

APPEAL NO. 000499

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 February 7, 2000. The issue at the CCH was the date that the appellant/cross-respondent (claimant) reached maximum medical improvement (MMI). The hearing officer concluded that claimant reached MMI on January 28, 1997, the date she determined to be his statutory MMI date. Claimant requests our review. He agrees that his MMI date should be the date he reached statutory MMI. However, he contends that his statutory date of MMI should be April 11, 2000, because after sustaining his compensable injury he did not begin to lose time from work as a result of that injury until April 5, 1998; his income benefits did not begin to accrue until April 12, 1998; and therefore he did not reach statutory MMI until 104 weeks after April 12, 1998. The respondent/cross-appellant (carrier) also requests our review. The carrier asserts that the proper date of MMI should be August 7, 1995, the first MMI date in this case which was determined by claimant's treating doctor at the time, Dr. A. Claimant filed a response to the carrier's request for review.

DECISION

Reversed and remanded.

No testimonial evidence was adduced at the hearing and the parties submitted their respective cases to the hearing officer on documentary evidence and argument.

The parties stipulated that on _____, claimant sustained a compensable injury to the low back; that on _____, Dr. A, claimant's treating doctor at the time, assessed claimant at MMI on _____, and assessed an impairment rating (IR) of 10%; that on August 29, 1995, the carrier filed a Payment of Compensation or Notice of Refused or Disputed Claim (TWCC-21) disputing only the IR assigned by Dr. A; that claimant was sent to be evaluated by Dr. M, the designated doctor, for an IR and MMI date; that on January 5, 1996, Dr. M issued a Report of Medical Evaluation (TWCC-69) in which he found that claimant was not yet at MMI and assessed no IR; and that on October 29, 1999, Dr. M issued a second evaluation report in which he once again found that claimant had not yet reached MMI and assigned no IR.

Dr. A's March 8, 1995, report states that claimant was referred to him by the carrier; that claimant first injured his back in March 1994 while picking up a motor on a truck bed; that he returned to work with restrictions which are not observed; that claimant's second injury occurred on January 28, 1995, when he attempted to push a heavy cabinet but could not do so because of low back and groin pain; and that he has not missed time from work. Dr. A's TWCC-69, dated "08/07/95," certified that claimant reached MMI on that date with an IR of 10%. Dr. A's accompanying narrative report stated that the 10% IR consisted of eight percent under Table 49 III A, Guides to the Evaluation of Permanent Impairment, third edition, second printing, dated February 1989, published by the American Medical

Association, for unoperated spondylolysis and spondylolisthesis, and two percent for abnormal range of motion.

The carrier's TWCC-21, dated "8/29/95," states that the carrier disputes Dr. A's 10% IR, assesses a three percent IR, and is paying impairment income benefits (IIBs) based on the assessed three percent IR.

The TWCC-69 of Dr. M, the designated doctor, dated January 5, 1996, states that claimant has not reached MMI and gives an estimated MMI date of April 1, 1996. Dr. M's accompanying narrative report states that claimant needs aggressive physiotherapy (PT) and possibly some epidural steroid injections (ESIs).

Dr. A's January 30, 1998, report states that claimant complained of pain radiating into his right lower extremity and that he works on his feet and finds it harder to do. Dr. A's records reflect that an MRI was obtained in February 1998 and his April 3, 1998, Specific and Subsequent Medical Report (TWCC-64) reflects that a discogram showed a rupture of the L4 disc, that claimant has severe pain, that he requires spinal surgery at that level, and that "he is to remain on a No Work status."

At the hearing, claimant, in argument, asserted that following his _____, injury, he continued to work until April 5, 1998, when he was taken off work following the results of the discogram and that up to that date he performed his regular duties without having lost time due to his injury. The carrier asserted that claimant missed no time from work after the injury until May 1998. Responding to a carrier interrogatory asking for the date he first missed work due to the _____, injury, claimant wrote, "May 5, 1998."

The Texas Workers' Compensation Commission (Commission) wrote Dr. M on May 13, 1998, stating that Dr. M had examined claimant on January 5, 1996, and found him not at MMI; that the only issue to be addressed was the IR; that the MMI date was _____; and that "[k]nowing the MMI date is _____, can we prevail upon you to review and reply to this." The letter asked that if this information changed Dr. M's opinion on MMI and IR, he should make the necessary amendments to his report and submit an amended TWCC-69. He was also advised that another examination was an option.

Dr. A's records reflect that he performed claimant's spinal surgery (L4 laminectomy, discectomy, and fusion) on June 8, 1998, after going through the spinal surgery procedure.

Dr. A's TWCC-69 dated September 14, 1998, certified that claimant reached MMI on "9/14/98 Statutory" with an IR of 17%. The accompanying narrative report states that when claimant was declared at MMI on _____, and rated, he was not then a candidate for surgery; that he continued to work; that when he was seen on January 30, 1998, he indicated that he worked on his feet and found it harder to do; and that following the MRI and discogram, he underwent surgery on June 8, 1998. Dr. A further wrote as follows: "He

is still not fully recovered but for financial reasons he is declared MMI and rated at this time."

The Commission wrote Dr. M on August 12, 1999, requesting that he respond to the Commission's May 13, 1998, letter.

