APPEAL NO. 950180
FILED MARCH 21, 1995

This appeal arises pursuant to the Texas Workers' Compensation Act of 1989, TEX. LAB. CODE ANN. § 401.001 *et seq*. (1989 Act). On December 7, 1994, a [contested case] hearing was held. He (the hearing officer) determined that appellant (claimant) knowingly and voluntarily made an agreement that maximum medical improvement (MMI) was reached on June 29, 1992, with 11% impairment (IR), that her hand and arm injury was not compensable, and that claimant's IR is 11%. Claimant asserts that the parties had different understandings of what the agreement said so good cause has been shown to obviate the agreement; in addition, the wrist injury is part of the compensable injury. Respondent (carrier) replies that good cause was not shown to refute the agreement and sufficient evidence supports the determination that the carpal tunnel injury was not shown to be part of the compensable injury.

DECISION

We affirm in part and reverse and render in part.

Claimant worked as a bus driver for (employer) on _____, when injury occurred. She had begun work for employer in November 1991 and had worked about three weeks on _____. Her accident is reported by Dr. C in the first medical record submitted, dated December 17, 1991, as "she hit the brakes and jarred her neck" in response to a van backing down a ramp she was entering at the airport. On July 2, 1992, Dr. M who performed an electrodiagnostic study of claimant's left hand, recorded that "she was driving a bus, and in order to miss a vehicle backing up on the entrance way to the airport, struck a curb. She was shaken up in her seat and hurt her neck and back." Claimant's testimony at the hearing was similar to the history given by Dr. M.

Claimant agreed that she did not relate left wrist pain to any doctor until June 1992. She said that the wrist began hurting prior to that time, but that was when she considered it bad enough to get help.

Dr. P on June 8, 1992, first relates a left hand problem. He reports "tingling" in the left hand, with positive Tinel's and Phalen's signs of the left wrist, "suggestive of a very mild left carpal tunnel syndrome [CTS]." On June 22, 1994, Dr. P stated that claimant could return to work. On June 30, 1994, Dr. P stated that claimant "has a permanent medical impairment rating by AMA Guides techniques of 10% . . . This is a permanent medical impairment rating not a disability rating . . . ." None of Dr. P's records in evidence accompanying the letter of June 30, 1994, states that claimant has reached MMI or that "further material recovery from or lasting improvement to an injury can no longer be reasonably anticipated." Dr. P did not offer an opinion as to the cause of the CTS he described on June 8, 1994.

Dr. W was identified in the Statement of Evidence as the designated doctor and that assertion was not addressed on appeal or disputed at the hearing. Dr. W used an old Report of Medical Evaluation (TWCC-69) form, which gives no date when he signed the certification. He found MMI on September 22, 1992, with 11% IR. Dr. W in his narrative stated that claimant thought the exercises and rehabilitation were contributing factors to the CTS; he added at the end of his explanation of ratings assigned, "if the carpal tunnel is included and it has been documented, then I think it is mild in the range of 10% to the upper extremity which would equate to 6% to the body."

The first doctor claimant saw, Dr. C, on July 28, 1992, refers to Dr. M and says that he thinks the left wrist problem is work related. He also provided a TWCC-69 form apparently dated July 7, 1992, in which he found MMI on July 7, 1992, with 15% IR. In that form he states that claimant was sent to Dr. H for her CTS. He stated, "her impairment for that injury will be dealt with by Dr. H . . . ."

Dr. M stated on July 15, 1992, that there was no electromyographic evidence of thoracic outlet syndrome. He still stated that "in my view there is a work relationship as the patient feels that the exercises that she has done as part of her general rehabilitation from her work-related injury has (sic) been a contributor to aggravate and possible (sic) even cause the symptoms in her left wrist." The (county hospital) performed carpal tunnel release surgery on claimant's left wrist in November 1993. On August 15, 1994 Dr. W at the request of the Texas Workers' Compensation Commission gave another IR. He stated his impression that the CTS was part of the original injury "primarily by history." He then refers to Dr. H as documenting a relation to the work injury, but no document of Dr. H in the record indicates that. Dr. W also refers to Dr. M and his discussion of the history the claimant gave. (Dr. M's comments are reflected above.) Dr. W also says that the CTS does not appear to stem from the claimant's diabetes. He added five percent for CTS to the 11% he previously found and concluded that claimant has 16% IR. (Note that the combined values chart in the Guides for the Evaluation of Permanent Impairment, third edition, second printing, dated February 1989, published by the American Medical Association (AMA Guides) provides that 11% and five percent combine to 15%, not 16%.)

The hearing officer is the sole judge of the weight and credibility of the evidence. *See* Section 410.165. The Appeals Panel has stated repeatedly that whether or not an injury reported months after the compensable injury is part of the original injury is a factual determination for the hearing officer. *See* Texas Workers' Compensation Commission Appeals No. 92503, decided October 29, 1992, and No. 93086, decided March 17, 1993. That passage of time, coupled with the short duration of work for employer, along with no medical indication that the trauma to one's hands on a steering wheel when the bus being driven struck a curb could cause CTS (no testimony indicated that the bus was moving at any particular rate of speed), does not warrant reversal of the finding that the CTS injury was not compensable. *Compare* to Texas Workers' Compensation commission Appeal No. 941722, decided February 6, 1995, in which the doctor stated that the way that claimant hyperextended her wrist when falling could result in CTS. In addition, Texas Workers'

Compensation Appeal No. 94210, decided March 31, 1994, remanded a hearing officer's decision that work-hardening had caused CTS. That decision noted that there was no description of the type of activities, the frequency, the duration, or how such caused the onset of CTS.

