APPEAL NO. 950018
FILED FEBRUARY 17, 1995

This appeal is considered in accordance with the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act). This matter was remanded in Texas Workers' Compensation Commission Appeal No. 941175, decided October 12, 1994. Pursuant to the remand, additional evidence was taken on November 29, 1994, and new findings and clarifications issued, in a decision issued on December 9, 1994.

The issues in the hearing were whether claimant reached maximum medical improvement (MMI), and, if so, the date, and the correct impairment rating (IR) to be assigned to the claimant.

The hearing officer again determined that the claimant had a 19% IR, based upon the treating doctor's assessment of impairment, which the hearing officer indicated was part of the great weight of medical evidence contrary to the zero percent rating of the designated doctor. Although in her earlier decision she had given presumptive weight to the designated doctor's MMI date of October 20, 1993, there is no express finding of the date of MMI in the new decision; however, the hearing officer's order used the day after the MMI date shown on the designated doctor's report.

The appellant, hereinafter carrier, has appealed this decision, arguing that the hearing officer erred by finding that the great weight of other medical evidence was against the designated doctor's report on impairment, and by concluding that claimant's IR was 19%. The carrier argues that the hearing officer still did not articulate the reasons why the great weight of other medical evidence overcame the designated doctor's report. The carrier argues essentially that the hearing officer should not only be bound to give presumptive weight to the designated doctor's assessment of IR and MMI, but to his opinion as to the extent of the compensable injury. The carrier further points out that having rejected the designated doctor's report as against the great weight and preponderance of the evidence, that the hearing officer had no basis upon which to use his date of MMI, rather than that of the treating doctor whose IR she adopted. The carrier asks that the case be remanded for the appointment of a second designated doctor if we do not reverse and render a decision based upon the current designated doctor's report. The claimant responds that the decision should be upheld, and the date of MMI not disturbed because it was not appealed the first time around. The claimant argues evidence he believes is in favor of the treating doctor's opinion on IR.

DECISION

We affirm the hearing officer's decision that claimant had a 19% IR. We reverse her implied finding that the date of MMI was October 20, 1993, and render a decision that the date claimant reached MMI is May 17, 1993, in accordance with the report of the treating doctor upon which the hearing officer based her finding of IR.

The factual summary set forth in Appeal No. 941175 is referred to and incorporated herein. Further pertinent evidence is as follows:

> - Reports by [Dr. Z], orthopedic surgeon, dated October 1992 and January 1993, indicate that claimant has a sprain of the cervical spine with left cervical radiculopathy. Bulging discs noted at several levels of the cervical spine, minimal central herniation at C3-4, along with spondylosis and degenerative disc disease.
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> - A Specific and Subsequent Medical Report from [Dr. S], the treating doctor, dated October 28, 1994, notes that he previously assessed MMI and impairment, and that claimant had mild symptoms in the upper left extremity and neck.

The claimant contended at the remand hearing that the Appeals Panel had misinterpreted a report of Dr. L in its previous decision. Dr. L's June 11, 1992, report states as follows:

> Review of MRI of the cervical spine. I cannot find a specific date on this study. It was done at (medical facility). It is strictly sagittal type views.
>
> There is a ventral extra-dural defect seen at C3-4. This produces some canal narrowing. There is no obvious evidence of cord compression on these studies. There are other bulges at other levels which are less significant. There is a set of axial studies present. This shows a central and right sided extra-dural defect at C3-4. Again, the canal is narrowed, but there is no obvious cord compression. Other levels there are small bulges, but no obvious disc herniation or nerve compression.

In our remand opinion, we asked for further clarification from the hearing officer as to whether she found the designated doctor's report against the great weight of other medical evidence because of her opinion that it did not properly assess either the injury or the range of motion (ROM). Although additional evidence was minimal, additional grounds for rejection of the designated doctor's opinion have been furnished for our review. The hearing officer's decision adds an additional finding of fact that claimant has abnormal ROM as a result of his neck injury. In the discussion, the hearing officer indicated that she believed the degenerative disease was caused by or "related to" his _____, injury.

We also suggested that, as the basis of the designated doctor's opinion was predicated on what appeared to be a good faith opinion that the degenerative disease was not "caused" by the accident, instruction to the designated doctor about the principle of "aggravation" as a compensable injury, i.e., that a worsening or acceleration of a pre-existing condition could be a "compensable injury," could lead toward resolution. (We suggested that claimant seek similar clarification from the treating doctor.) This was not

done. It thus remains unknown whether Dr. X would have agreed that an aggravation occurred and revised his rating accordingly.

