APPEAL NUMBER 94969
FILED SEPTEMBER 6, 1994

This appeal is brought pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq*. (1989 Act). On June 15, 1994, a contested case hearing was held in (City), Texas, (hearing officer) presiding. The issues to be resolved were:

1.Whether the Claimant has reached maximum medical improvement [MMI], and if so, on what date; and

2.What is the Claimant's impairment rating [IR]?

The hearing officer determined that the claimant reached MMI on August 26, 1993, with a whole body IR of 11% in accordance with the designated doctor's opinion and that the great weight of the medical evidence was not contrary to that of the designated doctor. Appellant, claimant, contends that the hearing officer erred in his determination that MMI had been reached and contended that if MMI had not been reached an IR could not be assessed. Claimant also alleged error in the admission of a hearing officer exhibit and that the hearing officer allowed the designated doctor's telephonic testimony. Respondent, carrier, responds requesting review of the timeliness of claimant's appeal, and on the merits responds that the decision is supported by the evidence and requests that we affirm the decision.

DECISION

The decision and order of the hearing officer are affirmed.

We have reviewed claimant's appeal for timeliness and determine that it is timely. The decision of the hearing officer was sent to the parties by cover letter dated June 30, 1994, and distributed July 1, 1994. Claimant does not state when he received the decision, therefore, under Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 102.5(h) (Rule 102.5(h)) the "deemed" date of receipt is July 6, 1994. Section 410.202 provides that an appeal shall be filed within 15 days of the date the hearing officer's decision was received. Fifteen days after the deemed receipt date is Thursday, July 21, 1994. Claimant's appeal is dated July 20, 1994, the postmark is illegible but the appeal was received on July 25, 1994, and appears timely pursuant to Rule 143.3(c).

Claimant testified, and it is undisputed that claimant was employed as a "packer" by employer, and on _____ (all dates are 1993, unless otherwise noted), he was injured when he fell over a "tote" which was described as a hard plastic tub which contained pairs of slacks. Claimant states he fell backward hitting his right shoulder on a conveyor belt and landing on the concrete floor on his back. Several coworkers saw the fall. The same day, claimant was treated by Dr. T, who claimant stated was the "company doctor." Claimant saw Dr. T three times between _____ and March 17th and a lumbar MRI

was ordered. Dr. T prescribed pain medication, diagnosed "back pain" and returned claimant to light duty with a 25 pound lifting restriction.

Claimant testified he next saw Dr. W, on March 19th. Dr. W took claimant off work on March 19th and began therapy on March 22nd, with a diagnosis of "1. Thoracic sprain; 2. Myofascial syndrome; 3. R/O herniated nucleus pulposus; 4. Cervical sprain; 5. Fibromyositis; 6. Right costovertebral sprain." In a subsequent report dated July 12th, Dr. W added to the diagnosis "7. Rotator cuff tear (R); 8. Supraspinatus fraying (R)." Dr. W obtained an additional MRI of both shoulders, a CAT scan of the lumbar spine, an x-ray examination and an arthrogram of the right shoulder on (20 days after date of injury).

Following conservative treatment, Dr. W referred claimant to Dr. E, for further assessment in April. Dr. W also referred claimant to Dr. G, for an EMG and nerve conduction studies. By report dated May 28th, Dr. G found no abnormalities. Dr. W also referred claimant to Dr. C, in July. Dr. C agreed with Dr. W's conservative treatment. Dr. W submitted a Report of Medical Evaluation (TWCC-69) dated August 5th, indicating claimant had not reached MMI.

In August, claimant was examined by Dr. Wh, carrier's choice of doctors for an independent medical examination. Dr. Wh, in a comprehensive narrative report and TWCC-69 dated August 26th, certified MMI on August 26th with a zero percent IR. Dr. Wh, noted "[t]he patient has no objective findings to indicate that he has any serious anatomical injuries whatsoever."

In November, claimant saw Dr. Ch, who rendered two reports (one on claimant's back and the other on the right shoulder) both dated November 22nd, stating the opinion of "[b]ack sprain superimposed upon early degenerative disease" and "Rotator cuff tendinitis, possible brachial plexus stretch" of the right shoulder. Dr. Ch referred claimant to Dr. Ch's partner, Dr. H, who has recommended "arthroscopic subacromial decompression" of the right shoulder. Both Dr. Ch and Dr. H apparently disagreed with Dr. Wh's assessment of MMI and zero percent IR.

