APPEAL NO. 94171

On December 28, 1993, a contested case hearing was held in (city), Texas, with (hearing officer) presiding as the hearing officer. The hearing was held under the provisions of the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq*. (1989 Act). The issue at the hearing was whether the respondent (claimant) timely disputed the "assignment" of maximum medical improvement (MMI) and impairment rating by his treating doctor. The hearing officer determined that the treating doctor's "findings" of MMI and impairment rating were invalid because the date of MMI was prospective. The hearing officer decided that because the "certification" of MMI and impairment rating were not valid, the claimant was not obligated to dispute the impairment rating, and further decided that the claimant remained entitled to temporary income benefits until disability ends or MMI is reached. The hearing officer ordered the appellant (carrier) to pay benefits in accordance with his decision and the provisions of the 1989 Act. The carrier disagrees with the hearing officer's decision and requests that we reverse it and render a decision in its favor or, in the alternative, reverse and remand for further proceedings. The claimant responds that the hearing officer's decision should be affirmed.

DECISION

The hearing officer's decision and order are affirmed.

The parties stipulated that the claimant was injured in the course and scope of his employment with the (employer) on (date of injury). The claimant fell at work and since that time has had neck pain which radiates into both arms.

Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 130.5(e) (Rule 130.5(e)) provides that "[t]he first impairment rating assigned to an employee is considered final if the rating is not disputed within 90 days after the rating is assigned."

"MMI" means the earlier of: (a) 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; or (b) the expiration of 104 weeks from the date on which income benefits begin to accrue. Section 401.011(30). "Impairment" means any anatomic 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).

Section 408.123(a) provides in part that "[a]fter an employee has been certified as having reached [MMI], the certifying doctor shall evaluate the condition of the employee and assign an impairment rating using the impairment rating guidelines described by Section 408.124." And, Section 408.123(b) provides in part that "[a] certifying doctor shall issue a written report certifying that [MMI] has been reached, stating the employee's impairment rating, and providing any other information required by the commission. . . ." (Underlining added.)

Rule 130.1(a) provides that a doctor who is required to certify, or who determines during the course of treatment, whether an employee has reached [MMI], or has an impairment, shall complete and file a medical evaluation report as required by this rule. Texas Workers' Compensation Commission (Commission) Form TWCC-69, Report of Medical Evaluation, is the Commission prescribed form for reporting the date the claimant has reached MMI and the claimant's impairment rating.

In a TWCC-69 dated August 24, 1992, the claimant's initial treating doctor,(Dr. G), reported that the claimant would reach MMI on September 15, 1992, with a two percent impairment rating. It appears from the record that Dr. G's two percent impairment rating was the first impairment rating assigned to the claimant. In Finding of Fact No. 5, the hearing officer found that on August 24, 1992, the claimant's treating doctor issued a statement that the claimant would reach MMI on September 15, 1992, with a whole body impairment rating of two percent. In its appeal, the carrier does not state any disagreement with Finding of Fact No. 5, and, in fact, states in its appeal that "[o]n August 24, 1992, claimant's treating physician, on form TWCC-69, stated that claimant would reach [MMI] on September 15, 1992, with a whole body impairment rating of 2%." It has been held that material fact findings that are not challenged on appeal are binding on the reviewing court and stand as the proven facts of the case. *See* Lovejoy v. Lillie, 569 S.W.2d 501 (Tex. Civ. App.-Tyler 1978, writ ref'd n.r.e.); Texas Workers' Compensation Commission Appeal No. 94146, decided March 23, 1994. Thus, in our review of the hearing officer's decision we take it as proven that on August 24, 1992, Dr. G certified MMI as of September 15, 1992, with a two percent impairment rating.

The carrier disagrees with the following findings of fact:

FINDINGS OF FACT

6.Claimant's certification of [MMI] and impairment rating was [sic] invalid because the date of [MMI] was prospective.

7.Because the certification of [MMI] and impairment rating were invalid it [sic] could not become final.

The carrier states in its appeal that it is unaware of any rule which states that a treating physician cannot certify that a claimant will reach MMI at some point in the future and that in this case Dr. G, the claimant's treating physician, certified that the claimant would reach MMI approximately three weeks after the certification was made.

