

APPEAL NO. 001733

On January 13, 2000, a contested case hearing (CCH) was held, with the record closing on April 25, 2000. The CCH was held under the provisions of the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* The hearing officer resolved the disputed issues of maximum medical improvement (MMI) and impairment rating (IR) by deciding that the respondent's (claimant) date of MMI and IR cannot be determined until a second designated doctor is appointed by the Texas Workers' Compensation Commission (Commission). The appellant (carrier) requests that the hearing officer's decision be reversed and that a decision be rendered in its favor. The claimant requests that the hearing officer's decision be affirmed.

DECISION

Affirmed in part and reversed and rendered in part.

The parties stipulated that on _____, the claimant sustained a compensable injury. The claimant's injury occurred when he grabbed onto a metal scaffold with his left hand and onto a sprinkler pipe with his right hand and had an electrical shock. The claimant underwent a lumbar spinal fusion at several levels in September 1996, after having an MRI which revealed several herniated discs and after going through the spinal surgery second opinion process. A cervical MRI done in February 1995 showed a small bulged disc at C4-5. Dr. F, the designated doctor chosen by the Commission, has examined the claimant on several occasions.

On October 10, 1995, a CCH was held with regard to the following issues involving the claimant's claim for compensation: (1) whether the carrier waived its right to contest the compensability of the claimant's cervical and lumbar disc problems; (2) whether the claimant's cervical and lumbar disc problems were a result of his injury of _____; (3) the claimant's date of MMI; and (4) the claimant's IR. The hearing officer decided that: (1) the claimant's cervical and lumbar disc problems are not related to his injury; (2) the carrier is liable for the claimant's cervical and lumbar disc problems because it had waived its right to contest compensability; and (3) there was no valid certification of MMI because all of the doctors who had certified MMI did not take into account the claimant's cervical and lumbar disc problems. The carrier appealed the hearing officer's decision on the waiver and MMI issues and we affirmed the hearing officer's decision in Texas Workers' Compensation Commission Appeal No. 961090, decided July 22, 1996.

On June 30, 1997, a CCH was held with regard to the following issues involving the claimant's claim for compensation: (1) the claimant's date of MMI; (2) the claimant's IR; and (3) whether the claimant has had disability from January 17, 1995, through December 23, 1996, resulting from the injury sustained on _____. The hearing officer decided that: (1) the claimant reached statutory MMI on December 23, 1996; (2) the IR issue was not ripe for determination because the claimant needed to be reexamined by Dr. F, the designated doctor; and (3) the claimant had disability from December 20, 1994, through

November 18, 1996. The carrier appealed the hearing officer's decision on the issues of MMI, IR, and disability and in Texas Workers' Compensation Commission Appeal No. 972212, decided December 12, 1997, we affirmed the hearing officer's decision. In Appeal No. 972212, we stated that "[w]ith regard to the date of MMI, it is clear that the hearing officer's determination that the claimant reached statutory MMI (104 weeks from the date income benefits began to accrue - - Section 401.011(30)(B)) on December 23, 1996, is the date of MMI found by the hearing officer. . . ." With regard to IR, we stated that "the hearing officer's determination that the claimant needs to be reexamined by the designated doctor is supported by the fact that the designated doctor's examinations of the claimant were all done prior to the date the claimant reached MMI."

Dr. F reexamined the claimant in January 1998 and again certified that the claimant reached MMI on January 17, 1995, but instead of assigning a zero percent IR as he had previously done, he assigned the claimant a 13% IR for the claimant's lumbar surgery. In response to a benefit review officer's inquiry regarding whether the claimant is entitled to an IR for a specific disorder of the cervical spine since the claimant had a compensable cervical injury, Dr. F declined to provide an IR for the claimant's cervical spine because, in Dr. F's opinion, the claimant "has no objective evidence of a compensable cervical injury, which in reasonable medical probability would cause a specific spinal disorder, a credible loss of range of motion, or a credible loss of neurologic function." Dr. F went on to state that "[t]he asserted injury event herein is simply an unverifiable, nonspecific, self-asserted, self-reported injury event with no credible objective etiology of an actual traumatic occupationally related event."

