APPEAL NO. 990011

This appeal arises pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act). A contested case hearing (CCH) was held on December 10, 1998. With regard to the issue at the CCH, she determined that the respondent (claimant) reached maximum medical improvement (MMI) on July 11, 1997, as certified by Dr. B, a referral doctor. The parties entered into a Benefit Dispute Agreement (TWCC-24) and agreed that the claimant's impairment rating (IR) is 13%, as certified by Dr. KW, a Texas Workers' Compensation Commission (Commission)-selected designated doctor. Although not an issue, the hearing officer determined that the claimant's IR was 13%, as per Dr. KW and the TWCC-24. The appellant (carrier) appeals, seeks a reversal of the decision and argues that the claimant reached MMI on May 23, 1996, as certified by Dr. KW. The claimant responds and seeks an affirmance of the decision.

DECISION

We reverse and render.

The parties stipulated that the claimant sustained a compensable injury on _____.

On May 24, 1996, Dr. A, the claimant's initial choice of treating doctor, certified him at MMI on May 23, 1996, with a nine percent IR. On August 6, 1996, Dr. KW certified him at MMI on May 23, 1996, with a 13% IR. The parties entered into a TWCC-24 and agreed that Dr. KW is the designated doctor. There is no dispute that the Commission erroneously selected Dr. P as another designated doctor. Nevertheless, Dr. P's August 14, 1996, report is in evidence, wherein he certified that the claimant did not reach MMI. On February 5, 1997, Dr. KP performed an L4-5 discectomy, laminectomy and facetectomy. On July 21, 1997, Dr. B certified the claimant at MMI on July 11, 1997, with a 10% IR. On July 24, 1997, Dr. O, his treating doctor, indicated her agreement with Dr. B's certification.

The claimant raised the issue of the date he reached MMI at an April 28, 1997, benefit review conference. On October 13, 1997, the Commission wrote Dr. KW and inquired as to whether medical reports from Dr. KP changed his opinion as to the date he reached MMI. Dr. KW responded and noted:

> I was not asked to render a determination of MMI, only IR. This is because all parties involved namely; the treating doctor, the carrier and their representatives and the patient and his representatives had agreed upon an MMI date of May 23, 1996.

Dr. KW specified that Dr. KP's reports did not change his opinion and wrote that "the patient was at MMI as of the initial agreed upon date of May 23, 1996." The record does not reflect whether Dr. KP reviewed Dr. O's July 18, 1996, Initial Medical Report (TWCC-61) when he evaluated the claimant on August 2, 1996. On January 22, 1998, Dr. O stated that she was the claimant's treating doctor when Dr. KW evaluated him and did not agree he reached

MMI on May 23, 1996, and that Dr. KW erred in certifying him at MMI on May 23, 1996, because he experienced medical improvement after that date. On July 28, 1998, the Commission wrote Dr. KW again and inquired as to whether medical reports from Dr. O and Dr. B changed his opinion as to the date the claimant reached MMI. On August 16, 1998, Dr. KW responded that those reports did not change his opinion and reiterated that the claimant reached MMI on May 23, 1996.

The carrier appeals the following:

**FINDINGS OF FACT**

4. [Dr. KW] was asked to only provide an [IR] therefore his findings on a date of [MMI] are not entitled to presumptive weight.

* * *

9. The great weight of the medical evidence established Claimant's date of [MMI] as July 11, 1997.

**CONCLUSION OF LAW**

3. The claimant reached [MMI] on July 11, 1997.

The hearing officer does not afford presumptive weight to Dr. KW's report because, according to Finding of Fact No. 4, he "was asked to only provide an [IR]." The carrier argues Dr. KW's report should be afforded presumptive weight and that if Dr. KW's report is afforded presumptive weight, the great weight of the other medical evidence is not contrary to his certification of MMI on May 23, 1996.

Although Dr. KW's opinion as to MMI is not entitled to presumptive weight since he was not asked to provide an opinion as to that date, his assignment of an IR of 13% agreed to by the parties significantly affects the determination of MMI in this case. The date of MMI is the earlier of "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," or "the expiration of 104 weeks from the date on which income benefits begin to accrue." Section 401.011(30). Impairment is defined as "any anatomic or functional abnormality or loss *existing after [MMI]* that results from a compensable injury and is reasonably presumed to be permanent." (Emphasis added.) Section 401.011(23). An IR is "the percentage of permanent impairment of the whole body resulting from a compensable injury." Section 401.011(24).

The 1989 Act and the Commission's rules contemplate that a party may dispute the date an employee reached MMI, his IR or both the date he reached MMI and his IR, and that the Commission may select a designated doctor to assess the date he reached MMI, his IR or both the date he reached MMI and his IR. Sections 408.122(c) and 408.125(e);

Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE ' 130.6(a) (Rule 130.6(a)). "The designated doctor shall address the issue(s) in dispute and confine the [impairment evaluation report] . . . . to only those issues." Rule 130.6(j). However, the rules recognize that impairment and an IR may exist only after MMI and predicate a dispute of an employee's IR on a prior resolution of the issue of when he reached MMI. The rules dictate that "[w]hen the [IR] is the only issue in dispute, the doctor shall assess an [IR] without regard to [MMI]." *Id.* The carrier appeals Finding of Fact No. 4 but does not challenge the determination that the Commission selected Dr. KW to assess the claimant's IR only. It challenges the portion of that finding which withdraws the presumptive value of Dr. KW's MMI assessment as a result of the Commission's original mandate to Dr. KW.

In Texas Workers' Compensation Commission Appeal No. 950018, decided February 17, 1995, the hearing officer determined that the great weight of the other medical evidence was contrary to the designated doctor's IR and adopted the treating doctor's IR assessment but adopted the designated doctor's date of MMI. We reversed and rendered a decision that the employee reached MMI on the date assessed by the treating doctor and commented that "the concepts of MMI and IR are somewhat inextricably intertwined, and an IR cannot be assessed until MMI is reached." *Id.* The determination and the agreement of the parties that the claimant had a 13% IR, as assessed on May 23, 1996, cannot be reconciled with a July 11, 1997, date of MMI. Dr. KW could not assess the claimant's IR without him having reached MMI.

Therefore, we reverse Conclusion of Law No. 3 and the determination that the claimant reached MMI on July 11, 1997, and render a new decision that he reached MMI on May 23, 1996, as assessed by Dr. KW. Section 408.125(e).

_____
Christopher L. Rhodes
Appeals Judge

CONCUR:

_____
Joe Sebesta
Appeals Judge

_____
Elaine M. Chaney
Appeals Judge