By letter dated November 30th, the Texas Workers' Compensation Commission (Commission) appointed Dr. Mc as a Commission-selected designated doctor to determine whether MMI had been reached and the percentage of impairment, if any. Dr. Mc by narrative report and TWCC-69 dated February 4, 1994, certified MMI on August 26, 1993 (the same date as Dr. Wh), with an 11% IR ". . . strictly based on loss of range of motion [ROM]." Dr. Mc raises a question with his opinion that "all limitations of [ROM] are attributable to entities existent prior to the accident." Dr. Mc's impression is that there is no evidence to suggest that a significant injury occurred as a direct result of trauma in the _____ industrial accident. Carrier seizes on the statement that the ROM limitations are due to a pre-existing condition to urge that Dr. Wh's zero percent IR is correct. Claimant testifies he has had no prior injuries or accidents. Both parties apparently

overlook or disregard Dr. Ch's reference to "early degenerative change." Dr. Mc in a letter dated April 8, 1994, acknowledges clarification of a typographical error, explained how he determined that certain bony spurring and lapping, evident on an MRI taken 20 days after the accident, was "physiologically impossible" to have been caused by the fall 20 days before. Dr. Mc confirmed his certification of MMI on August 26, 1993.

At the CCH, after claimant and carrier had rested, the hearing officer asked if either of the parties wanted to get any "additional information from [Dr. Mc]." Claimant's attorney responded that she was "not really satisfied" and would like to pose some "questions--cross questions." After some discussion, the hearing officer proceeded to call Dr. Mc on the speaker telephone, swore him in as a witness, asked questions and allowed claimant's attorney to ask questions. Dr. Mc testified that he had reviewed the MRI report of (20 days after date of injury), of claimant's right shoulder, that claimant did not have a rotator cuff tear, explained how he had determined that claimant had a pre-existing condition and that pre-existing condition had been aggravated by the _____ fall. Dr. Mc confirmed his 11% IR. In response to claimant's questions that Dr. H recommended surgery, Dr. Mc responded that the arthroscopic subacronnal decompression that Dr. H contemplated might relieve some pain but "is not designed to improve shoulder motion and will not be expected to improve shoulder range of motion." Dr. Mc testified that pain "is subjective, and . . . is not considered in an [IR], according to AMA Guides . . . ." Dr. Mc further testified that "[t]here is no provision for grading pain or giving a separate rating for pain" and stood by his certification that MMI had been reached.

The hearing officer determined that claimant reached MMI on August 26, 1993, with an 11% IR based on the designated doctor's reports and testimony, and that the designated doctor's opinion is entitled to presumptive weight. Claimant appeals on four grounds.

Claimant's first contention of error is that the hearing officer erred in concluding claimant has reached MMI because there was medical evidence of "the potential need for surgery." Dr. Mc explained that the type of surgery contemplated for claimant would not improve his ROM or change the IR, but rather might only relieve some pain. It was also Dr. Mc's opinion that claimant did <u>not</u> have a rotator cuff tear. When the Commission selects a doctor as a designated doctor to determine MMI and IR, the report of the designated doctor has presumptive weight and the Commission must base its determinations of MMI and IR on the designated doctor's report, unless the great weight of the other medical evidence is to the contrary. Sections 408.122(b) and 408.125(e). No other doctor's report, including that of a treating doctor, is entitled to presumptive weight. To overcome the presumptive weight accorded to the report of the designated doctor requires more than preponderance of the evidence; it requires the "great weight" of the other medical evidence to be contrary to the report. Texas Workers' Compensation Commission Appeal No. 92412, decided September 28, 1992. In Texas Workers' Compensation Commission Appeal No. 94045, decided February 17, 1994, the Appeals

Panel declined to rule that "simply because a treating doctor indicates that a claimant is a candidate for surgery that MMI may not be found." In this case, the additional surgery, according to the designated doctor, will not change the IR and at best will only relieve subjective complaints of pain. We reject claimant's contention that just because the treating doctor recommends surgery that fact automatically means claimant is not at MMI.

