

APPEAL NO. 030139
FILED FEBRUARY 28, 2003

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 December 5, 2002, with the record closing on January 2, 2003. The hearing officer determined that the appellant's (claimant) maximum medical improvement (MMI) date and impairment rating (IR) are not ripe for adjudication and that a second Texas Workers' Compensation Commission (Commission)-appointed designated doctor needs to be appointed in order to resolve the MMI/IR dispute. The claimant appeals this decision. The respondent (carrier) urges affirmance of the hearing officer's decision and order.

DECISION

Reversed and a new decision rendered that the claimant reached MMI on June 29, 2001, with a 24% IR.

The evidence reflects that the claimant sustained a compensable injury on _____. The claimant was examined by the carrier-selected required medical examination (RME) doctor on October 29, 1999. At that time, the RME doctor, relying on the Guides to the Evaluation of Permanent Impairment, third edition, second printing, dated February 1989, published by the American Medical Association (3rd edition), certified that the claimant reached MMI on the same date, with a zero percent IR. Subsequently, a dispute arose regarding the MMI/IR certification and the Commission appointed a designated doctor to resolve the dispute. The designated doctor initially examined the claimant on November 21, 2000, at which time he certified MMI on the same date and assigned a 13% IR. The designated doctor relied on the Guides to the Evaluation of Permanent Impairment, fourth edition (1st, 2nd, 3rd, or 4th printing, including corrections and changes as issued by the American Medical Association prior to May 16, 2000) (4th edition) in making the certification. As the initial MMI/IR certification was made using the 3rd edition, in accordance with Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 130.1(c)(2)(B)(ii) Rule 130.1 (c)(2)(B)(ii), the designated doctor should have relied on the 3rd edition as well.

On January 9, 2002, the Commission requested clarification from the designated doctor and asked him to consider a November 28, 2001, operative report and indicate whether this information would cause him to change his opinion regarding MMI/IR. The Commission did not note in this letter that the designated doctor had improperly relied on the 4th edition in making his MMI/IR certification, nor did it request that the designated doctor rely on the 3rd edition in making subsequent certifications relating to the claimant. In a letter dated January 21, 2002, the designated doctor responded and requested a reexamination of the claimant. On March 14, 2002, the designated doctor examined the claimant again and, relying again on the 4th edition, certified that the claimant reached MMI on March 14, 2002, with a 21% IR.

On June 20, 2002, the Commission again requested clarification from the designated doctor relating to the MMI date. Specifically, the Commission asked the designated doctor if: (1) he was aware that statutory MMI occurred on June 29, 2001, which was prior to the March 14, 2002, MMI date certified by the designated doctor? (2) whether, after November 21, 2000, there was further material recovery or lasting improvement in the claimant's condition? and (3) whether there was any change in the claimant's medical condition between November 21, 2000, and June 29, 2001? The designated doctor responded, in a letter dated June 27, 2002, that; (1) he was unaware of the statutory MMI date and, having been supplied with that date, agreed that the claimant reached MMI statutorily on June 29, 2001; (2) when he examined the claimant in November 2000, he believed that she was at MMI, but after learning that the claimant had a cervical discectomy on November 28, 2001, felt that her MMI date had changed and requested another examination; and (3) *with the exception of the information relating to the November 2001, cervical surgery*, he was not aware of any changes in the claimant's medical condition.

In a letter dated August 15, 2002, the Commission sent another letter of clarification to the designated doctor asking: (1) since the designated doctor had no medical records covering the period from November 21, 2000, and the date of statutory MMI, on what basis did he determine that the claimant reached MMI statutorily? and (2) were the two prior MMI/IR certifications based upon the 3rd or 4th edition? On August 26, 2002, the designated doctor responded and clarified that (1) he changed the MMI date to the statutory date because the March 14, 2002, MMI date was subsequent to statutory MMI; and (2) that he had used the 4th edition.

The designated doctor requested a reexamination of the claimant. On September 17, 2002, the designated doctor examined the claimant for a third time. Relying on the 3rd edition, he certified that the claimant reached MMI statutorily on June 29, 2001, with a 24% IR. There is no indication that the Commission requested further clarifications from the designated doctor. The hearing officer determined that because the designated doctor refused to follow a Commission request to provide clarification regarding the June 29, 2001, MMI date that he assigned, another designated doctor needs to be appointed and that the issues of MMI and IR are premature.

Section 408.125(e) provides that where there is a dispute as to the IR, the report of the Commission-selected designated doctor is entitled to presumptive weight unless it is contrary to the great weight of the other medical evidence. Rule 130.6(i) provides that the designated doctor's response to a request for clarification is also considered to have presumptive weight, as it is part of the designated doctor's opinion. See *also*, Texas Workers' Compensation Commission Appeal No. 013042-s, decided January 17, 2002. We cannot agree that the designated doctor refused to provide clarification regarding the June 29, 2001, MMI date. While his written response to the third request for clarification by the Commission is not entirely clear with regard to why he changed the claimant's MMI date from November 21, 2000, to June 29, 2001, the designated doctor confirmed the statutory MMI date via his third and last examination of the claimant, which was subsequent to the Commission's final request for clarification. We

believe that under the facts of this case, issuing a new Report of Medical Evaluation (TWCC-69) based upon a reexamination of the claimant constitutes a clarification entitled to presumptive weight. For the foregoing reasons, we reverse the hearing officer's decision and render a new decision that in accordance with the opinion of the designated doctor, the claimant reached MMI on June 29, 2001, with a 24% IR.

The true corporate name of the insurance carrier is **LIBERTY MUTUAL INSURANCE COMPANY** and the name and address of its registered agent for service of process is

**CT CORPORATION SYSTEM
350 NORTH ST. PAUL STREET
DALLAS, TEXAS 75201.**

Chris Cowan
Appeals Judge

CONCUR:

Terri Kay Oliver
Appeals Judge

Robert W. Potts
Appeals Judge