APPEAL NO. 94352

On January 28, 1994, 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 issues at the hearing were: (1) whether the appellant (claimant) reached maximum medical improvement (MMI), and if so, on what date; (2) the claimant's impairment rating; and (3) whether the claimant had disability from January 28, 1992, through May 28, 1993. The hearing officer found that the claimant reached statutory MMI on May 31, 1993, with a 14% impairment rating, and further found that the claimant had disability from May 18, 1992, through May 31, 1993. The hearing officer decided that the claimant is entitled to temporary income benefits (TIBS) for the period of disability found, and that the claimant is entitled to 42 weeks of impairment income benefits (IIBS) based on the 14% impairment rating. The carrier disagrees with the hearing officer's decision and requests that we reverse it and render a decision that the claimant reached MMI on February 27, 1992, or, in the alternative, on May 14, 1992, with a four percent impairment rating. Alternatively, the carrier requests that we remand the case for further development of the evidence. No response was filed by the claimant.

DECISION

Affirmed.

On (date of injury), the claimant was employed by the employer, (employer), as a drill press operator. On that day, he was injured at work when a heavy item he was working on hit him in the right knee. Carrier reports indicate that income benefits began to accrue on May 28, 1991. The claimant went to (Dr. D) who referred him to (Dr. G). Dr. G diagnosed an internal derangement of the right knee and phlebitis of the right leg. On September 10, 1991, Dr. G performed an arthroscopy procedure on the claimant's right knee which revealed that the knee joint was normal except for the medial meniscus which had a "bucket-handle tear that had become very degenerated" for which a partial medial meniscectomy was done.

On October 10, 1991, Dr. G performed a second medial meniscectomy on the right knee for a torn medial meniscus. In this operation, the degenerating posterior horn of the medial meniscus was excised in multiple fragmented pieces. Dr. G noted that the claimant had chondromalacia of the medial femoral condyle that was not treated. In an undated Report of Medical Evaluation (TWCC-69) which was received by the Texas Workers' Compensation Commission (Commission) on January 27, 1992, Dr. G noted that the claimant was complaining of soreness and stiffness, and Dr. G reported that the claimant had not reached MMI. Dr. G said he had no objection to the claimant answering telephones at work.

The claimant testified that he did return to work for his employer in January 1992 and that he was given a desk job answering the telephone at his pre-injury wage. The claimant

said he was terminated one to three months later because he was unable to obtain a full work release. Reports from the employer stated that the claimant returned to light duty on January 29, 1992, and was terminated on March 6, 1992, when "light duty" ran out and "due to reduction in force." The claimant said that although he was unable to work because of his knee injury, he nevertheless looked for work but found none until October 1993 when he got a part-time job as a hotel bellman. The claimant said that at some of the places he applied he mentioned his knee injury and he believes he was not hired at those places because of his injury. The claimant said he was terminated from his bellman job in December 1993 or January 1994.

At the request of the carrier, the claimant was examined by (Dr. C) on February 17, 1992, and in an undated TWCC-69, which is stamped as being received by the Commission on March 2, 1992, Dr. C reported that the claimant had not reached MMI and gave an estimated date of MMI of May 17, 1992. He also reported that the claimant had a four percent impairment rating. In a narrative report dated February 17, 1992, Dr. C did not mention MMI but stated that the claimant has a four percent impairment rating for a specific disorder of the knee, the loss of his medial meniscus.

In an undated TWCC-69 which was received by the Commission on February 28, 1992, Dr. G, the initial treating doctor, stated that he had last examined the claimant on February 24, 1992. Dr. G reported that the claimant had reached MMI, but failed to specify the date MMI was reached in the space on the form for reporting that information. Dr. G assigned the claimant a four percent impairment rating.

