APPEAL NO. 94363

This appeal arises under the Texas Workers' Compensation Act of 1989, TEX. LAB. CODE ANN. § 401.001 *et seq.*, (1989 Act). On December 2, 1993, a contested case hearing was held in (city), Texas, with (hearing officer) presiding. He kept the record open until February 18, 1994, for additional evidence and then determined that claimant reached maximum medical improvement (MMI) for her right hand only on March 4, 1993 (this date was misstated as 1991) with a hand impairment rating (IR) of six percent, that claimant reached statutory MMI on August 17, 1993, but concluded that claimant's whole body impairment could not be determined. Appellant (carrier) asserts that the certification of MMI on March 4, 1993, with an IR of six percent became final. Respondent (claimant) replies that her psychological problems together with medical evidence she submitted support the decision of the hearing officer which should be affirmed.

DECISION

We reverse and render.

Claimant suffered a serious injury while working for (employer). On (date of injury), after having worked approximately 20 years, claimant tripped while at work and apparently tried to steady herself with her right hand; her hand was caught in exposed machinery causing the eventual loss of her fifth finger and extensive damage to the third and fourth fingers. She was hospitalized and had surgery. Her treating doctor, (Dr. D) prescribed physical therapy and then referred her to a psychologist, (Dr. deS). Approximately 18 months later, on March 8, 1993, Dr. D signed a Report of Medical Evaluation (TWCC-69), which stated that claimant reached MMI on March 4, 1993, with six percent impairment. Dr. D's narrative attachment to the TWCC-69 said that claimant had been treated for an "extended period of time." He referred to the surgery on her hand and subsequent amputation of one finger, along with "a prolonged rehabilitation program, both psychological and physical." He discussed claimant's dexterity. He closed his report by saying, "No other medical care will be necessary on this individual. I have released her from my care. She continues under the care of [Dr. deS] and she will return to see me only as needed."

The hearing officer stated that the issues were: (1) what is claimant's correct IR?, and (2) what is claimant's correct date of MMI? The benefit review officer's report was admitted as a hearing officer exhibit and it showed, in regard to the issue of MMI, claimant's position to be that she disputed MMI; carrier's position was that MMI was reached on March 4th and not disputed. In regard to the IR, claimant's position was that she disputed the six percent; carrier's position was that the IR became final for lack of timely dispute. In addition, the question of whether the claimant disputed the first IR within 90 days was a primary focus of litigation at the hearing. The hearing officer did not make a finding of fact directly as to whether the first IR was timely disputed or became final, but found that such MMI date of March 4, 1993, and IR of six percent occurred but applied only to the right hand. Finding of Fact No. 5 read:

On March 4, 1991, claimant reached MMI for the injury to her right hand only and retained a 6% [IR] to her hand only.

The hearing officer did state in the "Discussion" part of his opinion:

[Dr. D] mailed his Commission form 69 to [claimant]. When she received it she showed it to her son so that he could explain it to her. She did not dispute [Dr. D's] assessment.

(Texas Workers' Compensation Commission Appeal No. 93111, decided March 29, 1993, only calls for "evidence of notice or knowledge" of the initial certification of MMI and IR to start the 90 day period.) The hearing officer made no finding of fact that Dr. D had not certified MMI on March 4, 1993; as pointed out in Texas Workers' Compensation Commission Appeal No. 92670, decided February 1, 1993, the accuracy of a certification as to MMI or IR should be challenged within the 90 days as provided by Tex W. C. Comm'n, 28 TEX. ADMIN. CODE § 130.5(e) (Rule 130.5(e)). In addition, there was no finding that the certification was invalid because of some clear misdiagnosis. *See* Texas Workers' Compensation Commission (Commission) Appeal No. 93489, decided July 29, 1993. On the contrary, the evidence indicates that Dr. D's narrative, accompanying the certification, considered the fact that claimant had been undergoing treatment for psychological problems resulting from the accident. Nine months after Dr. D's certification of MMI, Dr. deS, on December 14, 1993, said claimant had not reached MMI as to psychological impairment. Dr. D, then on February 1, 1994, stated that his MMI determination had related to claimant's hand.

