APPEAL NO. 950014
FILED FEBRUARY 14, 1995

This appeal arises pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq*. (1989 Act). On November 9, 1994, a hearing was held. She determined that appellant (claimant) reached maximum medical improvement (MMI) on November 11, 1993, with a nine percent impairment rating (IR). She also found that claimant had disability from July 16, 1993, through November 11, 1993. Claimant asserts that the determination of MMI was incorrect and that the IR did not include all conditions that should have been rated; in addition, disability should continue past November 11, 1993, because claimant's current treating doctor has not released him to work. Respondent (carrier) replies that the decision should be affirmed.

DECISION

Affirmed in part and reversed and remanded in part.

Claimant worked in construction. On _____, he was struck on the head and shoulder by a 2" by 8" board that was reported to have fallen approximately 12 inches. He continued to work that day and the next until the afternoon of (date), when he went to the doctor. The only medical document claimant offered from 1993 is a report of his first treatments on (date) and (date), 1993; it shows that he reported with a headache and dizziness. On (date), a contusion was diagnosed. On (date) blurred vision was reported; again a contusion was diagnosed; a CT scan of the brain was advised.

According to the records described by the designated doctor, (Dr. S), claimant was seen by (Dr. A) from July 16, 1993, for several months until released on November 11, 1993. Dr. A treated claimant's cervical area, his left knee, and his skull; physical therapy was prescribed along with medication. Claimant was seen three times in July, twice in August, and once in September 1993. Dr. A believed claimant would have disability for four weeks as of August 11, 1993. In September 1993 an x-ray indicated a fracture of the skull; headaches were still a complaint. On November 11, 1993, Dr. A noted that he had released claimant stating that he never returned for care; Dr. A "assumed" that claimant had reached MMI. Dr. A prepared a TWCC-69 showing MMI at November 11, 1993, with zero percent IR.

Dr. S examined claimant on June 24, 1994, as the designated doctor. Dr. S discussed not only Dr. A's medical records, but also those of claimant's current treating doctor, (Dr. Z), through May 4, 1994. (Claimant offered Dr. Z's records for consideration at this hearing.) Dr. S also noted that (Dr. F) had consulted with Dr. Z. Dr. S described claimant's injury as to the skull, cervical and lumbar area, and left knee. Although Dr. Z's records mentioned left carpal tunnel syndrome, Dr. S did not discuss that condition as part of the injury or rate it for impairment. We note that Dr. Z's records do not describe how

carpal tunnel syndrome was caused by the compensable injury. Dr. S found MMI on November 11, 1993, with nine percent IR, made up of four percent for cervical and five percent lumbar, both from Table 49 which addresses Specific Disorders of the Spine, found on page 73, Guides to the Evaluation of Permanent Impairment, third edition, second printing, dated February 1989, published by the American Medical Association (AMA Guides). He found that claimant's ranges of motion were within normal limits.

Claimant testified that he stopped seeing Dr. A when he went to (Country) in October 1993. He did not see a doctor in (Country), and he did not work in (Country); he stated that he went to (Country) to care for his son. He returned from (Country) in March 1994 and went to see Dr. A, but Dr. A was not at his prior location. Claimant has been seeing Dr. Z, who advises that he should have carpal tunnel surgery. Claimant now works because, he states, he has to work.

The hearing officer is the sole judge of the weight and credibility of the evidence. *See* Section 410.165. The designated doctor's report is to be given presumptive weight as to MMI and IR unless the great weight of other medical evidence is contrary to it. *See* Sections 408.122 and 408.125. No testimony was offered that Dr. S performed an inadequate examination in providing his report, only that his IR did not include all conditions. The medical records for approximately two months after the injury (prior to claimant going to (Country)) related no complaint as to carpal tunnel syndrome. With the medical records only relating the injury as set forth by Dr. S, his report did not err in not rating carpal tunnel syndrome.

The designated doctor's determination of MMI does raise concern in the way it was specifically described by Dr. S. Dr. S noted that Dr. A had determined MMI to be on November 11, 1993. Dr. S added that there was no indication that claimant sought medical care for six months thereafter while in (Country) (claimant agreed with that point). Dr. S said, "therefore, MMI date will be the date of secession [sic] of care on November 11, 1993."

While Dr. S's report makes it clear that he considered both the injury claimant experienced on _____, and medical records of Dr. A and Dr. Z, the specific reference he makes to MMI does not reflect the standard set forth in Section 401.011(30). *See* Texas Workers' Compensation Commission Appeal No. 92164, decided June 5, 1992, which called for a certification of MMI to be based on "reasonable medical probability."

It is true that the TWCC-69 defines MMI in terms of reasonable medical probability (on its reverse side) in asking whether MMI has been reached. In this case, however, Dr. S was not merely silent as to reasonable medical probability, his "Discussion of Maximum Medical Improvement" indicates a possibility that he found MMI based on a standard other than that set forth in Section 401.011(30). That section states in part:

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.

We are not unmindful of points mentioned by Dr. S in his report that could be considered in a determination of MMI based on reasonable medical probability. We cannot, however, imply reasonable medical probability of MMI on behalf of the designated doctor when his comments have cast doubt that he used the standard of Section 401.011(30). We are aware that the hearing officer inquired of counsel for claimant whether a request had been made to the Commission to clarify MMI with the designated doctor and that counsel replied that no request was made. Nevertheless, the designated doctor serves at the request of the Commission (*see* Texas Workers' Compensation Commission Appeal No. 92595, decided December 21, 1992). MMI must be based on reasonable medical probability.

The determination of disability as lasting from July 16, 1993 to November 11, 1993, when claimant went to (Country) and ceased medical treatment until March 1994, is sufficiently supported by the evidence. Dr. A thought that claimant would cease his disability in September 1993. Claimant has resumed work since returning from (Country). Dr. Z's opinion as to disability was a significant part of the evidence, but was for the hearing officer to consider along with all other evidence, including that claimant sought no medical care while in (Country).

We reverse and remand for the hearing officer to query the designated doctor as to whether he certifies that the claimant has reached MMI as defined by Section 401.011(30), and if so, when. The determination of the hearing officer as to disability is affirmed. While no error was found in the determination of IR, IR cannot be considered on review until there is a certification of MMI. If a determination is made that MMI was reached on a date subsequent to June 24, 1994, when Dr. S assessed nine percent IR, then another assessment of IR would be appropriate.

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.

Joe Sebesta
Appeals Judge

CONCUR:

Lynda H. Nesenholtz
Appeals Judge

Gary L. Kilgore
Appeals Judge