

APPEAL NO. 002671

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 October 19, 2000. The hearing officer held that the respondent/cross-appellant's (claimant) income benefits began to accrue on June 26, 1997, and upheld the Texas Workers' Compensation Commission's (Commission) choice of designated doctor. She further determined that because the claimant was examined by the designated doctor before he had reached maximum medical improvement (MMI), determination of his impairment rating (IR) was not yet ripe and he should be re-examined by the designated doctor.

Both parties have appealed. The appellant/cross-respondent (carrier) has appealed the accrual date, arguing that the 1989 Act requires determination of an earlier date and related statutory MMI. The carrier argues that the report of the second designated doctor on IR and MMI is not premature and should be adopted. The claimant appeals and argues that he should have been sent back to the first designated doctor who examined him (and found he had not reached MMI), rather than to a second designated doctor.

DECISION

Affirmed in part, reversed and remanded in part.

The claimant sustained an injury on _____, which he described as a specific incident but also appears to be described in medical records as an upper extremity and cervical repetitive trauma injury. He was first taken off work on October 8, 1996, by the company doctor, then he consulted with one Dr. B on October 11, a Friday. The claimant was scheduled to work later that day but Dr. B told him not to go in. According to correspondence from Dr. B, the claimant was told to go back to work on his next scheduled workday (which was Monday the 14th). He said that he had some restrictions on the type of tool he should use. The claimant said that if he had been called in Saturday the 12th, he would have been able to go to work, although the employer would have required a release for that day. However, the claimant said that if he had been scheduled in advance to work that Saturday, he would have obtained the release.

The claimant was next treated with an injection on October 25th, another Friday, and was again advised not to go in that afternoon on his scheduled shift because of a reaction to the injection. He said that he was told by the doctor that he could go in to work after the 25th with restrictions. As it happened, his next scheduled workday was the following Monday, the 28th. He said he would have been able to work that Saturday. The claimant thereafter worked until he had surgery on June 26, 1997. Thereafter, the claimant had three more surgeries, including cervical surgery. We note that the claimant was treated by Dr. H, who was an associate of Dr. B.

The claimant was examined by Dr. R, a designated doctor, when he disputed a carrier doctor's assertion that he was at MMI. Dr. R certified on July 20, 1998, that claimant had not reached MMI. Benefits were continued.

In November 1998 the Commission asked Dr. B to supply an IR based upon the claimant having reached "statutory" MMI. When Dr. B did not respond, the Commission appointed Dr. M to perform a required medical examination (RME), which he did on February 17, 1999. Dr. M. stated that although the claimant had reached "statutory" MMI on October 12, 1998, he would continue to need active medical treatment. Dr. M recommended that the claimant's cervical radiculopathy should be evaluated for surgical intervention. He certified that the claimant had a 20% IR. Although he signed his Report of Medical Evaluation (TWCC-69) indicating he was a "designated doctor," neither party during the CCH agreed that he was anything but a Commission-appointed RME doctor. Dr. H indicated that he agreed with the MMI and IR certifications.

The carrier disputed Dr. M's IR, and the claimant was sent to another designated doctor, Dr. MG, who certified that the claimant had a 10% IR. He examined the claimant on April 19, 1999. Both Dr. M and Dr. MG were informed by the Commission that the claimant had reached "statutory" MMI on October 12, 1998. The major difference between the IRs was in the assignment of sensory and motor IR for the left upper extremity. Dr. H indicated disagreement with Dr. MG's report.

The general issue reported from the benefit review conference (BRC) and considered at the CCH was whether the claimant reached MMI, and, if so, on what date. There was no express agreement or stipulation at the CCH that the claimant had reached MMI only by the statutory date; however, neither party raised, in argument or at time of stipulation, that MMI was achieved at a date that would not be a "statutory" MMI date (according to the definition set forth in Section 401.011(30)(B)). The Dispute Resolution Information System (DRIS) notes do not show that the claimant had disputed the appointment of Dr. MG as the designated doctor prior to his examination and certification of a 10% IR, nor did the claimant testify that he objected. There was likewise no evidence of impropriety in the selection of Dr. MG, nor was there any explanation in the record as to why the Commission did not again select Dr. R as the designated doctor.

Date for Accrual of Income benefits.

