APPEAL NO. 93850

This appeal arises pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE. ANN. § 401.001 *et seq*. (1989 Act) (formerly V.A.C.S., Article 8308-1.01 *et seq*.). A contested case hearing was held in (city), Texas, on August 23, 1993, (hearing officer) presiding. The issue from the benefit review conference was whether the great weight of the medical evidence is contrary to the findings of the designated doctor, who assessed maximum medical improvement (MMI) on April 2, 1993, with a six percent impairment rating. At the request of the carrier, the hearing officer added the issue of for what periods has the claimant had disability.

The carrier, who is the appellant herein, contends the hearing officer erred in determining that the designated doctor's date of MMI was April 2, 1993, and that the doctor did not change that date pursuant to his July 30, 1993, letter. The carrier also alleges error in the dates of disability found by the hearing officer. The claimant filed no response to carrier's request for review.

DECISION

Finding no error, we affirm the decision and order of the hearing officer.

The claimant, who was 61 years of age at the time of injury, was working as a pipeline inspector for (employer). (employer) on (date of injury), when he suffered an injury to his shoulder when he was struck by a door with a watertight latch. Because he was working on an offshore barge at the time, he got limited treatment from a medic on the barge. However, when he returned at the conclusion of the project, he sought medical attention and on April 30th began treating with (Dr. T), an orthopedist with whom he was continuing to treat at the time of the hearing. Medical records in evidence show that Dr. T released claimant to limited duty work on April 30th, to regular duty on August 26, 1991, and back to limited duty in November of 1991. Dr. T performed surgery on claimant's shoulder on February 20, 1992. Dr. T found claimant reached MMI on October 15, 1992, with a nine percent impairment rating.

At the carrier's request the claimant was also seen by (Dr. G), a shoulder and arthroscopic surgeon, on October 5, 1992. Dr. G wrote on that date that he anticipated the claimant would reach MMI in February 1993, with a 30% impairment to the right shoulder. (The claimant contended at the hearing that pursuant to the American Medical Association's Guides to the Evaluation of Permanent Impairment, this equated to an 18% whole body impairment.) Dr. G also wrote that claimant would be "100% disabled from any occupation requiring prolonged overhead work, lifting, pushing, pulling, or carrying more than 20 pounds."

The claimant was seen on April 2, 1993, by a designated doctor, (Dr. P), who certified MMI as of that date and gave claimant a six percent impairment rating. He also advised that claimant continue physical therapy, but stated that he could return to work "though being cognizant as regards the impairment he has about the shoulder."

On July 23, 1993, carrier's attorney wrote Dr. P asking for his opinion as to whether claimant reached MMI on October 15, 1992, as certified by Dr. T. On July 30th, Dr. P replied in pertinent part as follows:

> I have some difficulty retrospectively declaring this patient having reached Maximum Medical Improvement on that date [October 15, 1992] since I didn't have a chance to personally physically assess his status at that time. I have no reason, however, to not concur that the treating physician, [Dr. T], was in a better position to assess when this patient reached MMI than this physician who saw the patient on only one occasion. The patient then I think may well be considered to have reached Maximum Medical Improvement as of the 15th of October 1992 as has been detailed by his treating physician, [Dr. S].

With respect to the issue of disability, the claimant testified that the work he did for employer was "kind of on a contract basis," and that he worked whenever he was called for a particular project. He described his duties as a pipeline inspector as ranging from examining x-ray films to climbing into large pipes to make repairs. He said the job also involved doing work above his head. Between each project, he said, he would go home and wait for the employer to call him for the next job. The project on which he was injured ended around the middle of May, then he testified he was called by employer for another, one-day job on May 9th. Claimant said that was the last time he was ever called for work by employer.

Subsequently, claimant worked for several other employers, always on an as-needed, by the job basis. For two weeks in June and July of 1991 he worked for a company called (employer), inspecting vessels. Claimant said he completed that project, but that toward the end he was taken off any work which required climbing and put on ground observation duties. He said (employer) declined to hire him for their next project, which was just across the road from where he had been working.

The claimant said he continued to look for work, trying to limit himself to ground inspection jobs because he could not raise his right arm. He sent out resumes and was hired on by a company called (employer) in September 1991. By the time that project ended four weeks later, claimant said, he had been taken off climbing duties and replaced by another worker. He said (employer) did not hire him for another job. A December 21, 1992 letter from the president of (employer) stated that claimant was terminated by reduction in force due to the job nearing completion. The letter also stated that it was believed that the claimant was technically incapable of performing his duties but that he was physically capable of doing the job, including climbing process towers. In December of 1991 he also worked for Horton & Associates as a ground pipeline inspector on a project that lasted around a month.

On January 22, 1992, claimant was hired by (employer) as a pipe fitter on a project that lasted less than three weeks. At the end of that time, the claimant said, everyone else

moved on to the next location and he was told "to go get my physical defect fixed." Shortly thereafter he had surgery to repair his shoulder. After Dr. T released him in October of 1992, claimant said he looked for work at (employer) and U.S. Contractors, but was not hired because "I had worked and tried to work for different people" and "the word had got around." He said he stopped looking for work in February of 1993.