On April 2, 1992, the carrier sent Dr. C's TWCC-69 to Dr. G and asked Dr. G if he agreed or disagreed with the report. At the bottom of this letter, Dr. G wrote a note dated April 7, 1992, stating "[s]ee my TWCC 69 dated 2-24-92 (agree 4%)." In an undated TWCC-69 which was received by the Commission on May 15, 1992, Dr. G stated that he had last examined the claimant on May 13, 1992, and that he agreed with Dr. C's "previous report." Dr. G reported that the claimant had reached MMI on May 14, 1992, with a four percent impairment rating.

In interrogatories the carrier asked the claimant when he became aware that Dr. G had certified MMI with a four percent impairment rating. The claimant answered that it was in May of 1992. The carrier also asked the claimant when he first let the Commission and carrier know that he disagreed with Dr. G's certification of MMI and four percent impairment rating. The claimant answered that it was in July of 1993.

In a Payment of Compensation or Notice of Refused/Disputed Claim form (TWCC-21) dated May 21, 1992, which indicates that a copy was sent to the claimant, the carrier notified the Commission that it was terminating TIBS and starting payment of IIBS for the reason that MMI was reached on May 17, 1992. The claimant testified that he received 12 weeks of IIBS, which would be the amount owed for a four percent impairment. A TWCC-

21 dated August 14, 1992, indicates that the last IIBS payment was made on August 8, 1992.

The claimant testified that the reason he did not go to a doctor for about a year after he was last seen by Dr. G was because, after he was paid his 12 weeks of IIBS, he talked to (JC), who is an adjustor for the carrier, and JC told him that he was not entitled to any more benefits and could no longer see any doctors. The claimant further testified that during some unspecified time period prior to January 1993, his knee swelled up and he went to an attorney who told him he was entitled to lifetime medical treatment for his work-related injury. The claimant said that Dr. G, who had retired in December 1992, referred him to Dr. C, the doctor he had previously seen at the request of the carrier. After finding out that he was entitled to lifetime medical benefits for his work-related injury, the claimant said he contacted JC in January 1993, and JC told him that if he agreed to see Dr. C, the carrier would start his benefits again.

The claimant said that he did agree to see Dr. C and that benefits where restarted. In a TWCC-21 dated March 31, 1993, the carrier notified the Commission that it had resumed payment of TIBS on March 10, 1993; that it would use "reasonable judgment as to MMI;" and that IIBS would be based on Dr. C's future impairment rating, if any. The claimant said that his resumed income benefits were stopped in July or August of 1993 when the carrier informed him that he had reached statutory MMI at 104 weeks.

In reports dated June 23 and July 6, 1993, Dr. C noted that the claimant had a torn medial meniscus and a torn lateral meniscus of the right knee. In an operation report dated July 13, 1993, Dr. C reported that he performed a surgical procedure on the claimant's right knee consisting of an arthroscopy with partial medial meniscectomy, arthroscopic debridement, and removal of loose bodies. In the operation report, Dr. C noted that he removed several loose bodies from the knee joint. He also noted that the medial joint line demonstrated that the front half of the meniscus had been surgically removed and that the last of the meniscus was intact but was torn. He further noted that the tear sat in front of the bucket-handle tear. The claimant underwent physical therapy for his knee in July and August 1993, and the physical therapist noted significant improvement in the claimant's condition.

In a patient note dated August 18, 1993, Dr. C said that it would take six months for the right knee to heal. Then, in a TWCC-69 dated September 10, 1993, Dr. C reported that the claimant reached MMI on September 10, 1993, with a zero percent impairment rating; however, in a narrative report also dated September 10, 1993, Dr. C explained that the claimant has a four percent impairment rating, but since the claimant had already been paid for a four percent impairment rating he was assigning a zero percent rating.

In a TWCC-21 dated August 16, 1993, the carrier reported to the Commission that it was terminating TIBS because statutory MMI had been reached at 104 weeks. The carrier

noted that TIBS had been paid from May 28, 1991, to January 28, 1992 (when the claimant returned to light duty), and from March 10, 1993, to August 1, 1993.

