APPEAL NO. 94173

This appeal arises under the Texas Workers' Compensation Act of 1989 (1989 Act), TEX. LAB. CODE ANN. § 401.001 *et seq*. On November 5, 1993, and January 5, 1994, a contested case hearing was held in (city), Texas, with (hearing officer) presiding. He determined that appellant (claimant) reached maximum medical improvement (MMI) on December 15, 1992, with eight percent impairment. Claimant appeals both the MMI date and impairment rating, particularly pointing out that the designated doctor was only requested to provide an impairment rating. Respondent (carrier) replies that the decision should be affirmed.

DECISION

We reverse and remand.

Claimant was injured on (date of injury), when struck in the back at work for (employer). On August 11, 1993, (Dr. S) was appointed the designated doctor for "percentage of impairment only." At the hearing on November 5, 1993, the hearing officer recited that the disputed issue concerned the claimant's impairment rating. The hearing officer added an issue of MMI, to which both parties agreed. It was proper for the hearing officer to make findings of fact and a decision as to both issues.

Error occurred when the hearing officer indicated in Finding of Fact No. 9, that he treated the issue of MMI in the context of giving presumptive weight to the opinion of the designated doctor. Finding of Fact No. 9 read:

The great weight of other medical evidence is not sufficient to contradict the finding of maximum medical improvement as determined by the designated doctor.

Texas Workers' Compensation Commission Appeals No. 93710, decided September 28, 1993, and Texas Workers' Compensation Commission Appeal No. 93910, decided November 22, 1993, held that the designated doctor's opinion is entitled to presumptive weight only for an impairment rating or MMI when the doctor is appointed to provide such an opinion. As stated, Dr. S was only designated to provide an opinion as to impairment rating. As such, the issue of MMI should have been decided on the basis of preponderance of the evidence when the hearing officer had considered all the medical evidence, including that of the designated doctor.

The finding of fact that the impairment rating of the designated doctor is not contrary to the great weight of the other medical evidence is sufficiently supported by the evidence. The hearing officer is the sole judge of the weight and credibility of the evidence. *See* Section 410.165. The hearing officer considered this question and applied the correct standard. *See* Texas Workers' Compensation Commission Appeal No. 93031, decided February 25, 1993, which noted that the legislature in the 1989 Act chose to give presumptive weight to the designated doctor, rather than to a treating doctor, who should be more familiar with the treatment accorded the claimant.

The decision and order are reversed and the case is remanded for reconsideration of the evidence in regard to when MMI was reached. In reconsidering the evidence under the preponderance of the evidence standard, the hearing officer may make additional or different findings of fact and conclusions of law. 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.

Joe Sebesta
Appeals Judge

CONCUR:

Thomas A. Knapp
Appeals Judge

DISSENTING OPINION:

I would affirm the hearing officer. Even if there was error in the standard of weighing that he used, in that the designated doctor was not specifically appointed to determine "an issue" of MMI, there is no indication on this record that the use of this standard probably rendered an incorrect result.

The claimant's treating doctor originally certified MMI as of December 15, 1992; the designated doctor merely agreed with this when she rendered her opinion. The treating doctor subsequently gave an opinion that the same percentage impairment was also in existence on August 24, 1993. Although the claimant argues that this was a change in the treating doctor's opinion, I respectfully suggest that it is consistent with the opinion that MMI was reached on a earlier date. Indeed, the treating doctor, in his narrative report attached to his TWCC-69 which lists MMI on August 24, 1993, concurs with a consulting doctor's impairment rating opinion which certified MMI on June 14, 1993. This indicates to me that the treating doctor does not intend his August 24th date to stand as the date MMI was first reached. Statutory MMI was reached in March 1993.

An important aspect of the "date" of MMI that is sometimes overlooked is that if MMI is truly reached on a certain date, a doctor who examines an injured worker thereafter should

also be able to certify that MMI exists on a subsequent date. The fact that the same impairment rating was found by the treating doctor on each date he certified establishes the accuracy of the first date. I do not think it can be automatically assumed, absent an express recision of an earlier date, that a doctor who issues a second opinion with a later MMI date has necessarily changed his original opinion. In reviewing the claimant's testimony, it appears that much of the reason he believes he had not reached MMI or had a greater impairment was because he continues to experience pain. We have stated before 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.

Because of this, I believe that review under even a preponderance standard yields a finding that MMI was reached December 15, 1992. Mindful that the Appeals Panel has attempted not to become the fact finder, I would nevertheless point out that we aren't becoming fact finders by acknowledging the preponderance of the evidence in such a case as this. Because statutory MMI was reached in March 1993, the hearing officer is not free to weigh either a June or August date as an alternative. Neither of those later dates was qualified as the date MMI was first reached. The 15% impairment rating found was the same as that found on December 15, 1992, which affirms the accuracy of the first date. Between December 15, 1992, and the date of statutory MMI, the earlier date is the one supported by the preponderance of the evidence. While I believe it is important for hearing officers to apply the correct standard, I am disinclined to remand where there is no indication that the error was harmful, in other words, led to an incorrect result.

Susan M. Kelley
Appeals Judge