APPEAL NUMBER 94920
FILED SEPTEMBER 8, 1994

This appeal is considered in accordance with the Texas Workers' Compensation Act (1989 Act), TEX. LAB. CODE ANN. § 401.001 *et seq.* On May 18, 1994, a contested case hearing was held in (City), Texas, with (hearing officer) presiding. The record in the hearing was closed on June 10, 1994. The issues were whether the respondent, (CC), who is the claimant herein, sustained a compensable injury to his shoulder when he injured his elbow on _____; whether he had the inability to obtain and retain employment equivalent to his pre-injury wage (disability) as a result of his injury, from October 13, 1993, to the date of the hearing; whether he had reached maximum medical improvement (MMI), and, if so, his correct impairment rating.

The hearing officer determined that claimant had a compensable injury to his shoulder, and had disability from October 13, 1993, through the date of the hearing. The hearing officer determined that claimant had not reached MMI, in accordance with the opinion of the designated doctor, Dr. E.

The carrier has appealed the determination that claimant had a shoulder injury that was causally connected to his elbow injury, and argues evidence it believes to be in its favor on this point. The carrier also argues that the great weight of other medical evidence is against the designated doctor's opinion that claimant has not reached MMI. The carrier points out that Dr. E admits in his opinion that he does not usually, in the course of his practice, treat elbow or shoulder problems. The carrier argues that Dr. E did not comply with rules of the Texas Workers' Compensation Commission (Commission), specifically Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE §§ 130.1 through 130.6, insofar as he did not have claimant's earlier medical records available. The carrier finally argues that there is no disability because the shoulder condition is not a compensable injury. The claimant responds by pointing out the evidence in favor of the hearing officer's decision. The claimant responds that the designated doctor's opinion is not against the great weight of other medical evidence, that he was fully qualified to render the opinion, and that any rules violation was the fault of the treating doctor, not the designated doctor.

DECISION

We affirm the hearing officer's determination that the shoulder is related to the compensable injury and that claimant had disability for the periods of time found. We reverse the hearing officer's determination to give presumptive weight to the designated doctor's report, as written, and remand for additional evidence in accordance with this decision, and clarification as to whether claimant may have reached "statutory" MMI.

The claimant was a carpenter for three years for (employer), until he was terminated following surgery for his injury. He hurt his elbow on _____, as he was pulling pieces of rebar out of the way. On about the third piece, he felt a sharp pain in his elbow, and concluded he may have bumped another piece of rebar. Claimant said he had his

arm immobilized in a sling, and continued to work, until he had surgery on his elbow on April 8, 1992. He missed two days of work for his surgery, and returned to work in a cast. He was laid off about three weeks after he returned to work.

The claimant said that at the time of his injury, he had some shoulder pain as well. He recalled that he mentioned this to someone, perhaps at the clinic where he was sent, and was under the impression it was pain radiating from his elbow. He said that he was primarily concerned with his elbow and did not realize until he began going through physical therapy after surgery and tried to do lifting exercises that his shoulder was hurt as well.

Voluminous medical evidence was submitted and it is conflicting. One of claimant's treating physicians, Dr. B, indicated his belief in a March 7, 1994, letter that the shoulder was not injured at the time of the rebar accident but developed from immobilization of his arm in a cast. The earlier medical records do not record shoulder pain as such, although upper extremity pain is generally noted. To summarize the highlights of the medical records, a doctor for the carrier, Dr. F, concluded that claimant's shoulder was not causally related, to his injury, primarily because it was not mentioned in claimant's early medical records. Dr. F determined that he had reached MMI on December 9, 1993, with a zero percent impairment rating. Dr. B determined that claimant reached MMI on March 23, 1993, with a 15% impairment, which included claimant's arm, elbow, and shoulder.[1] Dr. B noted in later medical reports, however, that claimant had some increasing shoulder pain, for which he was given injection. The claimant testified that Dr. B told him that arthroscopic surgery could relieve his pain.

Claimant had protracted physical therapy, apparently without much relief. Claimant was examined by Dr. K, apparently pursuant to a benefit review conference (BRC) agreement that he would render an opinion on the causal connection between the elbow and shoulder. Dr. K's October 1993 report noted that claimant had a normal EMG and full range of motion. In December 1993, the Commission asked Dr. K the direct question of whether the shoulder was related to the work-related injury and Dr. K responded by signed facsimile to the Commission that it was.