Claimant's second contention is that the hearing officer erred in concluding that claimant had an IR of 11% because claimant is not at MMI. While we agree that an injured employee cannot have a valid IR before MMI is assessed, the designated doctor and carrier's doctor both certified MMI on August 26th, claimant's complaints of pain notwithstanding. With regard to the claimant's complaints of pain, we note the Appeals Panel has held that a finding of MMI does not require that the injured employee be pain free. As we held in Texas Workers' Compensation Commission Appeal No. 93007, decided February 18, 1993:

When the doctor finds MMI and assesses an impairment he or she agrees, in effect, that while the injured worker may continue to have consequences, and quite possibly pain, from the injury, the doctor has determined, based upon medical judgment, there will likely be no further material recovery from the injury. Thus, although claimant is unfortunately in pain, this fact alone would not rule out MMI.

We also note that the claimant is entitled to all reasonable medical care as and when needed. Section 408.021. This entitlement does not cease when an injured worker reaches MMI.

Claimant contends the hearing officer erred in "admitting Carrier's Exhibit No. 4." Claimant obviously means Hearing Officer Exhibit No. 4 in that carrier offered no exhibits. The exhibit in question was a response to the Commission from Dr. Mc and which was then attached to Dr. Mc's report. The letter was addressed to the Commission and carrier stated it had received the letter addendum from claimant's ombudsman who had been assisting claimant. Claimant's contention fails for several reasons. First, the communication was back to the Commission which had selected Dr. Mc as the designated doctor and therefore could have been considered as part of the complete report. Further, the hearing officer has a duty to completely develop the record (Section 410.163(b)) and therefore did not abuse his discretion in accepting as a hearing officer's exhibit a portion of a report needed to complete the designated doctor's report. Also, as the carrier stated it received the letter from the Commission ombudsman, Rule 142.13 does not require a reverse exchange of documents back to the other party. *See* Texas Workers' Compensation Commission Appeal No. 93336, decided June 16, 1993. Claimant cites the Texas Rules of Civil Procedure for authority for its position however, we note that the Texas Rules of Civil Procedure are not applicable to workers' compensation proceedings. Texas Workers' Compensation Commission Appeal No. 94684, decided July 1, 1994.

Claimant's final contention of error is that the hearing officer erred in allowing the telephonic testimony of the designated doctor, Dr. Mc. In addition to the hearing officer's obligation to develop a complete record, as noted earlier (Section 410.163(b)) the hearing officer is permitted to use summary procedures and similar measures to expedite the proceedings. Upon review of the record it further appears to us that the hearing officer was prepared to go to closing argument and it was claimant's attorney who indicated she has some "cross-questions" that she wished to ask the designated doctor. The hearing officer complied by calling the doctor, without objection by the claimant, and allowed claimant to ask the doctor questions. Claimant is in no position to now argue that being allowed to ask the designated doctor questions constitutes error. Because claimant's counsel was unprepared to ask questions, and thought a deposition on written questions in a post hearing proceeding would be authorized, does not constitute error by the hearing officer in completing the record. Claimant made no objection as to leading questions to the designated doctor at the CCH and, in fact, only the hearing officer and claimant's attorney even asked questions of the designated doctor. Claimant certainly was aware that Dr. Mc was a person with knowledge regarding the proceeding and was aware of the doctor's position from his reports. Claimant cannot allege surprise at Dr. Mc's testimony which merely further explained the position taken in his reports. The decision to telephonically take evidence from the designated doctor was commendable and within the hearing officer's discretion. We find no abuse of discretion by the hearing officer. Morrow v. H.E.B., 714 S.W.2d 297 (Tex. 1986). Claimant had ample time to develop evidence to counter the designated doctor's opinion which was known well in advance of the CCH. We find claimant's argument to be without merit.

Having reviewed the record, we find no reversible error and sufficient evidence to support the hearing officer's factual determinations. In considering all the evidence in the record, we find that the decision of the hearing officer is not so against the great weight and preponderance of the evidence as to be manifestly wrong and unjust. In re King's Estate, 150 Tex. 662, 244 S.W.2d 660 (1951).

The decision and order of the hearing officer are affirmed.

Thomas A. Knapp
Appeals Judge

CONCUR:

Stark O. Sanders, Jr.
Chief Appeals Judge

Gary L. Kilgore
Appeals Judge