By letter dated October 6, 1993, the Commission notified the claimant and the carrier that it had received a notice of dispute over MMI and/or impairment rating (there is no indication in the letter as to who disputed what) and that the Commission was selecting (Dr. CA) as the designated doctor to determine the "percentage of impairment and confirmation of [MMI] date."

In a TWCC-69 dated October 21, 1993, Dr. CA reported that the claimant reached MMI on May 8, 1993, with a 14% impairment rating. In a narrative report attached to the TWCC-69, Dr. CA stated "he was not in fact at maximal [sic] medical improvement after his first surgery as Dr. G [sic] had apparently stated. He did reach the 104 week statute as of May 8, 1993. That was near the time of his surgery with [Dr. C] so he actually reached his MMI date per statute on 05/08/93."

In a TWCC-21 dated November 11, 1993, the carrier stated that it was disputing the 14% impairment rating assigned by Dr. CA because no breakdown of the rating was provided, and because the 14% rating was significantly different than the ratings given by the treating doctors. The carrier also contended that the first impairment rating was given on February 24, 1992, that MMI was found on that date, and that that rating was never disputed and was final.

The benefit review officer (BRO) noted in the report of the benefit review conference (BRC) held on December 14, 1993, that in regard to the issue of MMI, it was the claimant's position that he did not reach MMI until he reached statutory MMI on May 28, 1993, that Dr. G's initial MMI date was not reasonable in light of his subsequent surgery, and that the Commission should accept the designated doctor's date of MMI. The carrier's position was stated to be that the date of MMI was May 14, 1992, as reported by Dr. G, because the "original certification" was not disputed within 90 days. In regard to impairment rating, the BRO reported that neither party agreed with Dr. CA's 14% impairment rating. The disability issue was added as an issue at the hearing upon the agreement of the parties.

In yet another TWCC-69, dated December 14, 1993, Dr. G reported that the claimant reached MMI on May 14, 1992, with a four percent impairment rating, and stated that the report was a duplicate of the TWCC-69 which was originally completed and mailed to the claimant, the carrier, and the Commission on May 14, 1992. The TWCC-69 is shown as having been received by the carrier's attorney on January 25, 1994. The TWCC-69 of December 14, 1993, contains the same information as was in the original TWCC-69, that is, the diagnosis is torn medial meniscus treated by a meniscectomy, the last examination was on May 13, 1992, and Dr. G said he agreed with Dr. C's "previous report." There is no indication on this "duplicate" report that Dr. G was aware that the claimant had undergone additional surgery in July 1993.

On December 16, 1993, the BRO wrote to Dr. CA, the designated doctor, requesting clarification of the 14% impairment rating. By letter dated December 30, 1993, Dr. CA responded that the impairment rating was composed of 20% for a specific disorder of the right knee (two torn menisci) and 18% for loss of range of motion of the right knee, which when combined in accordance with the combined values chart yielded a 34% impairment of the lower extremity, and resulted in a 14% impairment of the whole body.

The claimant testified that he still has pain and cannot work and that Dr. C told him in July 1993 that he will eventually need an artificial knee.

At the hearing, the claimant said he agrees with the report of the designated doctor, Dr. CA. The carrier argued that the great weight of the medical evidence was against the designated doctor's impairment rating of 14%, that the claimant was "bound" by the "initial impairment rating assigned" by Dr. G (it did not indicate what report contained the "initial" impairment rating but urged that Dr. G had assigned a four percent impairment rating on February 24, 1992, and had assigned a four percent impairment rating on May 14, 1992, and that the four percent impairment rating had never been disputed); and that the claimant did not have disability after January 28, 1992.

The hearing officer decided that the claimant reached statutory MMI on May 31, 1993, with a 14% impairment rating, and that the claimant had disability from May 18, 1992, through May 31, 1993.