In Texas Workers' Compensation Commission Appeal No. 93259, decided May 17, 1993, we reversed a hearing officer's decision that the MMI date and assignment of impairment rating by the claimant's treating doctor had become final under the provisions of Rule 130.5(e) and we rendered a decision that the MMI date and assignment of impairment rating were not final under the provisions of Rule 130.5(e) because the treating doctor had

provided a prospective date of MMI which we determined was not a valid certification of MMI and thus the impairment rating was not valid. We stated that:

> Under the 1989 Act, an impairment rating is assigned after there is a certification that MMI has been reached. Article 8308-4.26(d) [Now Section 408.123(a)]. Where, as here, the determination of MMI is to take place prospectively or in the future, a current date of MMI has not been certified and an impairment rating cannot be assigned. Dr. C's report, although on a Form TWCC-69, would indicate that there was no current MMI but that MMI would happen in the future. We have stated that an anticipated date of MMI is not a statement or certification that MMI has been reached. *See generally* Texas Workers' Compensation Commission Appeal No. 92627, decided January 7, 1993; Texas Workers' Compensation Commission Appeal No. 92198, decided July 3, 1992; Texas Workers' Compensation Commission Appeal No. 92127, decided May 15, 1992. With no valid MMI date, there can be no valid impairment rating under the circumstances. It follows that there was nothing to become final at the expiration of the 90 days and there was nothing for the claimant to dispute.

We conclude that our holding in Appeal No. 93259, *supra*, is dispositive of the carrier's contention on appeal. The treating doctor in this case made a prospective determination of MMI which was not a valid certification that MMI had been reached and thus the impairment rating assigned by the treating doctor was not valid and there was nothing to become final at the expiration of the 90-day period provided for in Rule 130.5(e).

The carrier's reliance on our decision in Texas Workers' Compensation Commission Appeal No. 92453, decided October 12, 1992, is misplaced. In that case, the designated doctor examined the claimant in June 1992 and certified that the claimant had reached MMI on February 3, 1992, as had previously been found by another doctor. In affirming the hearing officer's decision that the claimant had reached MMI on February 3, 1992, as reported by the designated doctor, we stated:

> In the present case, Dr. D, the designated doctor, examined the claimant on or about June 11, 1992, reported his findings, and opined the he agreed with Dr. A's certification of MMI, which was given as of February 3, 1992. In addition to considering the report of Dr. A, Dr. D indicates that he also examined x-rays taken by Dr. B and did not find any significant findings on them. Thus, Dr. D had a factual basis for his opinion that appellant reached MMI as of February 3, 1992. We do not find in the MMI provisions of the 1989 Act or in the Commission's rules, any provision which specifically restricts the designated doctor to certifying MMI only as of the date of his or her examination of the employee.

It is obvious that Appeal No. 92453, *supra*, concerned a situation where a designated doctor determined that MMI had been reached on a date earlier than the date of the

designated doctor's examination of the claimant and that we held that that would be appropriate where the designated doctor has a factual basis for his or her opinion that MMI had been reached at an earlier date than the date of examination. Thus, in Appeal No. 92453 the doctor was in fact certifying that MMI had been reached and was not making a determination that MMI would be reached at some date in the future, as is the situation in the present case. As previously noted, we have held that an anticipated date of MMI is not a statement or certification that MMI has been reached.

Since the hearing officer did not decide this case on the basis of a possible exception to Rule 130.5(e) as was discussed in Texas Workers' Compensation Commission Appeal No. 93489, decided July 29, 1993, we do not here consider that matter. We simply observe that following the treating doctor's report of August 24, 1992, additional diagnostic tests were performed which revealed disc protrusions and bilateral foraminal stenosis, a referral doctor recommended surgery, the treating doctor then stated in April 1993 that the claimant had not reached MMI and concurred with the surgery recommendation, and neck surgery was performed in August 1993.

The hearing officer's decision and order are affirmed.

Robert W. Potts
Appeals Judge

CONCUR:

Philip F. O'Neill
Appeals Judge

Thomas A. Knapp
Appeals Judge