The temporary income benefits (TIBs) accrual arguments raised by the carrier have already been answered and rejected in Texas Workers' Compensation Commission Appeal No. 93678, decided September 15, 1993; Texas Workers' Compensation Commission Appeal No. 950462, decided May 11, 1995; and Texas Workers' Compensation Commission Appeal No. 000499, decided April 24, 2000. We cannot agree with the carrier's argument that Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 124.7 (Rule 124.7) was somehow not intended to harmonize all statutory provisions having to do with the date on which TIBs "accrue" where disability has not continued, but is intermittent.

As to the method of computing when the eighth day occurred, we would agree with the carrier's general argument that weekends or holidays encompassed within a period of "off work" time should be counted. Rule 124.7 makes clear that it is days of "disability" which are cumulated to calculate the eighth day, and not just days of lost work. The fact that a particular employment may not be open for work over the weekend does not obviate "disability."

It is, however, the responsibility of the hearing officer to interpret the evidence of a doctor's off work and/or release recommendation, along with testimony, in determining the existence of disability. Under the facts of this case, we cannot agree that the hearing officer erred. The letters from doctors relating to his release, as well as the claimant's testimony, support the determination that he was not affirmatively taken off work through the weekends involved here, but was released effective the next Monday because that happened to be his next scheduled day of work. For example, he was off work on October 25 due to a specific reaction to his injection, resolved after that date. The hearing officer is supported in her finding that the eighth day of disability was June 26, 1997. Statutory MMI would therefore be reached on June 23, 1999 (not June 24, 1999, as found by the hearing officer). We affirm this portion of her decision subject to correction of this date.

Appointment of Dr. MG as designated doctor.

The Appeals Panel has generally frowned on appointing a second designated doctor to opine in an ongoing dispute between the parties. It is the better practice for continuity to return to the previous designated doctor. As noted in the concurring opinion in Texas Workers' Compensation Commission Appeal No. 980101, decided March 4, 1998, the MMI and IR statutes indicate that separate controversies may arise, at different times, as to (first) whether MMI has been reached, and then what the appropriate IR is to be. There is no rule requiring appointment of a designated doctor selected in the earlier dispute. However, where a party has objected from the beginning to the appointment of a different designated doctor to resolve a subsequent MMI or IR dispute, the Appeals Panel has set aside that appointment. Texas Workers' Compensation Commission Appeal No. 960454, decided April 17, 1996; Texas Workers' Compensation Commission Appeal No. 970946, decided June 26, 1997. The issue before us is whether an order appointing another designated doctor in the subsequent dispute here should be invalidated as an abuse of discretion for that reason alone when no objection was made to the appointment of Dr. MG until after his IR was known.

We agree that the hearing officer did not err in finding that the Commission had not abused its discretion by appointing Dr. MG as designated doctor to resolve the second dispute in this case.

Sending the claimant back to Dr. MG for another evaluation is appropriate in this case, as Dr. MG had examined the claimant based upon a Commission-supplied MMI date that ostensibly preceded his examination, while the hearing officer found that this date was not, in fact, statutory MMI.

Date MMI was reached.

The carrier argues that Dr. MG should not be restricted to the finding that the claimant reached statutory MMI on June 23, 1999. We agree, and remand the case to await the re-examination by Dr. MG and resolution of the generally reported issues of the date of MMI, and the amount of claimant's IR, and reissuance of a decision. The hearing officer stated in her discussion that the parties acknowledged that the issue of MMI was a question of when statutory MMI occurred. However, we do not believe that this was quite so clear and there was no express agreement to this effect nor is there a certification by a doctor of MMI for a date after October 12, 1998. We note that Dr. M's February 1999 report indicated that the claimant's condition required active treatment at that time, which indicates that the claimant may not have reached MMI. However, neither he nor Dr. MG addressed or evaluated whether the claimant had indeed reached "clinical" MMI because they were precluded from doing so due to the pronouncement that statutory MMI had been reached (as well as the fact that the MMI issue was somewhat belatedly raised in the process). As the existence and date of MMI is now in issue, having been raised in the BRC and CCH, it is appropriate for that matter to be reviewed by the designated doctor, who may agree with the later statutory MMI date (of which he should at least be advised) or an earlier "clinical" MMI date indicated by his review of the medical records.

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.

Susan M. Kelley
Appeals Judge

CONCUR:

Robert Lang
Appeals Panel Manager

Philip F. O'Neill
Appeals Judge