We first address the carrier's contention that the hearing officer erred in not admitting into evidence Carrier's Exhibit No. 8 which is a "to whom it may concern" letter dated January 25, 1994, from (JA), a carrier claims representative. The letter states that a review of activity notes in the claimant's file maintained by the carrier indicates that the claimant contacted JC (the prior adjustor) on May 19, 1992, by telephone, and that at that time IIBS were explained to the claimant. The letter goes on to state that a further review of notes and documents in the file did not reveal any discussion of an intent to dispute the "original impairment rating" nor any correspondence which indicated a dispute had been filed by the claimant. JA added that the carrier did not file a dispute of the rating issued by Dr. G.

The record indicates that the carrier gave this letter to the claimant on the day of the hearing, January 28, 1994. The claimant objected to its introduction into evidence on the grounds that it had not been timely exchanged. The carrier's attorney asserted that there was no late exchange because the letter was exchanged when he received it from the carrier. The carrier's attorney explained that he had been in contact with JA for several weeks in regard to getting some kind of note as to when the claimant contacted the carrier, however, JA did not write the letter until January 25, 1994. The carrier's attorney acknowledged that the carrier had not exchanged the underlying notes and documents referred to in the letter.

The hearing officer ruled that the carrier had not shown good cause for failing to timely exchange the exhibit and excluded it from evidence. On appeal, the carrier asserts that there was no late exchange because the document was exchanged with the claimant as soon as practicable after it was generated. The carrier cites Texas Workers' Compensation Commission Appeal No. 93921, decided November 30, 1993, in support of its contention that it timely exchanged the document. In Appeal No. 93921, we held that the hearing officer did not err in finding good cause for the claimant's failure to exchange, until the day of the hearing, a letter from a doctor which was dated four days before the date of the hearing. We stated that Section 410.160 regarding exchange of information prior to a hearing, except for the identity and location of witnesses, clearly focuses on documents, and that the carrier had cited no authority for the proposition that a party will run afoul of the exchange requirement if the party does not, early on, cause a document to be created that can then be exchanged. We further stated that "[g]iven that Section 408.025 requires a health care provider to supply requested treatment information to either an injured employee or the carrier, it is not clear that either party has superior "control" over such information so as to consciously elude the exchange requirements."

We find the facts of the present case to be vastly different than the facts of Appeal No. 93921. In Appeal No. 93921, the issue involved the timely exchange of a document created by a nonparty shortly before the hearing date. In the instant case, a party, that is the carrier, did not exchange the underlying documents that form the basis for JA's letter, which documents were in existence and in the custody and control of the carrier for over a year and a half before the hearing, and waited until shortly before the hearing to summarize the information contained in those documents and to exchange the written summary on the day of the hearing. Under these circumstances, we find no abuse of discretion on the part of the hearing officer in finding that the carrier did not have good cause for failing to timely exchange the document offered by the carrier.

We next address the carrier's contention that the hearing officer improperly placed the burden of proof on it in regard to Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 130.5(e) which 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." At the outset of the hearing the hearing officer stated that "[t]o the extent that a designated doctor's report is involved, the burden is by the great weight of the other medical evidence," and further stated that "[t]he order of proceedings today will be reversed, since this is a carrier-requested hearing, and the carrier is attacking the designated doctor's report." It is obvious that the hearing officer was placing the burden of proof on the carrier to show that the great weight of the medical evidence was contrary to the report of the designated doctor.

The carrier agrees in its appeal that that would be proper if the issue of impairment rating involved only the report of the designated doctor; however, the carrier points out that the issue of impairment rating in this case also involved the 90-day dispute provision which was asserted by the carrier at the BRC and at the hearing. Contrary to the carrier's assertion, there is no discussion in the record or in the hearing officer's decision as to where

he placed the burden of proof on the 90-day dispute provision. In Texas Workers' Compensation Commission Appeal No. 93111, decided March 29, 1993, the employee contended that the carrier had not timely disputed the first impairment rating assigned to her. In affirming the hearing officer's decision that the carrier had timely disputed the rating, we stated "[t]he hearing officer properly declared at the opening of the hearing that the burden of proof was on the carrier in this case since it was attempting to meet the conditions for timely disputing an impairment rating under Rule 130.5."