The evidence in this case is set out at length in Appeal No. 972212, and will not be repeated herein. We note that in addition to the medical reports referred to in Appeal No. 972212, other reports show that Dr. T reported in April 1995 that the claimant reached MMI on April 21, 1995, with a four percent IR and that the claimant's treating doctor at that time, Dr. H, agreed with Dr. T's report in May 1995; and that Dr. G, the claimant's current treating doctor, reported in August 1997 that the claimant has a 24% IR for impairment of the cervical spine and the lumbar spine.

The carrier appeals the hearing officer's finding that the compensable injury includes injury to the claimant's cervical and lumbar spine. That issue was determined adversely to the carrier in Appeal No. 961090 when we affirmed the hearing officer's decision that the carrier is liable for the claimant's cervical and lumbar disc problems because it had waived its right to contest compensability. The carrier does not state that it ever sought judicial review of Appeal No. 961090.

The carrier appeals the hearing officer's finding that Dr. F is unwilling to rate the claimant's entire compensable injury. That finding is supported by the evidence because Dr. F makes clear that he does not believe that the claimant sustained a compensable cervical injury and thus does not evaluate the claimant's cervical spine for impairment. Based on our decision in Appeal No. 961090, the claimant does have a compensable cervical injury because of the carrier's waiver of the right to contest compensability.

The carrier appeals the hearing officer's decision that Dr. F's certification of MMI and IR are not entitled to presumptive weight because they are contrary to the great weight of the other medical evidence and because of Dr. F's apparent refusal to rate the claimant's entire compensable injury. The carrier contends that the hearing officer erred in not giving presumptive weight to Dr. F's reports under Section 408.125, that the claimant's request for a second designated doctor was not made within a reasonable time, that the equitable defense of laches applies, and that it is improper to appoint a second designated doctor.

With regard to MMI, that issue was decided in Appeal No. 972212 wherein we affirmed the hearing officer's decision that the claimant reached statutory MMI on December 23, 1996, and made clear that that was the date of MMI found by the hearing officer. The carrier does not state that it ever sought judicial review of Appeal No. 972212. We reverse the hearing officer's decision that the date of MMI cannot be determined until another designated doctor is appointed, and we render a decision that the MMI issue was determined in Appeal No. 972212 and that the claimant's MMI date is December 23, 1996.

With regard to IR, we have previously held that when a designated doctor refuses to provide an IR for the compensable injury (whether the IR be zero or a significant percentage) based on the designated doctor's opinion that the claimant does not have a compensable injury, one of the remedies is to appoint another designated doctor. Texas Workers' Compensation Commission Appeal No. 982402, decided November 23, 1998. In the instant case, the hearing officer decided that the Commission shall appoint a second designated doctor to evaluate the claimant's compensable injury and to determine the date of MMI and the IR resulting from the compensable injury. As previously noted, the MMI date has previously been determined to be December 23, 1996, and thus a second designated doctor is not needed to determine the date of MMI. However, given the hearing officer's finding that Dr. F refused to rate the claimant's entire compensable injury, which is supported by the evidence and is not so contrary to the overwhelming weight of the evidence as to be clearly wrong and unjust, we affirm the hearing officer's decision to appoint a second designated doctor to determine the claimant's IR.

We stress that no determination of the claimant's correct IR has yet been made by the Commission in this case. The parties are encouraged to resolve this issue by agreement. See Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 147.9 (Rule 147.9). However, if this cannot be agreed upon, then, if either party is not satisfied with the certification of IR that will be made by the second designated doctor, that party may again invoke the Commission's dispute resolution system by requesting a benefit review conference.

We reverse the hearing officer's decision that the claimant's date of MMI cannot be determined until another designated doctor is appointed and we render a decision that the claimant's date of MMI was previously determined to be December 23, 1996, in Appeal No.

972212. We affirm the hearing officer's decision to appoint a second designated doctor to determine the claimant's IR.

Robert W. Potts
Appeals Judge

CONCUR:

Elaine M. Chaney
Appeals Judge

Thomas A. Knapp
Appeals Judge