APPEAL NO. 012284
FILED NOVEMBER 1, 2001

This appeal arises pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act). A contested case hearing was held in two sessions, on April 19, 2001, and on August 17, 2001. With respect to the single issue before her, the hearing officer determined that the appellant (claimant) reached maximum medical improvement (MMI) on September 30, 1999, as the designated doctor certified in his April 28, 2000, Report of Medical Evaluation (TWCC-69). In his appeal, the claimant asserts that the hearing officer erred in not giving presumptive weight to the designated doctor's amended report and, more specifically, the April 26, 2000, MMI date. In its response to the claimant's appeal, the respondent (carrier) urges affirmance. The parties stipulated that the claimant's impairment rating is 12%.

DECISION

Reversed and rendered.

The hearing officer erred in giving presumptive weight to the September 30, 1999, date of MMI certified by the designated doctor in his April 28, 2000, TWCC-69. On June 14, 2000, a dispute resolution officer of the Texas Workers' Compensation Commission (Commission) contacted the designated doctor seeking clarification of his date of MMI. With the request for clarification, the Commission forwarded some progress notes from the claimant's treating doctor to the designated doctor for his consideration and review. On June 21, 2000, the designated doctor responded to the request for clarification and changed the date of MMI to April 26, 2000, the date the treating doctor stated the claimant had reached MMI. In so doing, the designated doctor stated that "[b]etween September 1999 and April 26, 2000, the [claimant] underwent further treatment, in the form of epidural steroid injections [ESI], and therefore, his [MMI] date should be amended to the 04-26-00 date." In November 2000 a benefit review officer contacted the designated doctor and again sought clarification of the designated doctor's decision to certify a later date of MMI. On November 15, 2000, the designated doctor responded to the request for clarification, again noting that since the claimant continued treatment in the period from September 30, 1999, to April 26, 2000, the later date was the correct date of MMI. In his response, the designated doctor, while discussing ongoing treatment, specifically referred to the fact that the claimant received an ESI after September 30, 1999. The records from the doctor to whom the claimant had been referred by his treating doctor for the ESIs indicate that the claimant had a second ESI on August 19, 1999; however, the scheduled third ESI of September 30, 1999, was not performed because the first two ESIs had provided no relief. Thus, the designated doctor was mistaken that the claimant had an ESI after September 30, 1999; and, since he had specifically mentioned only the ESI treatment as the ongoing treatment that justified his change to a later date of MMI, questions arose as to the basis for the change to the later date of MMI.

On April 19, 2001, the initial setting of the hearing was convened. During cross-

examination of the claimant at that hearing, the claimant acknowledged that he had unilateral contact with the designated doctor just before the first clarification letter was sent by the Commission to the designated doctor in violation of Section 408.125(f). Based upon that revelation and the question related to the basis for the designated doctor's certification of a later date of MMI, the hearing officer sent additional questions to the designated doctor. The hearing officer noted in her decision that she initially suggested that a second designated doctor should be appointed "to dispense with any taint caused by the Claimant's actions." Although the claimant was willing to agree to the appointment of a second designated doctor, the carrier was not.

On June 6, 2001, the designated doctor responded to the questions sent to him by the hearing officer. The designated doctor responded "no" to a question of whether the ESI was the only medical treatment he relied on in amending the date of MMI from September 30, 1999, to April 26, 2000, and expanded that the further treatment included medications prescribed by the treating doctor and the treating doctor's encouragement that the claimant walk twice a day. The designated doctor also stated that "[m]easures such as change in medication, a home exercise program, and no activity or rest, could constitute prescribed medical treatment, and could warrant a change in MMI." In response to a question asking what material recovery or lasting improvement to the claimant's condition occurred during the time from September 30, 1999, to April 26, 2000, the designated doctor stated:

> In retrospect, minimal to mild improvement was seen in that period, according to the office notes, but the treating doctor was seen in that period. However, the treating doctor was still working with the [claimant] in good faith to try to materially improve his condition between 09-30-99 and 04-26-00.

Finally, the designated doctor responded "yes" to the question of whether it was still his medical opinion that the claimant reached MMI on April 26, 2000.