Having reviewed the evidence relating to the hearing officer's rejection of the designated doctor's report, and her further clarification, for determining that the great weight of medical evidence was contrary to the designated doctor's report, we affirm the decision to assign the IR in accordance with the treating doctor's report. The hearing officer has determined that the great weight is against Dr. X not only because the medical evidence indicates the presence of a specific spinal condition resulting from the injury, but also of impaired ROM as a result. The hearing officer's discussion of the evidence includes the observation that the treating doctor's report allowed a reasonable inference that claimant's "degenerative disc disease is a related to, if not in part caused by, his _____ injury." Notwithstanding the carrier's disparagement of the inference as that of a fact finder who is not a doctor, the sole judge of weight, credibility, materiality and relevance of the evidence is the hearing officer. Section 410.165(a). We have stated before that the designated doctor's opinion has presumptive weight on IR and MMI, but not on issues of causation or extent of injury. Texas Workers' Compensation Commission Appeal No. 93734, decided September 30, 1993. Such issues are ultimately to be determined by the hearing officer. Presumptive weight accorded to the designated doctor's report does not mean a "rubber stamp" adoption of the designated doctor's report where the hearing officer weighs the evidence and determines that the great weight of other medical evidence proves that the claimant is not at MMI, and/or the percentage of impairment is not accurate. *See* Texas Workers' Compensation Commission Appeal No. 94053, decided February 23, 1994.

We agree with the carrier, however, that the use of the October 21, 1993, date in the hearing officer's order as the starting date of impairment income benefits (IIBS) is not supported by sufficient evidence. At the beginning of the hearing, the hearing officer stated that the remand was done on "the issue" of IR. We respectfully point out that our remand was not limited just to this issue, as the case was remanded in total with no findings affirmed. We pointed out the apparent anomaly in the remand decision that the designated doctor's report had been found against the great weight of other medical evidence for purposes of IR but not as to MMI. The different treatment of these issues went to the heart of why we were unable to fully understand the reasons that led the hearing officer to reject the designated doctor's report on IR. The whole opinion was reversed and remanded, and the MMI determination was not separately affirmed. We had concern over the unexplained disparate treatment given to these elements of the designated doctor's report, and the possibility of additional evidence on the issues. The new decision now rejects the designated doctor's opinion as against the great weight of contrary medical evidence. There is no express finding on the date of MMI but the date used on the order is October 21, 1993. We believe this is supported by an implied finding that the date claimant reached MMI is October 20, 1993.

We reverse the order and the implied finding, and render a new decision that MMI was reached on May 17, 1993, as certified in the treating doctor's report. We render an order that carrier shall pay 57 weeks of IIBS to the claimant beginning on that date, in

accordance with the 1989 Act and implementing rules. We have stated before that the concepts of MMI and IR are somewhat inextricably intertwined, and an IR cannot be assessed until MMI is reached. *See* Texas Workers' Compensation Commission Appeal No. 92517, decided November 12, 1992. Clearly, the treating doctor based his IR from ROM with reference to his opinion that claimant had reached MMI and could therefore be properly evaluated for ROM; to assess ROM prior to the achievement of MMI could result in artificially high measurements, rather than stabilized ones. If the hearing officer believed, factually, that MMI had not been reached when the 19% IR was certified, then she should not have adopted that rating in lieu of the designated doctor's opinion. We note that Dr. X opined in his interim report (pending his evaluation of further tests) that claimant would have reached MMI a year after his _____, injury (even though he ultimately used the October 20, 1993 date on the certification that the hearing officer rejected). The designated doctor's interim opinion was consistent with the treating doctor's report. In this record, a finding of an MMI date of October 20, 1993, is against the great weight and preponderance of the evidence.

As to the claimant's point that carrier has waived its right to complain of the date of MMI because it was not expressly raised after the first decision, we point out that a decision issued on remand is a new decision, and each party has the right to appeal that hearing officer's decision as set out in Section 410.202. In fact, we made clear at the end of our decision in Appeal No. 941175 that it was not a final decision and that issuance of a new decision would require the filing of new appeals.

We therefore affirm the determination of the hearing officer that the great weight of other medical evidence is contrary to the designated doctor's opinion, and that claimant has a 19% IR. We reverse the implied finding and order of the hearing officer that claimant first reached MMI on October 20, 1993, finding this to be against the great weight and preponderance of the evidence, and render a new decision and order on the MMI issue that the claimant reached MMI on May 17, 1993, in accordance with the report of the treating doctor, and that IIBS are due from that date.

Susan M. Kelley
Appeals Judge

CONCUR:

Robert W. Potts
Appeals Judge

Lynda H. Nesenholtz
Appeals Judge