Dr. M's TWCC-69, dated October 29, 1999, states that claimant has not reached MMI and that the estimated date of reaching MMI is "02/15/00." Dr. M's accompanying narrative report states that when he first evaluated claimant, he felt claimant had mechanical back pain and should be treated conservatively; that claimant was treated conservatively but not consistent with his recommendations; that claimant worsened, developed radicular symptoms, and underwent an L4-5 discectomy and fusion; and that claimant thereafter seemed to improve but that his pain syndrome has worsened and he has symptoms consistent with radiculopathy in a right L5 distribution. Dr. M's assessment is "chronic low back pain, status post discectomy/fusion at L4-5, with persistent right L5 radiculopathy associated with postoperative perineural scarring." Dr. M further stated that assuming the history that claimant began losing time on April 5, 1998, is accurate, he has not reached statutory MMI and that, at this time, he has not reached medical MMI either. Dr. M further stated that claimant may still materially recover with further medical treatment to include ESIs, aggressive PT to attempt to loosen the documented perineural scar tissue, and functionally oriented PT. Dr. M also commented: "[i]f the information provided me by the examinee regarding when he began to collect disability benefits and lose time at work is inaccurate, the statutory MMI date would need to be changed."

The records of Dr. J, apparently claimant's current treating doctor, reflects that she commenced the conservative treatment of claimant in September 1999 and that in December she recommended ESIs and other injections in addition to PT. Dr. J's December 1, 1999, record states, among other things: "[MMI]: reached statutorily."

Claimant challenges Conclusion of Law No. 3 which states that the date of MMI is January 28, 1997. Claimant states that he agrees with the hearing officer's analysis that his MMI date should be the date he reached statutory MMI. However, claimant maintains that the hearing officer failed to correctly determine his statutory MMI date because she failed to first determine when his temporary income benefits (TIBs) began to accrue. Claimant argues, as he did below, that he lost no time from work because of the compensable injury until April 5, 1998, when, following the discogram, he was taken off work and thus that his statutory MMI date would not be reached until the passage of 104 weeks after his TIBs began to accrue.

The carrier urges that claimant's MMI date is _____, as first determined by Dr. A and that claimant cannot now attempt to establish a later MMI date because of the substantial passage of time between the first certified MMI date and the statutory MMI date he seeks.

Both parties agree that the first certified MMI date did not become final pursuant to Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 130.5(e) (Rule 130.5(e)) because Dr. A's 10% IR was disputed within 90 days.

Section 401.011(30) provides, in pertinent part, that MMI means the earlier of: "(A) 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] (B) the expiration of 104 weeks from the date on which income benefits begin to accrue; . . ." The latter provision is commonly referred to as "statutory MMI."

Section 408.082(a) provides that income benefits may not be paid for an injury that does not result in disability for at least one week. Section 408.082(b) provides that if the disability continues for longer than one week, weekly income benefits begin to accrue on the eighth day after the date of the injury and that if the disability does not begin at once after the injury occurs or within eight days of the occurrence but does result subsequently, weekly income benefits accrue on the eighth day after the date on which the disability began. Rule 130.4(a), relating to presumption of MMI, provides that if 104 weeks have passed since the date that TIBs began to accrue, MMI has, by definition, been reached and this section does not apply. Rule 124.7(b) provides that an injured worker's accrual date is the worker's eighth day of disability. TWCC Advisory 93-01, dated January 11, 1993, relates to statutory MMI at 104 weeks and provides, in part, that a claimant, by definition, reaches MMI on the day after the expiration of 104 weeks from the date income benefits began to accrue, and that the claimant's eligibility for TIBs ends at this point and eligibility for IIBs begins. TWCC Advisory 93-03, dated March 9, 1993, relates to MMI and the accrual date and provides that Section 8308-1.03(32) (now Section 401.011(30)) provides that statutory MMI determination occurs at the expiration of 104 weeks from the date income benefits begin to accrue and that, as provided by Rule 124.7(b), an injured worker's accrual date is the worker's eighth day of disability. See *generally*, Texas Workers' Compensation Commission Appeal No. 93678, decided September 15, 1993, concerning accrual date and statutory MMI.

In Texas Workers' Compensation Commission Appeal No. 92164, decided June 5, 1992, the Appeals Panel stated that "[t]he determination of [MMI] is to be based on reasonable medical probability," and that "[w]hen [MMI] is litigated in a [CCH], the hearing officer considers all the evidence at the hearing, beginning with that as to certification of [MMI] by a doctor, in deciding whether [MMI] has occurred and, if so, whether it is based on reasonable medical probability. [Citation omitted.]"

In her statement of the evidence, the hearing officer states that based on the evidence as a whole she finds that claimant's date of MMI is the date he reached statutory MMI which, she says, is January 28, 1997. In determining that claimant reached statutory MMI on January 28, 1997, the hearing officer appears to have simply added two years to the _____, date of injury. The hearing officer made no finding nor other mention of claimant's accrual date for income benefits. Accordingly, we must reverse the decision and

remand for such further findings of fact and conclusions of law as are appropriate and consistent with this decision.

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 Commission's Division of Hearings, pursuant to Section 410.202. See Texas Workers' Compensation Commission Appeal No. 92642, decided January 20, 1993.

Philip F. O'Neill
Appeals Judge

CONCUR:

Robert W. Potts
Appeals Judge

Dorian E. Ramirez
Appeals Judge