The records also indicate that claimant had a second injury in which he injured his right wrist in early 1992 but this was not fully developed in the hearing. Also not fully developed was the import of a BRC agreement wherein the carrier and claimant both agreed that Dr. B's certification of MMI would be a nullity because he was not a treating doctor.

[1] As an alternative to its assertion that the shoulder is not a compensable injury, the carrier requests that the Appeals Panel reverse the hearing officer and order that claimant reached MMI and impairment as found by Dr. B.

The Commission appointed Dr. E, of (clinic), as designated doctor, on May 19, 1993, and indicated in the appointment letter that, by a copy of it to Dr. B, he was to provide all reports, radiographic films, and tests to Dr. E. We may surmise that no one followed up on this matter, because Dr. E's apparent June 8, 1993 report states early on that "I do not have any medical records". Dr. E's report noted found restricted motion in claimant's shoulder. Dr. E apparently had an x-ray of claimant's elbow taken which he noted did not reveal bone or joint abnormalities. A Report of Medical Evaluation (TWCC-69) ostensibly filed by Dr. E indicated that claimant had not reached MMI; the narrative on Dr. E's letterhead stated he had no recommendations to make on further treatment as he did not, in the usual course of his practice, treat elbow or shoulder problems. Both the TWCC-69 and the narrative report are unsigned, although Dr. E's name is typed in the signature line on the TWCC-69.

The carrier's argument at the hearing and on appeal is based upon the proposition that medical evidence is required to establish the injury to the shoulder. We would note that were this the case, there is sufficient medical evidence to support the hearing officer's conclusion that the shoulder is compensable, and disability resulted therefrom. However, medical evidence does not bind the trier of fact one way or the other, because a claimant's testimony alone may establish that an injury has occurred, and disability has resulted from it. Houston Independent School District v. Harrison, 744 S.W.2d 298, 299 (Tex. App.-Houston [1st Dist.] 1987, no writ); Gee v. Liberty Mutual Fire Insurance Co., 765 S.W.2d 394 (Tex. 1989).

The hearing officer is the sole judge of the relevance, the materiality, weight, and credibility of the evidence presented at the hearing. Section 410.165(a). There are conflicts in the record, but those were the responsibility of the hearing officer to judge, considering the demeanor of the witnesses and the record as a whole. An appeals level body is not a fact finder, and does not normally pass upon the credibility of witnesses or substitute its own judgment for that of the trier of fact, even if the evidence would support a different result. National Union Fire Insurance Co. of Pittsburgh, Pa. v. Soto, 819 S.W.2d 619, 620 (Tex. App.-El Paso 1991, writ denied). We affirm the hearing officer's findings and conclusions that claimant had a compensable shoulder injury and disability.

We reverse and remand her determination to accord the designated doctor's existing report presumptive weight. First of all, it is not signed, which we have held is required for a valid certification under Rule 130.1(c)(4) that MMI has, or has not, been reached. Texas Workers' Compensation Commission Appeal No. 92074, decided April 8, 1992. Second, while we would agree that it may not be required that a designated doctor have each and every medical record for an injured worker, Dr. E plainly had no records, and so stated. Regardless of whose responsibility it was to forward records to Dr. E, it would seem clear that Dr. E would be somewhat constrained in rendering an opinion on MMI without the benefit of seeing progressive records on claimant's condition. We therefore remand the case to the hearing officer so that Dr. E's opinion may be signed, and

so that he can review medical records pertinent to claimant's condition. *See* Texas Workers' Compensation Commission Advisory 93-04, March 9, 1993. We note that the hearing officer's order states that claimant is entitled to temporary income benefits which should continue until disability ends or he has reached MMI. Although we reverse the determination to give presumptive weight to the designated doctor's opinion in its current form, we are not, by this action, necesarily rendering an opinion that he has reached MMI. However, it may be that claimant may have reached "statutory" MMI as defined in Section 401.011(30) (B), as it appears that he began experiencing disability on May 4, 1992, according to his testimony, and the hearing officer's discussion of the evidence, thus, the broad Conclusion of Law No. 4 stating that claimant "has" not reached MMI would be erroneous if statutory MMI was reached. This matter should be cleared up on remand .

While the problems with the designated doctor's report could have been resolved prior to the decision with the expenditure of minimal time, we cannot ignore the errors, notwithstanding the additional time that must be taken to resolve them. Pending further resolution of the remand, a final decision has not been made in this case. However, since reversal and remand necessitates 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.

Susan M. Kelley
Appeals Judge

CONCUR:

Stark O. Sanders, Jr.
Chief Appeals Judge

Lynda H. Nesenholtz
Appeals Judge