APPEAL NO. 122627
FILED FEBRUARY 19, 2013

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 November 5, 2012, in [City], Texas, with [hearing officer] presiding as hearing officer. With regard to the two disputed issues before him, the hearing officer determined that the respondent (claimant) reached maximum medical improvement (MMI) on July 13, 2012, and the claimant's impairment rating (IR) is 6%.

The appellant (self-insured) appeals, contending that the MMI date and IR adopted by the hearing officer should not be adopted and asking that the MMI date and IR of the designated doctor be adopted. The appeal file does not contain a response from the claimant.

DECISION

Reversed and rendered.

The claimant, a juvenile probation officer, testified that on [date of injury], she intervened in an argument involving three inmates and that she sustained a left shoulder injury when one of the inmates grabbed or yanked on her left arm to keep her from falling over another inmate. The parties stipulated that the claimant sustained a compensable injury on [date of injury]. The parties also stipulated that [Dr. T] was the designated doctor for the issues of MMI and IR. A Request for Designated Doctor Examination (DWC-32) dated May 4, 2012, listed the conditions accepted by the self-insured as: "[l]eft shoulder sprain/strain." Extent of injury was not an issue and the parties did not stipulate what the compensable injury included.

**MMI/IR**

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." Section 408.1225(c) provides that the report of the designated doctor has presumptive weight, and the Texas Department of Insurance, Division of Workers' Compensation (Division) shall base its determination on whether the employee has reached MMI on the report of the designated doctor unless the preponderance of the other medical evidence is to the contrary. Section 408.125(c) provides that the report of the designated doctor shall have presumptive weight, and the Division shall base the IR on that report unless the preponderance of the other medical evidence is to the contrary, and that, if the preponderance of the

medical evidence contradicts the IR contained in the report of the designated doctor chosen by the Division, the Division shall adopt the IR of one of the other doctors.

Dr. T, the designated doctor, examined the claimant on July 9, 2012, and certified MMI on January 27, 2012, with a 0% IR. Regarding the MMI date, Dr. T recited that he based the MMI date "on the information provided and the examination findings presented today." As rationale for the MMI date, Dr. T stated "[t]his was when the [claimant] was released to full duty and where it appears the [claimant's] condition had become static." In evidence is a Work Status Report (DWC-73) dated January 27, 2012, from the treating doctor, releasing the claimant to return to work as of January 27, 2012, without restrictions. Regarding the 0% IR, Dr. T found the upper extremity range of motion (ROM) "[w]ithin normal limits" giving the measurements of the injured left shoulder and the right shoulder.

The hearing officer rejected Dr. T's report, stating in the Background Information:

> It should be noted, however, that between April and May of 2012, the claimant underwent [eight] weeks of physical therapy that had been recommended by her doctor. So it is clear that on the [d]esignated [d]octor's date of MMI, further material recovery from or lasting improvement to the claimant's injury could still reasonably be anticipated. As a result, the [d]esignated [d]octor's MMI date cannot be adopted.

We note that Dr. T's examination was on July 9, 2012, after the claimant had completed the physical therapy, and that Dr. T had received treatment/consultation notes from the treating doctors and from [Dr. L], a referral doctor, which covered the period of the claimant's physical therapy. Nonetheless, Dr. T had described the claimant's condition as of January 27, 2012, as "static." Dr. T, in his report of July 18, 2012, under "Treatment History" stated that the claimant "has had [eight] weeks of physical therapy and indicated it has helped her condition." Dr. T was clearly aware that the claimant had been prescribed and completed eight weeks of physical therapy after January 27, 2012, and still certified January 27, 2012, as the date of MMI. The Appeals Panel has observed that a finding of MMI does not mean that there will not be a need for some future medical treatment, and the need for such additional treatment does not mean that MMI was not reached at the time it was certified. Appeals Panel Decision (APD) 020834, decided May 16, 2002; APD 991932, decided October 25, 1999.

Dr. L, a doctor selected by the treating doctor acting in place of the treating doctor, examined the claimant on July 13, 2012 (we note that this examination was just four days after Dr. T's examination) certified MMI on July 13, 2012, with a 6% IR. Regarding the MMI date Dr. L writes "[f]urther active medical care is not likely to result in further material medical improvement." In a report dated May 4, 2012 (and which is

specifically referenced in Dr. T's evaluation) Dr. L wrote that the claimant "continues to do well. She does have some symptoms that has made further progress since her last visit weeks ago." In a note dated June 15, 2012, Dr. L states that the claimant sometimes has pain "but overall she is doing about the same." The hearing officer, in his Background Information, referenced Dr. L's July 13, 2012, report which certified MMI on July 13, 2012, and commented "[c]oming as it does after the claimant [eight] weeks of PT [Dr. L's] opinion on MMI is more persuasive than that of the [d]esignated [d]octor." We again note that Dr. T's report on July 9, 2012, was also after the claimant had completed the eight weeks of physical therapy and, in fact, Dr. T noted that the claimant had completed eight weeks of physical therapy in his report.

Regarding the IR, Dr. L assigns a 6% upper extremity impairment for loss of ROM but then includes a rating for loss of strength stating that "a 10% motor deficit is assigned from [T]able 12 [page 3/49 of 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)] to the axillary nerve (35% maximum motor impairment from [T]able 15)." Dr. L's IR cannot be adopted because he rates nerve injuries which have not been accepted by the self-insured, nor has there been any administrative determination that the claimant's compensable injury includes nerve disorders.

In reviewing a "great weight" challenge, we must examine the entire record to determine if: (1) there is only "slight" evidence to support the finding; (2) the finding is so against the great weight preponderance of the evidence has to be clearly wrong and manifestly unjust; or (3) the great weight and preponderance of the evidence supports its nonexistence. *See* Cain v. Bain, 709 S.W.2d 175 (Tex. 1986).

We reverse the hearing officer's determinations that the claimant reached MMI on July 13, 2012, and that the claimant's IR is 6% as being so against the great weight or preponderance of the evidence as to be clearly wrong and manifestly unjust. We render a new decision that the claimant reached MMI on January 27, 2012, with a 0% IR as assessed by the designated doctor whose opinion was not contrary to the preponderance of the other medical evidence.

The true corporate name of the insurance carrier is **[a self-insured governmental entity]** and the name and address of its registered agent for service of process is

**[ COUNTY JUDGE]**
**[ADDRESS]**
**[CITY], TEXAS [ZIP].**

Thomas A. Knapp
Appeals Judge

CONCUR:

Carisa Space-Beam
Appeals Judge

Margaret L. Turner
Appeals Judge