In the instant case, the Commission had appointed a designated doctor whose report is entitled to presumptive weight, unless the great weight of the other medical evidence is contrary to the report. The carrier contended that the great weight of the medical evidence was contrary to the report of the designated doctor, and the record reflects that the hearing officer placed the burden on the carrier to prove that the great weight of the medical evidence was contrary to the report of the designated doctor. At the hearing, the carrier did not object to presenting its case first nor did it request additional instructions from the hearing officer as to where the burden lay in regard to what the carrier refers to as "the ninety day defense." No mention was made as to the burden of proof under Rule 130.5(e). The carrier has failed to demonstrate that its case was prejudiced, and we cannot conclude that the carrier has shown reversible error in regard to its burden of proof point on appeal.

The carrier next contends that the hearing officer erred because he made no finding as to whether the claimant "timely disputed [Dr. G's] TWCC-69s." The carrier argues that the claimant reached MMI on February 27, 1992, and, if that MMI date is invalid, then the claimant reached MMI on May 14, 1992. The carrier also takes issue with the hearing officer's conclusion of law that Dr. G's May 14, 1992, report was invalid.

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). MMI at 104 weeks is known as statutory MMI. As previously noted, Rule 130.5(e) provides that the first impairment rating assigned to an employee is considered final if the rating is not disputed within 90 days after the rating is assigned. We have held that if the impairment rating becomes final under Rule 130.5(e), so does the underlying finding of MMI. Texas Workers' Compensation Commission Appeal No. 92670, decided February 1, 1993. In addition, we have held that the time period for disputing the first impairment rating runs from the time the claimant becomes aware of the impairment rating. Texas Workers' Compensation Commission Appeal No. 92693, decided February 8, 1993.

Dr. G's initial TWCC-69, which was received by the Commission on January 27, 1992, reported that the claimant had not reached MMI. Dr. C's narrative report of February 17, 1992, reports that the claimant has a four percent impairment rating, but makes no mention of MMI, and his TWCC-69, which was received by the Commission on March 2, 1992, gives an estimated date of MMI of May 17, 1992, with a four percent impairment

rating. We have previously held that an estimated or expected date of MMI is not a date that MMI was reached. Texas Workers' Compensation Commission Appeal No. 92198, decided July 3, 1992. And, we have held that an impairment rating is not assessed until MMI is reached. Texas Workers' Compensation Commission Appeal No. 92517, decided November 12, 1992. Dr. G's second TWCC-69, which was received by the Commission on February 28, 1992, reported that the claimant had reached MMI, with a four percent impairment rating, but, as noted in the hearing officer's decision, Dr. G failed to state the date MMI was reached. We have previously observed that, because entitlement to IIBS begins the day after the employee reaches MMI, it is important to establish an MMI date. Texas Workers' Compensation Commission Appeal No. 92650, decided January 20, 1993. The TWCC-69 form specifically requests that a date of MMI be given if MMI is found to have been reached. Dr. G did not report on his second undated TWCC-69 that the claimant had reached MMI on February 27, 1992, as asserted by the carrier in its appeal (although he did state that he last examined the claimant on February 24, 1992).

Dr. G's third TWCC-69, which was received by the Commission on May 15, 1992, reported that the claimant had reached MMI on May 14, 1992, with a four percent impairment rating. The hearing officer made no finding as to when the claimant became aware that Dr. G had certified MMI with a four percent impairment rating, but in his discussion of the case, the hearing officer stated that "I find that claimant did receive the certification of MMI." He did not give a date of receipt. However, we think it is clear from the claimant's answers to the carrier's interrogatories that the claimant was aware sometime in May 1992 that Dr. G had certified MMI with a four percent impairment rating and that the claimant did not dispute the certification of MMI or impairment rating until July 1993, which was more than 90-days from the date he became aware that Dr. G had certified MMI with a four percent impairment rating. Thus, Dr. G reported in both his second and third TWCC-69's that the claimant had reached MMI with a four percent impairment rating, but he failed to state the date of MMI in the second TWCC-69 and, presupposing that a date of MMI could be found from the second TWCC-69, that date was amended by Dr. G when he completed the third TWCC-69 within 90 days of the second TWCC-69 and gave the date of MMI as May 14, 1992. The four percent impairment rating assigned to the claimant in Dr. G's third TWCC-69, was the first impairment rating assigned to the claimant which had an underlying date of MMI set forth on the report which was not an estimated date of MMI.

