 1992), or as his opinion that claimant had recovered from his compensable injury with no impairment. Other medical records (from Dr. W and Dr. L, for example) showed that claimant has been treated for "degenerative changes," sometimes also described as spondylosis, as part of his work-related back condition. Some of these records are recited in Dr. P's October 23, 1992, report. It isn't clear what Dr. P understood the compensable injury to be for purposes of evaluating impairment and MMI. This should be clarified on remand.

Equation of Return to Work With MMI. Because Dr. P initially made MMI conditional on work hardening, and observed that claimant had "disability" related to spondylosis, he appeared to equate the achievement of MMI with claimant's ability to return to work. These are different concepts, and a full release to work does not equate to MMI. *See* Texas Workers' Compensation Commission Appeal No. 92257, decided August 3, 1992. We would also observe that an injured worker can reach MMI without a full release back to work.

Because of the problems with the designated doctor's report noted above, we cannot properly evaluate whether the great weight of medical evidence is, or is not, against his zero percent impairment. Dr. W's 20% rating does not constitute a great weight against Dr. P's report because it appears to be based upon subjective, rather than objective, criteria, and was not confirmable by a designated doctor, as required by Section 408.122(a). It is also not possible to tell how Dr. W derived his 20% rating because he does not describe it with reference to applicable portions of the AMA Guides.

We caution the claimant that a remand of this case will not necessarily afford the claimant complete restoration of the TIBS. We note that the record has much evidence supporting an MMI date earlier than December 7, 1992. Dr. L indicated that MMI was reached in March 1992. Dr. W, the treating doctor at the time, actually certified MMI in April 1992. Dr. S had earlier estimated that MMI would be reached in October 1991. Claimant's medical records generally indicate stability, and no improvement, in his medical condition through many months. We've already pointed out that MMI does not mean, in all cases, pain-free recovery, nor does it mean that an injured worker can return to full duty work. Further, because claimant has by this time reached MMI under the "104 weeks" definition, regardless of the outcome of this case, TIBS cannot continue.

The claimant stated that he forwarded exhibits from the hearing as well as some developed after the hearing. Our review is limited to the record, and we do not consider additional evidence submitted with an appeal. Texas Workers' Compensation Commission Appeal No. 91126, decided February 28, 1992. Therefore, we have considered only those exhibits accepted into evidence at the hearing.

The case is remanded for the development and consideration of further evidence as the hearing officer deems appropriate, in light of this opinion. Any communications directed to the designated doctor must go through the Commission. 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 Article 8308-5.41. *See* Texas Workers' Compensation Commission Appeal No. 92642, decided January 20, 1993.

Susan M. Kelley
Appeals Judge

CONCUR:

Thomas A. Knapp
Appeals Judge

Gary L. Kilgore
Appeals Judge