The determination of the hearing officer that no good cause exists for relieving the claimant of the benefit review conference agreement is reversible because in these circumstances it was an abuse of discretion. The agreement reads that the date of MMI was in issue; it also states, "Parties agree that maximum medical improvement was reached on 6-29-92 per [Dr. P]." As stated previously, Dr. P never found MMI. He issued an IR without addressing MMI. Where the date "June 29, 1992" comes from is unknown. MMI is defined in terms of "reasonable medical probability" (*See* Section 401.011 (30)), and the agreement erroneously ties MMI to Dr. P. That definition must be considered with Section 408.005(c) which says that an agreement "resolving an issue of impairment: (1) may not be made before the employee reaches maximum medical impairment;". These sections indicate that MMI must have been reached as a condition to effecting an agreement as to IR and that the parties cannot determine MMI without a medical opinion.

MMI has consistently been considered a significant milestone in the administration of the 1989 Act. Texas Workers' Compensation Commission Appeal No. 93551, decided August 19, 1993, affirmed a hearing officer's decision that found MMI had not been certified when neither the "yes" or "no" block had been checked on the TWCC-69 form, even though a date had been written and an IR had been assigned when the narrative accompanying it did not mention MMI either. *Also see* Texas Workers' Compensation Commission Appeal No. 93753, decided October 7, 1993, which did not find that MMI was certified from an entry in a doctor's treatment records that "I think that [claimant] has received maximum benefit from medical treatment."

In addition, claimant testified that she considered the 11% IR in the agreement to only apply to the back and neck injuries, pointing out that Dr. W in providing the 11% declared that he was not rating CTS at that time. Carrier in its reply to the appeal quotes claimant, from page 50 of the transcript, as saying:

Q. You agreed on the 11 percent rating that did not include the [CTS]?

A. That's right.

The transcript reflects that immediately prior to that exchange the following was stated:

Q. Will you agree with all of those things that I said?

A. Not all the things you said. I agree with what [Dr. W] says.
Q. I'm just describing [Dr. W's] report.

A. [Dr. W] said that he could not give one at that particular time because for lack of information.

Q. And as a result of that, would you agree with me that [Dr. W] did not include it in the 11 percent?

A. No, he did not include it in the 11 percent.

Q. Okay. And will you agree with me that in order to get the additional temporary income benefits back in October of 1992, you decided to waive, or give up any right you had to claim that the [CTS] was caused by the on-the-job injury?

A. No, I didn't give up that right. I didn't know this was what I was doing. I did not know that.

The next question and answer are the ones quoted in carrier's response set forth above.

There was no testimony or statement from any signatory to the agreement other than the testimony of claimant. The references she makes to Dr. W's report of MMI and IR are consistent with comments Dr. W made in his report in which he assigned 11% IR, and which was discussed earlier in this review. Claimant's belief that Dr. W, in his first opinion, only considered the back and neck, and said that the issue of CTS had not been decided one way or the other is not inconsistent with the limited position taken by Dr. C's report that also provided an IR, but said in it that CTS would be dealt with by another doctor.

Texas Workers' Compensation Commission Appeal No. 93706, decided September 27, 1993, also dealt with an agreement that purported to take MMI from one doctor's report and IR from another. That opinion affirmed a decision which found good cause to obviate an agreement based on claimant's understanding of the agreement, specifically that claimant did not understand that use of all the designated doctor's opinion would have resulted in increased impairment income benefits.

The agreement in question addressed the IR as follows: "Parties agree that the proper impairment rating is 11% per [Dr. W] (designated doctor)." The subject of CTS is not mentioned as waived, nor is it included in the agreement.

With unrefuted testimony that claimant did not understand the agreement to be covering whether or not she was entitled to an IR for CTS, and with no showing that MMI had been reached on June 29, 1992, the record shows that good cause existed for negating the agreement, if it retained any aspect of validity.

Even with no agreement, the findings of fact that claimant did not show her CTS injury was compensable still stand. Without an agreement, the finding of fact that "the great

weight of credible medical evidence is not contrary to the finding of the designated doctor" controls and will support a date of MMI of September 22, 1992. The 11% he found, without including an amount for CTS, is consistent with the finding that CTS was not part of the injury. With no valid agreement to warrant disregarding it, the date of MMI found by the designated doctor, September 22, 1992, is the date claimant reached MMI.

The decision and order are affirmed as stated, except that good cause is found to relieve claimant of the agreement in question, and the date of MMI is September 22, 1992.

Joe Sebesta
Appeals Judge

CONCUR:

Susan M. Kelley
Appeals Judge

Alan C. Ernst
Appeals Judge