APPEAL NO. 93965

This appeal arises under the Texas Workers' Compensation Act of 1989 (1989 Act), TEX. LAB. CODE ANN. § 401.001 *et seq*. (formerly V.A.C.S., Article 8308-1.01 *et seq*.) On September 24th and 27th, 1993, a contested case hearing was held in (city), Texas, with (hearing officer) presiding. She determined that respondent (claimant) had not reached maximum medical improvement (MMI) but did not have disability from (date of injury), through September 27, 1993. Appellant (carrier) asserts that MMI had been reached in December 1992 with no impairment and that claimant did not contest this rating; in addition carrier states that the opinion of the designated doctor is contrary to the great weight of other medical evidence. Claimant did not appeal the finding of no disability and responded that the initial rating was timely disputed and the designated doctor was entitled to presumptive weight.

DECISION

We affirm.

Claimant worked in an (Employer) outlet as a cashier and stocker. On (date of injury), he stated that he hurt himself while disposing of trash. While different areas of injury were mentioned, claimant consistently mentioned his neck, lower back, and right shoulder in the initial stages of treatment. No issue was raised as to whether an injury occurred on (date of injury), and the only issues at hearing were whether MMI had been reached, if so, what was the correct impairment rating, and whether claimant had disability from (date of injury), to the present.

Carrier states on appeal that the claimant was first given an impairment rating by (Dr. M) on December 11, 1992, and that timely dispute was not made. As a result, the designated doctor was not needed and claimant must be found to have reached MMI on December 11, 1992, with zero percent impairment. The carrier introduced its exhibit F, a four page report of Dr. M, dated December 11, 1992, which is marked at the bottom of page 4, "copy to (Dr. T) FAX 12/18/92." (Claimant was treated by (Dr. T)). This report states:

> (u)nless the patient participates in an active work hardening program, I believe that he has achieved maximum medical improvement at this time . . . . I see no objective basis at this time to say that the patient will have permanent physical impairment resulting from this injury.

As a separate exhibit, carrier also introduced a TWCC form 69 Report of Medical Evaluation, undated, which Dr. M signed saying MMI was reached on December 11, 1992, with zero percent impairment. This document has no legend on it as having been sent to claimant or his doctor.

Texas Workers' Compensation Commission Appeal No. 93259, decided May 17, 1993, pointed out that no impairment rating could become final if there were no valid certification of MMI. Without MMI, there is no impairment rating. In addition Texas Workers'

Compensation Commission Appeal No. 93705, decided September 27, 1993, stated that MMI was not reached when the doctor's opinion was not unconditional.

The narrative statement by Dr. M as to MMI was conditional and carrier's exhibit EE also shows that at some time prior to March 26, 1993, claimant was referred to a work hardening program - the event that Dr. M said would contradict that MMI was reached. In addition to the fact that MMI was, in effect, not certified as having been reached by the narrative of Dr. M, that same narrative is vague in regard to an impairment rating, not only in not stating what the percentage of impairment is, but also in saying "at this time" Dr. M can "see" no objective basis for a rating. This language reinforces the conditional nature of the opinion as to MMI. Without a valid determination of MMI, no impairment rating was assigned to claimant which he could then fail to dispute within 90 days.

The TWCC form 69 does not, in itself, carry any conditional features in regard to the statement of when MMI was reached. No statement on this form indicates that it was ever provided to claimant, however, and there is no legend on it that indicates transmission to the claimant. Texas Workers' Compensation Commission Appeal No. 92542, decided November 30, 1992, indicates that a party must be aware of the rating before the 90 day period can run. In addition, there was no indication that it was physically attached to the narrative or even that it was not composed at a later date. While claimant indicated some knowledge of a report by Mr. M at some time after December 11, 1992, he did not testify that he received a copy of the TWCC form 69. The narrative and the form were introduced as separate exhibits. Thus, while it is not always necessary to communicate an initial impairment rating to a claimant by providing a copy of the TWCC form 69, there is no evidence that the TWCC form 69 was ever provided to the claimant. Even if the TWCC form 69 and the narrative of the examination of December 11, 1992, were combined, the date of MMI could still be viewed as conditional, and invalid.

From the above, the hearing officer as fact finder, was not compelled to find that the claimant became aware of a first valid impairment rating on any particular date. The issues did not specifically include whether an initial rating had been disputed. As a result, a specific finding as to the 90 day period for disputing an initial rating was not necessary. By making no finding as to the 90 day period and by accepting the determination of the designated doctor, an implied finding can be made, consistent with the evidence, that the hearing officer determined that no valid impairment rating became final. (We note that claimant in its response refers to a document that may show claimant disputed the initial questionable rating in February, 1993; while such would be within the 90 day period, the record does not contain this document, and it will not be considered for the first time on appeal. There is no indication that the document would meet the test for a remand since it was in existence at the time of the hearing, there was no showing that it was not available to the claimant at that time, the claimant does not show that he could not obtain it earlier with due diligence, and it would not change the outcome of the decision).

In addition to its assertion that the 90 day rule made the impairment rating of Dr. M final, carrier also states that the designated doctor's opinion as to MMI is contrary to the great

weight of other medical evidence. In particular, carrier points out that the designated doctor, (Dr. C), based his opinion that MMI had not been reached on a problem claimant had with his left shoulder, whereas claimant had complained of his right shoulder. The hearing officer is the sole judge of the weight and credibility of the evidence. *See* Section 410.165. In regard to the extent of the injury, she is the fact finder, and no presumptive weight can be attributed to a designated doctor. The designated doctor is only entitled to presumptive weight as to his opinion of MMI and impairment rating. *See* Texas Workers' Compensation Commission Appeal No. 92617, decided January 14, 1993, in which the hearing officer re-opened the hearing to instruct the designated doctor to base his opinion as to MMI and impairment rating only on a certain area of claimant's body. The Appeals Panel affirmed that decision. *See also* Texas Workers' Compensation Commission Appeal No. 93735, decided October 4, 1993.

In this case, the claimant, prior to seeing Dr. C, had complained to (Dr. T) in March 1993 in regard to "left arm numbness" as shown in carrier's exhibits EE and M. In addition, after the designated doctor had provided his TWCC form 69 dated May 24, 1993, which stated, "needs treatment to the left shoulder . . . " in the space after "NO" in regard to whether maximum medical improvement had been reached, the parties met at a benefit review conference on July 16, 1993. At that conference the parties entered into an agreement that claimant's left knee was not injured on (date of injury). The agreement added, "he injured his neck, shoulder & back." Unlike the reference excluding an injury which specified a particular knee, the admission did not describe the shoulder; it also acknowledged that the neck had been injured. From the record, the hearing officer as finder of fact, could conclude that the injury to claimant included his left shoulder. (Texas Workers' Compensation Commission Appeal No. 93086, decided March 17, 1993, while affirming a hearing officer who found that areas of claimant's body, which claimant had been dilatory in mentioning, were not injured by a particular event, also pointed out that hearing officers had found compensable injuries to an area of the body not mentioned until over six months after injury.) There was sufficient evidence to support the hearing officer's finding of fact that the great weight of other medical evidence was not contrary to the designated doctor's opinion.

Finding that the decision and order of the hearing officer are not against the great weight and preponderance of the evidence, we affirm. *See* In re King's Estate, 150 Tex. 662, 244 S.W.2d 660 (1951).

Joe Sebesta
Appeals Judge

CONCUR:

Stark O. Sanders, Jr.
Chief Appeals Judge

Thomas A. Knapp
Appeals Judge