Although no express finding was made by the hearing officer as to whether the claimant disputed Dr. G's report within 90 days, the evidence is clear that he did not. However, if the expiration of the 90-day period were found not to be dispositive because the evidence showed that Dr. G's findings were invalid based on criteria set forth in our prior decisions, then the MMI date and impairment rating would not be final under Rule 130.5(e). *See* Texas Workers' Compensation Commission Appeal No. 93489, decided July 29, 1993; Texas Workers' Compensation Commission Appeal No. 94268, decided April 19, 1994; Texas Workers' Compensation Commission Appeal No. 93501, decided August 2, 1993.

In Appeal No. 93489, *supra*, we upheld a hearing officer's decision that the initial treating doctor's certification of MMI and assignment of an impairment rating became final under Rule 130.5(e) because the injured employee had not disputed the initial certification of MMI and assignment of impairment rating within 90 days. However, in affirming the hearing officer's decision we stated that:

> While giving a strict application to the provisions of Rule 130.5 and recognizing that the application of time limits can, by their very nature, appear to be harsh in a given case, there is a sound basis, as apparently determined by the Commission, to require some definitive finality in resolving claims. Nevertheless, the application of Rule 130.5 is not absolute and Appeal No. 92670 does not so hold. For example, if an MMI certification or impairment rating were determined, based on compelling medical or other evidence, to be invalid because of some significant error or because of a clear misdiagnosis, then a situation could result where the passage of 90 days would not be dispositive. However, the particular circumstances must be evaluated in such situation. We do not find that to be the case here. Rather, we find there is sufficient evidence to support the hearing officer's decision.
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> In the case at hand, there is not compelling evidence of a new, previously undiagnosed, medical condition or prior improper or inadequate treatment of the claimant's injury which would render the certification of MMI invalid.

We note that in Texas Workers' Compensation Commission Appeal No. 94049, decided February 18, 1994, wherein we affirmed a hearing officer's decision that the initial impairment rating had become final under Rule 130.5(e), we stated:

> We do not read Appeal No. 93489 as carving out broad new general categories of exceptions to Rule 130.5(e). Rather, we view that case as saying there may, under some circumstances, be such egregious medical conditions as to compel a finding that the passage of 90 days under Rule 130.5(e) would not be dispositive.

In its appeal, the carrier states that Conclusion of Law No. 2 that Dr. G's certification of MMI on May 14, 1992 is invalid, "is actually a finding that it was not sufficient to overcome the designated doctor's report. This does not mean that it was not valid ab initio; it must be considered by the Commission for purposes of Rule 130.5(e)." However, the carrier does not challenge the hearing officer's finding that the claimant's knee condition was inadequately treated prior to certification of MMI by Dr. G, nor does it challenge the finding that there is compelling medical evidence that the claimant was not at MMI on May 14, 1992. 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. Although these fact findings have not been challenged on appeal, we nonetheless observe that the evidence showed that after Dr. G reported that the claimant had reached MMI the claimant was diagnosed as having a tear of the lateral meniscus as well as the previously diagnosed tear of the medial meniscus; that the claimant underwent a third knee surgery which revealed that the last of the meniscus was torn; that the claimant was reported to have significantly improved after the third surgery; and that the designated doctor opined that the claimant was not at MMI following Dr. G's surgery.

