APPEAL NUMBER 94598
FILED JULY 6, 1994

This appeal arises under the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq*. (1989 Act). After a series of continuances, a contested case hearing was held in (City), Texas, on December 13, 1993, with the record closing on April 11, 1994. (Hearing officer) presided as hearing officer. There were two disputed issues unresolved at the benefit review conference, namely, whether the appellant and cross-respondent (claimant) had reached maximum medical improvement (MMI) from her injury of _____, and if so on what date; and, what was her proper impairment rating (IR) from that injury. Though not reflected in the hearing officer's decision, the parties stipulated that claimant sustained a compensable injury on or about _____. The hearing officer found that the designated doctor selected by the Texas Workers' Compensation Commission (Commission) examined the claimant and certified that claimant reached MMI on June 25, 1993, with a 13% IR, and further found that the designated doctor's findings were not against the great weight of the medical evidence. Based on these findings, the hearing officer concluded that claimant reached MMI on June 25, 1993, with an IR of 13%. Claimant's request for review generally appeals the hearing officer's decision. The respondent and cross-appellant (carrier) responded to claimant's request for review asserting both that it failed to adequately state an appeal consistent with Section 410.202(c) and that it may not have been timely filed. In its cross-appeal the carrier asserts that the designated doctor was not asked to determine MMI and, therefore, that the hearing officer erred in determining claimant's MMI date to be the June 25, 1993, date found by the designated doctor rather than the November 5, 1992, date determined by claimant's treating doctor. The carrier further asserts that claimant's IR should have been determined to be three percent, not 13%, because the designated doctor determined that 10% of the 13% IR he found was attributable to a prior compensable injury. In that regard, the carrier maintains it "preserved its right" to assert contribution from the prior compensable injury. Claimant filed no response to the carrier's appeal.

DECISION

Reversed and remanded.

According to the Commission's records, the hearing officer's decision was distributed to the claimant by mail April 29, 1994. Pursuant to Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 102.5(h) (Rule 102.5(h)), she was deemed to have received it on May 4, 1994, and had 15 days from that date (May 19, 1994) to file her request for review. Section 410.202(a). Claimant's appeal was postmarked May 12, 1994, was received by the Commission on May 13, 1994, and was, thus, timely filed. Rule 143.3. Claimant's request for review, obviously minimal, was not so deficient as to render it inadequate to perfect an appeal. Texas Workers' Compensation Commission Appeal No. 94455, decided May 19, 1994.

Before discussing the appealed issues concerning the MMI date and IR, we first address the potential issue of contribution. According to the benefit review conference (BRC) report in evidence, the two disputed issues at the July 13, 1993, benefit review conference (BRC) were whether claimant had reached MMI and, if so, the date; and her proper IR. Concerning the IR issue, the carrier's position was that it agreed with the designated doctor's assessment that claimant's IR was 13% "less 10% for prior injuries." The benefit review officer recommended that the designated doctor's IR be given presumptive weight and further stated that the carrier "may seek a reduction of income benefit [sic] based on contribution from the prior injury pursuant to Article 8308-4.30 [now Section 408.084]." With the case file and marked as Hearing Officer Exhibit D for identification but never introduced into evidence was carrier's August 20, 1993, response to the BRC report. This document, among other things, purported to address the matter of "contribution for impairment resulting from prior injury and surgery," stating that given the amounts of temporary income benefits (TIBS) and impairment income benefits (IIBS) already paid, and further given the IR of the designated doctor, namely, that 10% of the 13% IR resulted from claimant's previous injury and laminectomy, carrier had paid all TIBS and IIBS due and that any future income benefits to which claimant may be entitled must be reduced by the amount of overpaid benefits.

At the initial session of the hearing on October 7, 1993, the hearing officer asked the parties if the disputed issues before him were those from the BRC, namely, the MMI and IR issues, and they both responded in the affirmative. At none of the contested case hearing sessions was there any mention of carrier's response to the BRC report or of adding an issue of contribution to the disputed issues. Similarly, there was no mention of a contribution issue in the hearing officer's decision and order and the hearing officer ordered the payment of IIBS for 39 weeks beginning on June 26, 1993, based on the 13% IR of the designated doctor.

