APPEAL NO. 020784
FILED MAY 8, 2002

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 on March 7, 2002. The hearing officer determined that the appellant's (claimant) correct date of maximum medical improvement (MMI) is August 8, 2000, pursuant to the Texas Workers' Compensation Commission (Commission)-selected designated doctor's initial certification of MMI. The claimant appealed and the respondent (carrier) responded, urging affirmance.

DECISION

Reversed and remanded.

The parties stipulated that on _____, the claimant sustained a compensable injury. The medical records reflect that on August 8, 2000, Dr. W, the carrier-selected required medical evaluation doctor, certified that the claimant had reached MMI on August 8, 2000. On November 9, 2000, the designated doctor, Dr. B, also certified that the claimant had reached MMI on August 8, 2000. The claimant's treating doctor, Dr. R, disputed the MMI date based upon the fact that the claimant was still undergoing active treatment and was scheduled to commence ESI injections and work hardening. On February 26, 2001, in response to a letter of clarification from the Commission, Dr. B stated:

> [I]t should be noted that at the time of my examination on 11/9/00, there was no indication [claimant] was undergoing any further treatment. However, if [claimant] is approved for ESI's and work-hardening, he clearly is not at [MMI]. Therefore, based off of the fact that [claimant] is currently approved for further treatment to help improve his condition, he is not at MMI.

On September 28, 2001, Dr. B issued an amended certification with an MMI date of August 8, 2001. Between August 8, 2000, and August 8, 2001, the claimant was seen by numerous doctors. The recommendations varied from conservative treatment to spinal surgery. Dr. V believed that a 360E fusion would have an excellent chance of fusion; Dr. S believed that prior to any Intra-Discal Electro Thermal (IDET) procedure or surgical treatment, ESI injections should be considered; Dr. T believed that the claimant was a prime IDET candidate; and Dr. A believed that the claimant's prognosis was fair to good.

In determining that the claimant's correct date of MMI is August 8, 2000, the hearing officer found that the certification of MMI as of August 8, 2000, by Dr. B is not against the great weight of the other medical evidence. In the statement of the evidence, the hearing officer notes that one year after seeing the designated doctor, the claimant has had little to no improvement. The hearing officer acknowledged the fact that the claimant has needed continuing treatment but concludes, "[H]owever, it appears the [c]laimant's condition has not shown 'further material-recovery' or 'lasting improvement' since the first

certification of MMI at August 8, 2000." We find that the hearing officer erred as a matter of law.

Section 401.011(30) defines MMI, in pertinent part, as follows:

> (30) "[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**; [and]
>
> (B) the expiration of 104 weeks from the date on which income benefits begin to accrue[.] [Emphasis added.]

The Commission has now promulgated a rule which specifically refers to amendments by designated doctors. That rule is Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 130.6(i) (Rule 130.6(i)), which provides, in relevant part:

> The designated doctor shall respond to any commission requests for clarification not later than the fifth working day after the date on which the doctor receives the commission's request. **The doctor's response is considered to have presumptive weight as it is part of the doctor's opinion.** [Emphasis added.]

The rule does not provide any time limits, nor does it have any qualifications. "The intent is to ensure that the doctor's clarification has presumptive weight," and "[i]f the designated doctor determines that the additional documentation is supportive of a change in his original recommendation, then the opinion should also carry presumptive weight." *See* Texas Workers' Compensation Commission Appeal No. 013042-s, decided January 17, 2002. In the instant case, we find that the designated doctor's amended certification is entitled to presumptive weight pursuant to Rule 130.6(i).

In this case, we do not believe it appropriate to reverse and render the hearing officer's decision, as the new rule affects evidentiary weight, rather than prohibiting certain actions. We do, however, reverse and remand this case to the hearing officer with directions that he consider the amended designated doctor's report and give it presumptive weight as required by Rule 130.6(i). On remand, the hearing officer must determine whether the great weight of the other medical evidence contradicts Dr. B's amended report, considering the presumptive weight afforded to that report. If the hearing officer determines that Dr. B's amended report is against the great weight of the other medical evidence, he must specifically identify the medical evidence which he believes so constitutes the great weight of the other medical evidence and why he finds it to be so. If the hearing officer does determine that Dr. B's amended report is against the great weight

of the other medical evidence, he may seek further clarification from Dr. B, adopt another MMI certification of Dr. B, or adopt another MMI certification from another doctor.

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, which was amended June 17, 2001, to exclude Saturdays, Sundays, and holidays listed in the Texas Government Code in the computation of the 15-day appeal and response periods.

The true corporate name of the insurance carrier is **CONNECTICUT INDEMNITY COMPANY** and the name and address of its registered agent for service of process is

CORPORATION SERVICES COMPANY
800 BRAZOS
AUSTIN, TEXAS 78701.

Daniel R. Barry
Appeals Judge

CONCUR:

Gary L. Kilgore
Appeals Judge

Thomas A. Knapp
Appeals Judge