In Texas Workers' Compensation Commission Appeal No. 93705, decided September 27, 1993, a hearing officer's opinion that MMI had not been reached was upheld; there, the doctor's opinion that MMI had been reached was not unconditional (in that case a designated doctor's opinion was in issue); the opinion as to MMI had stated that MMI was reached "from a neurological standpoint." In contrast to that case, the case on appeal shows that Dr. D did not place a condition on his opinion as to MMI, but the hearing officer nevertheless found that it was limited to only part of the injury stemming from the accident in question. *Also see* Texas Workers' Compensation Commission Appeal No. 92452, decided October 5, 1992, which remanded the case to indicate whether a doctor had considered psychological injury in certifying that MMI had been reached; we point out that in addition to the indication that psychological treatment was considered in the narrative of Dr. D, in Appeal No. 92452 there was no issue as to finality of a the first rating under the 90-day rule.

In Texas Workers' Compensation Commission Appeal No. 92441, decided October 8, 1992 (and other cases), doctors have been allowed to change their opinions; in such cases, the hearing officer judges the weight to give any doctor's opinion in judging the totality of evidence from the doctor. That case, however, had no issue as to the 90-day rule. Recently, Texas Workers' Compensation Commission Appeal No. 94269, decided April 20, 1994, said that a doctor's rescission of his earlier certification of MMI and IR, after the 90-

day period had passed without dispute, does not mean the certification was not final; that appeal points out the exception for "clear misdiagnosis" set forth in Appeal No. 93489, *supra*, but did not find it applicable. That opinion also points out that later surgery would not mean that the initial certification of MMI and IR was not final. Appeal No. 94269 also indicated that when the issue of MMI included litigation of the 90-day rule, the hearing officer was permitted to decide the litigated issue even when it had not been set forth by the benefit review conference report. In the case on appeal, Dr. D's subsequent letter, dated February 1, 1994, said that he had not determined MMI in regard to the psychological problem. He added that only Dr. deS could evaluate that. Such letter does not even rescind an earlier certification, as reported in Appeal No. 94269 to be insufficient to affect finality, but tries to limit the past certification. We also point out, in ruling that Dr. D's subsequent letter does not change the finality of his initial certification, that a doctor does not have to be a specialist in a particular field to address MMI and IR of the claimant. *See* Appeal No. 93705, *supra*.

The Appeals Panel has not approved findings of fact and conclusions of law that determine MMI was reached on two occasions from the same injury. The findings of fact, together with the absence of any finding of fact that the initial MMI and IR certification was invalid because of significant error or clear misdiagnosis, along with the hearing officer's recitation that claimant received the initial certification, but did not dispute it (which was based in large part on the testimony of claimant herself,) can only support a determination that an MMI date of March 4, 1993, with six percent impairment, became final as specified by Rule 130.5(e). While no finding of fact states that claimant's psychological problems were caused by the accident in question, we imply from the other findings of fact and the hearing officer's "Discussion" that such a finding was made. The evidence sufficiently supports such an implied finding. *See* Texas Workers' Compensation Commission Appeal No. 91002, decided August 7, 1991. *Also see* Peeples v. Home Indemnity Co., 617 S.W.2d 274 (Tex. Civ. App.-San Antonio 1981, no writ).

The decision and order that claimant reached MMI on August 17, 1993, statutorily, and that an IR has not been properly determined, along with the requirement that impairment income benefits be paid beyond the amount called for by an MMI date of March 4, 1993 with six percent impairment, are reversed. A new decision is rendered that MMI was reached on March 4, 1993, with six percent impairment and that the psychological problems referred to in medical evidence were caused by the compensable injury. In rendering this decision, we point out that MMI does not mean that liability for medical care resulting from the compensable injury ceases. *See* Section 408.021 which provides for all health care reasonably required when needed. Contrast that section to

Section 408.102 which limits temporary income benefits to the period prior to MMI being reached.

Joe Sebesta
Appeals Judge

CONCUR:

Lynda H. Nesenholtz
Appeals Judge

Thomas A. Knapp
Appeals Judge