Pursuant to questioning by the hearing examiner, the exact dates of claimant's various employments were established, along with the fact that in each of them he earned the same amount or more than he had earned with employer.

Carrier's first point of error concerns the hearing officer's findings that Dr. P, the designated doctor, certified that claimant reached MMI on April 2, 1993, that he did not change the MMI date by his July 30, 1993 letter, and that the great weight of the other medical evidence is not contrary to Dr. P's certification. Carrier basically contends that a fair interpretation of Dr. P's July 30th letter is that it rises to the level of amending his original Report of Medical Evaluation (TWCC-69); that all communication from Dr. P must be taken into consideration in assessing his opinion on MMI; and that the evidence is clear that Dr. P agrees with Dr. T's opinion as to the date of MMI.

We acknowledge, as carrier states, that the Appeals Panel has previously held that a designated doctor may amend his or her report, and such will still be accorded the statutory presumptive weight. Texas Workers' Compensation Commission Appeal No. 93428, decided July 5, 1993. Under the facts of this case, the hearing officer determined that the designated doctor did not amend his MMI date, and we believe the evidence supports this finding. The hearing officer properly could, of course, consider Dr. P's July 30th letter as part of the other medical evidence in the record; however, we would agree that Dr. P's letter, which appears merely not to disagree with Dr. T's date of MMI while declining to adopt it, does not constitute, along with Dr. T's opinion, the "great weight of the other medical evidence" necessary to overcome the designated doctor's opinion. *See* Section 408.122(b); Texas Workers' Compensation Commission Appeal No. 92412, decided September 28, 1992. Carrier's first point of error is therefore overruled.

Carrier's second point of error concerns the periods of time in which the claimant had disability, which basically constituted the periods during which the claimant was between jobs, and from the time his last job ended until the date of the hearing. (Pursuant to the decision and order, however, claimant's entitlement to temporary income benefits ceased on April 2, 1993, the date the hearing officer found him to have reached MMI.) The carrier contends that there is weak medical evidence to show that claimant was in any way limited in his ability to work; it also points to the fact that the claimant was

able to secure employment on several occasions and contends that the claimant has not met his burden to show that his lack of work was a result of his compensable injury rather than the general economy or his effort in seeking appropriate employment.

It was claimant's uncontroverted testimony that the nature of the work he did was on

a contract or per-project basis, and that he was able to complete each job he undertook subsequent to his injury. However, he also testified that the jobs he undertook frequently required climbing and overhead work and that such work was difficult for him due to his injury; despite his testimony that he tried to get "ground work," the evidence showed that he also accepted jobs which required more than work on the ground. Further, he testified that on more than one job his employer had to assign some of his duties to someone else, and that he had not been rehired when the crew moved to a new project. Controverting this, at least with regard to one job, was the (employer) letter that indicated that claimant had technical, although not physical, difficulties with that job. Claimant's testimony by itself, if credited by the hearing officer, would be sufficient evidence upon which to base a determination of disability, which can be established by a claimant's testimony alone. Texas Workers' Compensation Commission Appeal No. 91083, decided January 6, 1992. To the extent there is conflicting evidence in the record, that is a matter for the hearing officer, as sole judge of the weight and credibility of the evidence, to reconcile. *See* Section 410.165; Ashcraft v. United Supermarkets, Inc., 758 S.W.2d 375 (Tex. App.-Amarillo 1988, writ denied). Further, this panel has not unequivocally held that disability can never be established where there are reasons other than the compensable injury why the claimant cannot obtain and retain employment. We have held, for example, that a termination for cause does not, in and of itself, foreclose the existence of disability. Texas Workers' Compensation Commission Appeal No. 92200, decided July 2, 1992.

In addition to the foregoing, the evidence also showed that claimant's treating doctor had released him to limited duty work, or had declined to release him to work, except for the period between August 26, 1991 and November 19, 1991. As we have previously stated, "Where the evidence sufficiently establishes an unconditional medical release to return to full duty status of the employee, the employee has the burden to show that disability is continuing. . . Where the medical evidence is conditional and not a return to full duty status because of the compensable injury, disability, by definition, has not ended unless the employee is able to obtain and retain employment at wages equivalent to the preinjury wage. . . ." Texas Workers' Compensation Commission Appeal No. 91045, decided November 21, 1991. As noted earlier, the claimant's own testimony can establish disability even in absence of supporting medical evidence. As stated by the hearing officer in his statement of the evidence, except for the period noted above claimant's treating doctor "had him in a limited work status or the medical evidence indicates his inability to return to the full range of his former work activities." Our review of the record indicates that the hearing officer's findings on disability are not so against the great weight and preponderance of the evidence as to be manifestly unjust. Pool v. Ford Motor Company, 751 S.W.2d 659 (Tex. 1986).

The decision and order of the hearing officer are affirmed.

Lynda H. Nesenholtz
Appeals Judge

CONCUR:

Robert W. Potts
Appeals Judge

Gary L. Kilgore
Appeals Judge