In its appeal the carrier contends that the hearing officer erred in not basing the order to pay IIBS upon an IR of three percent rather than 13%, and in not finding the MMI date to be November 5, 1992, and, thus, the commencement date for IIBS as the day after. The carrier asks the Appeals Panel to modify the decision and order accordingly and also to render a decision that the carrier's obligation to pay income benefits is complete and that claimant is not entitled to further benefits. In the alternative, the carrier seeks reversal and a remand for another hearing.

Section 410.151(b) provides that an issue not raised at a BRC may not be considered at a contested case hearing unless the parties consent or the Commission determines that good cause existed for not raising the issue at the BRC. Rule 142.7 provides procedures for adding disputed issues and Rules 142.7(b)(2) and Rule 142.7(c) specifically address responses to BRC reports. Under the circumstances of this case, we do not find the issue to have been added. The response to the BRC report was not offered into evidence nor was there an effort made at the hearing to add the contribution

issue. Accordingly, we decline to treat the issue further on appeal. Texas Workers' Compensation Commission Appeal No. 92027, decided March 27, 1992.

Claimant, the sole witness, testified that on _____, while at work, she slipped on a piece of lettuce and fell hurting her back. She said she initially treated with Dr. CS, her family doctor, and later began to treat with Dr. WW, an orthopedic surgeon, who remains her treating doctor. According to claimant, she was examined at the request of the carrier by Dr. ST, also an orthopedic surgeon, and after he issued his report, the carrier requested appointment of a designated doctor. She stated that the Commission selected Dr. HMS who, she said, was a general practitioner. Claimant also stated that she had a laminectomy in 1980 and agreed with Dr. CS that her back problems had "pretty much" resolved by the time she sustained her injury.

Claimant contended that the designated doctor's report should not be adopted because he was a general practitioner who was asked to resolve differences between two orthopedic surgeons; because his report erroneously stated that her laminectomy occurred in 1990 rather than 1980; and because he saw her only once for about 15 minutes. She maintained she had not reached MMI because Dr. HJS, Dr. CS and Dr. WW have indicated she has significantly deteriorated since her examinations by Dr. ST and Dr. HMS and she has been told she may require fusion surgery.

Dr. CS's letter of September 7, 1993, states that claimant had a lumbar laminectomy in 1980 followed by episodic low back pain and mild radicular symptoms, that she had few problems for one year before her October 1991 lumbar laminectomy, and that she has since had persistent lower extremity problems including partial atrophy of her lower leg muscles, partial foot drop, and a limp.

Dr. WW signed an undated Report of Medical Evaluation (TWCC-69) certifying that claimant reached MMI on "11/5/92" with an IR of 27% consisting of impairment for lumbar spine disorder, abnormal range of motion, and neurological disorder. Dr. WW's evidence indicates he referred claimant to another clinic for an impairment evaluation accomplished on March 3 or 4, 1993, and resulting in the 27% IR. Dr. WW's September 7, 1993, report stated that an October 22, 1991, MRI demonstrated a herniated disk at L4-5 and that claimant underwent surgery at the L3-4 and L4-5 levels on October 28, 1991. He reported that claimant continued to be incapacitated primarily by pain but also by weakness, and he felt such condition would continue pending further surgery to stabilize her spine and re-explore her nerve root. Dr. WW stated that "we proposed this to her but thus far have been declined the opportunity to provide surgical intervention."

Dr. ST's TWCC-69 of February 8, 1993, stated that claimant reached MMI on "01-28-93" with an IR of 16%. The accompanying narrative of January 28, 1993, reported that claimant's post-operative course was "reasonably uneventful," that most of her leg pain symptoms had improved but that she had a persistent foot drop, and that her neurological

situation was complicated by diabetes. Based on his examination of claimant and review of her medical records, Dr. ST felt claimant had then reached MMI and that she had a 16% IR based on her residual symptoms, especially her foot drop and lumbar spine motion limitation.

A report from Dr. HJS stated that "MMI was reached approximately in October 1992," that "[a]n exacerbation occurred on or about March 9, 1993," and that as of July 19, 1993, he did not feel claimant had reached "pre-exacerbation condition. . . ."