Essentially, the issue before the hearing officer was which report of the designated doctor was entitled to presumptive weight, his initial report that the claimant reached MMI on September 30, 1999, or his amended report certifying that the claimant reached MMI on April 26, 2000. The hearing officer determined that the earlier date of MMI certified by the designated doctor should be given presumptive weight. Implicit in that determination by the hearing officer is a determination that the designated doctor did not have a reasonable basis for amending his report and certifying the later date of MMI. The hearing officer appears to be primarily concerned with the fact that the designated doctor mistakenly believed that the claimant had a third ESI after September 30, 1999, which he did not, in fact, undergo. In the absence of the designated doctor's answers to the questions forwarded to him by the hearing officer, the hearing officer's determination in that regard would have been more tenable. However, in those responses, the designated doctor specifically noted that he did not rely solely on the claimant's having undergone ESI treatment after September 30, 1999, in determining that an amendment of the MMI date was warranted. To the contrary, the designated doctor noted that the ongoing treatment

was comprised of the medication prescribed to the claimant in that period, rest, and a home exercise program. The hearing officer appears to believe that those measures do not rise to the level of continuing medical treatment such that a change in the MMI date was warranted. The problem with her belief in that regard is that it is not supported by any medical evidence. Both the treating doctor and the designated doctor have opined that the medications, rest, and home exercise program constituted ongoing medical treatment that support an amendment of the MMI date. As such, the hearing officer's determination to the contrary is so against the great weight of the evidence as to be clearly wrong or manifestly unjust. Cain v. Bain, 709 S.W.2d 175, 176 (Tex. 1986).

The hearing officer also appears to have rejected the designated doctor's later date of MMI based upon her determination that the claimant did not undergo material recovery or lasting improvement in the period from September 30, 1999, to April 26, 2000. The hearing officer's focus on and requirement of material recovery or lasting improvement is misplaced. Section 401.011(30)(A) defines MMI as "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." (Emphasis added.) Thus, the question is not whether the claimant actually recovered or improved in the period between September 30, 1999, and April 26, 2000, but whether, based upon reasonable medical probability, material recovery or lasting improvement could reasonably be anticipated. Again, the only doctor to provide an opinion on that question was the designated doctor in his response to the questions posed by the hearing officer. The designated doctor noted that there was "minimal to mild improvement" in that period; however, he also noted that the "treating doctor was still working with the [claimant] in a good faith effort to try to materially improve his condition between 09-30-99 and 04-26-00." Therefore, it is apparent that the designated doctor believed that even though the treatment program pursued by the treating doctor actually only produced minimal to mild improvement, it was undertaken with the goal of effectuating material recovery or lasting improvement. In addition, the designated doctor's use of the phrase "good faith" indicates that material recovery and lasting improvement could reasonably be anticipated from the pursuit of the treating doctor's treatment program. Thus, it is of no moment that the treatment did not ultimately prove successful in providing material recovery or lasting improvement in the claimant's condition, where, as here, the recovery and improvement could reasonably be anticipated according to the designated doctor. The hearing officer's error in applying the statutory definition of MMI in this case resulted in her improperly rejecting the amended certification of MMI.

Finally, we briefly address the argument advanced by the carrier in its response that the claimant should not benefit from the later date of MMI because of the "taint" associated with his unilateral contact with the designated doctor shortly before the amendment occurred. As we noted above, the hearing officer suggested that a second designated doctor be appointed in order to address the problem of the claimant's having unilaterally contacted the designated doctor, and the carrier refused that offer. In addition, the designated doctor stated in his response to the hearing officer's questions that he was not aware of the claimant's attempt to contact his office; that he did not talk to the claimant

other than during the designated doctor examination; and that none of the designated doctor's office staff could recall having a telephone conversation or personal contact with the claimant after the examination. Thus, the claimant's contact with the designated doctor appears to have been of little consequence in this case. When that fact is considered in conjunction with the fact that the carrier declined the hearing officer's offer that a second designated doctor be appointed, we cannot agree that the prohibition of Section 408.125(f) counsels against giving presumptive weight to the April 26, 2000, date of MMI.

As we noted above, on two occasions subsequent to the amendment of his report and the certification of the April 26, 2000, date of MMI, the designated doctor reaffirmed that the April 26, 2000, MMI date was the more accurate date of MMI. In light of our determination that the basis for the hearing officer's rejection of that MMI date does not find sufficient support in the record, we reverse the determination that the claimant reached MMI on September 30, 1999, and render a new decision that the claimant reached MMI on April 26, 2000.

The true corporate name of the insurance carrier is **LUMBERMANS MUTUAL CASUALTY** and the name and address of its registered agent for service of process is

CORPORATION SERVICE COMPANY
800 BRAZOS STREET
AUSTIN, TEXAS 78701.

Elaine M. Chaney
Appeals Judge

CONCUR:

Thomas A. Knapp
Appeals Judge

Robert E. Lang
Appeals Panel
Manager/Judge