The hearing officer is the sole judge of the weight and credibility to be given to the evidence. Section 410.165(a). Where there are conflicts and contradictions in the evidence, it is the duty of the finder of fact, in this case the hearing officer, to consider the conflicts and contradictions and determine what facts have been established. St. Paul Fire & Marine Insurance Company v. Escalera, 385 S.W.2d 477 (Tex. Civ. App.-San Antonio 1964, writ ref'd n.r.e.). We have repeatedly held that we will not substitute our judgment for that of the hearing officer in factual determinations because we have no sound basis to disturb the hearing officer's decision unless it is so against the great weight and preponderance of the evidence as to be clearly wrong and manifestly unjust. Texas Workers' Compensation Commission Appeal No. 931097, decided January 14, 1994; Texas Workers' Compensation Commission Appeal No. 93994, decided December 8, 1993. Having reviewed the record we cannot conclude that the hearing officer's findings in regard to inadequate treatment and compelling medical evidence that the claimant was not at MMI on May 14, 1992, are so against the great weight and preponderance of the evidence as to be clearly wrong or manifestly unjust. These findings, which are unchallenged on appeal, support the hearing officer's conclusion that Dr. G's report of MMI was invalid. *See e.g.* Texas Workers' Compensation Commission Appeal No. 931115, decided January 20, 1994; Appeal No. 94268, *supra*; Appeal No. 93501, *supra*; and Appeal No. 93489, *supra*. Thus, the fact that the claimant did not dispute Dr. G's report of MMI within 90 days was not dispositive on the issues of MMI and impairment rating. We do not find Texas Workers' Compensation Commission Appeal No. 93979, decided December 14, 1993, which is cited by the carrier, to be controlling under the facts presented in this case, because Appeal No. 93979, did not involve the invalidity of a doctor's report of MMI based on circumstances as are discussed in Appeal No. 93489, *supra*, as is the case before us.

We next address the carrier's contention that the hearing officer erred in finding that the claimant reached statutory MMI on May 31, 1993, with a 14% impairment rating. Under the 1989 Act, the report of a designated doctor who is selected by the Commission to determine MMI and impairment rating is entitled to presumptive weight, unless the great weight of the medical evidence is contrary to the report. Sections 408.122(b) and 408.125(e). No other doctor's report, including that of a treating doctor, is entitled to presumptive weight. Texas Workers' Compensation Commission Appeal No. 92412, decided September 28, 1992. It takes more than a preponderance of the medical evidence to overcome the report of a designated doctor. Appeal No. 92412, *supra*. Having

reviewed the record, we cannot conclude that the hearing officer erred in finding that the report of the designated doctor is not contrary to the great weight of the medical evidence, and in according presumptive weight to the report of the designated doctor. We observe that the designated doctor found that the claimant had reached statutory MMI, but erroneously counted the 104 weeks from the date of injury instead of from the date income benefits began to accrue. *See* Section 401.011(30)(b). The hearing officer recognized that mistake and determined that statutory MMI was reached on May 31, 1993, (the carrier does not complain of how the 104 week time period was computed by the hearing officer), and further determined that the claimant has a 14% impairment rating as reported by the designated doctor.

We also point out that the finding of statutory MMI is consistent with the position taken by the carrier in its TWCC-21 dated August 16, 1993. It appears that the carrier was willing to concede that the claimant reached MMI at 104 weeks, and not at the time reported by Dr. G, up until the time the designated doctor assigned a 14% impairment rating.

The carrier does not contest the hearing officer's finding or conclusion that the claimant had disability from May 18, 1992, through May 31, 1993. Accordingly, since the claimant did not reach MMI until May 31, 1993, the claimant is entitled to TIBS for the period of disability found by the hearing officer. Section 408.101(a) provides that an employee is entitled to TIBS if the employee has a disability and has not attained MMI.

The hearing officer's decision and order that the claimant reached statutory MMI on May 31, 1993, with a 14% impairment rating, and that the claimant is entitled to TIBS from May 18, 1992, through May 31, 1993, are affirmed.

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Robert W. Potts
Appeals Judge

CONCUR:

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Alan C. Ernst
Appeals Judge

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Tommy W. Lueders
Appeals Judge