In evidence was a Commission form signed by the carrier stating that Dr. WW had assigned 27% while Dr. ST had assigned 16% and requesting the Commission to "designate a physician to resolve this dispute." Apparently, according to this document and the position of the carrier at both the BRC and the hearing, the carrier was disputing only the IR and requesting a designated doctor to resolve that dispute. Also in evidence was a Commission letter of April 30, 1993, to claimant advising that she was to be examined by Dr. HMS on May 24, 1993, to determine "percentage of impairment only." The carrier's position at the BRC was that claimant's MMI date was the November 5, 1992, date determined by Dr. WW and the benefit review officer (BRO) so recommended in the BRC report. However, claimant's position at the BRC and the hearing (and presumably on appeal) was that she had not yet reached MMI. The record did not indicate when claimant learned of Dr. WW's MMI date nor whether she disputed it prior to the BRC. However, there was no disputed issue regarding Rule 130.5(e) and dispute of the IR and/or MMI.

Dr. HMS's May 24, 1993, narrative report stated that claimant presented on that date "to determine percentage of impairment only relative to a work-related injury on _____." This report stated no date of MMI. Though not adverted to at the hearing, this report also stated that the assessment was made pursuant to the "AMA Guides to the Evaluation of Permanent Impairment, Third Ed, Rev. 1990." *See* Section 408.124 for the required version of the AMA guides to be used in determining an IR. Dr. HMS's TWCC-69, while not stating an MMI date, did state that claimant's IR was "13% - Whole Body Impairment but 3% related to injury _____." This document also stated that while claimant's IR was 13% for her lumbar spine, "10% [was] due to prior laminectomy [and] 3% due to injury & laminectomy of _____." An attachment did reflect that claimant's clinical condition was stabilized and not likely to improve with surgical intervention or active medical treatment.

The hearing officer's finding that the designated doctor certified that claimant reached MMI on June 25, 1993, is wholly without support in the evidence and requires our reversal and remand for further consideration and findings regarding the date claimant reached MMI. As mentioned, neither Dr. HMS's TWCC-69 nor his narrative report stated an MMI date. Dr. HMS's TWCC-69 indicates claimant was seen on May 24, 1993; the date of the TWCC-69 is partially illegible but may be "6-25-93." That the designated doctor did not state an MMI date is not altogether surprising considering that he was asked

only to determine claimant's IR. However, in Texas Workers' Compensation Commission Appeal No. 93377, decided July 1, 1993, the Appeals Panel held that where the IR is timely disputed, there is no basis to determine that the underlying MMI certification has become final. That decision stated as follows:

> This case, of course, involves a situation where the carrier timely disputed impairment only. Applying the same logic by which we determined that in the absence of any timely dispute MMI and impairment either become final together, or not, it appears to us that if the first [IR] has not become final because of timely dispute, it would follow that, under Rule 130.5(e), there is no basis to determine that MMI has become final.

See also Texas Workers' Compensation Commission Appeal No. 93529, decided August 2, 1993, and Texas Workers' Compensation Commission Appeal No. 92366, decided September 10, 1992.

We note that notwithstanding the _____, date of injury, there was no mention of statutory MMI at the hearing or in the hearing officer's decision. *See* Section 401.011(30)(B). *See also* Texas Workers' Compensation Commission Appeal No. 92517, decided November 12, 1992, wherein the Appeals Panel recognized that it may become necessary for a doctor to determine an IR when an employee has reached statutory MMI. However, in Texas Workers' Compensation Commission Appeal No. 931125, decided January 26, 1994, the Appeals Panel found no merit to the argument that the designated doctor's calculation of the employee's IR did not consider the employee's condition on the date of statutorily imposed MMI. That decision stated that the Appeals Panel has never held that MMI and IR can never be individually considered and decided; that IR can be decided separately from MMI, for example, when MMI is agreed to by the parties or when statutory MMI has been reached; and that in such cases "it is essential only that MMI be reached before an IR is assigned."

Because claimant's MMI date was a disputed issue and the hearing officer's finding of the June 25, 1993, MMI date was wholly unsupported by the evidence, we reverse the hearing officer's decision and order and remand this case for the hearing officer to expeditiously obtain a report from the designated doctor stating an MMI date and an IR based on the correct version of the AMA Guides, to permit the parties to comment on the report, to determine claimant's MMI date and IR, and for such further development of the evidence, consideration, and additional findings as may be appropriate and not inconsistent with this opinion.

Pending resolution of the remand, 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.

Philip F. O'Neill
Appeals Judge

CONCUR:

Thomas A. Knapp
Appeals Judge

Gary L. Kilgore
Appeals Judge