APPEAL NO. 950226

Pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq*. (1989 Act), a contested case hearing was held in (city), Texas, on September 9, 1994, with the record inexplicably closed as of January 11, 1995, (hearing officer) presiding as hearing officer. The hearing officer concluded that the respondent's (claimant) back problem was the result of a compensable injury sustained on or about (date of injury), that the claimant has not reached maximum medical improvement (MMI) and hence there can be no impairment rating (IR), and that claimant has had disability continuing since (date of injury). She also made a finding of fact that the carrier had not borne its burden of proof with regard to contribution and that it is not entitled to a reduction with regard to any of claimant's impairment or supplemental income benefits if and when they become applicable. The appellant (carrier) asserts that the hearing officer's conclusions that the claimant's (date of injury), injury resulted in disability after December 15, 1993, that the claimant had not reached MMI and had no IR, and that the claimant sustained a period of disability from the (date of injury), injury from December 15, 1993, until the date of the hearing were so against the great weight and preponderance of the evidence as to be manifestly unjust. The carrier also disagrees with the hearing officer's contribution determination. The claimant urges that the hearing officer's decision be affirmed but takes the position that the issue of contribution is premature.

DECISION

We affirm in part, reverse and render in part and reform in part.

Without question, the evidence in this case was conflicting and the claimant's testimony was somewhat inconsistent. These are matters generally within the province of the hearing officer. Section 410.165(a); Burelsmith v. Liberty Mutual Insurance Co., 568 S.W.2d 695 (Tex. Civ. App.-Amarillo 1978, no writ). Succinctly, the claimant sustained back injuries sometime in 1985 and 1988, had back surgery on two occasions, the last time being in 1989, and was returned to work in 1990. According to the claimant he did not have any back problems during the time he returned to work up to (date of injury), except for some soreness for which he went to a (Dr. M) to have his back "popped" and massaged. He testified at one point that he continued to work from the time he was released from his second surgery until his injury of (date of injury), and that he did not have any pain in his back. Medical records in evidence flatly contradict this testimony with notations that the claimant's back pain and left leg pain were ongoing during this period of time. The claimant stated that there was no telling what the doctors put down and that he did not recall going to an emergency room, although there were records of such, in September 1992, but that if he did it was only to get a prescription.

As a result of his ongoing treatment for the earlier injury, the claimant was examined for an independent medical examination, at carrier's request, by (Dr. S) in June 1992. Dr. S reported a history of continuing back problems following the second back surgery in 1989 and notes that the claimant indicated he had not improved after the second surgery and that

he is getting worse. Dr. S opined that the claimant is unable to return to work without restrictions, that there will be some "partial permanent medical impairment" resulting and indicated the possibility of another surgery. In a deposition offered into evidence, Dr. S stated that the claimant was a surgical candidate, that the claimant's medical condition did not change as a result of an (date of injury), injury, and that comparing the claimant's clinical status prior to (date of injury), and after that date, "overall there were no changes on the basis of the examination, history and results of the tests performed, therefore, it is my opinion that this patient's need for surgery is due to the condition existing prior to [date of injury]."

The claimant had been working for the current employer for either five days, according to the carrier, or two weeks, according to the claimant, when he felt a "pop" and immediate pain in his back while lifting 50 pound bags of cement. He has not worked since (date of injury), and began treating with several doctors. That the claimant sustained a compensable injury on (date of injury), was not disputed by the parties. The claimant underwent conservative treatment and therapy during the ensuing period and subsequently was sent to a Texas Workers' Compensation Commission (Commission)-selected designated doctor, (Dr. K), who determined that the claimant reached MMI on December 15, 1993, with a five percent IR. The claimant began treating with a (Dr. O), who in a report dated April 26, 1994, indicates that the claimant had undergone tests conducted by another doctor and had seen Dr. S, both of whom recommended surgery. In an addendum to his report, Dr. O indicated the need for surgery stating that "he has either broken his old fusion or it never united at L4-5 and needs to be done." Dr. O interestingly opines that the claimant's current problem "absolutely does not have anything to do with his other surgeries." There is no indication that the claimant saw Dr. O after April 1994; however, there is also some indication that a dispute over surgery has been ongoing between the parties.

In a June 10, 1994, letter to the Commission's Benefit Review Officer, Dr. K states:

In follow up to our telephone conversation this morning, I am writing this note to you.

> As I previously stated in my letter of 10 May, 1994, in light of the new information from [Dr. O] that recent radiographs show the previous fusion of [claimant's] back is unstable, it is my opinion that he has not reached maximum medical improvement and that another fusion is indicated. I rescind my previous statement of MMI.

Based upon this state of the evidence, the hearing officer determined that the claimant's back problem is a result of the compensable injury of (date of injury). Although there is certainly contrary evidence, there is evidence to support that determination and we cannot conclude that it is so against the great weight and preponderance of the evidence as to be clearly wrong or unjust. Cain v. Bain, 709 S.W.2d 175, 176 (Tex. 1986); Lopez v. Hernandez, 595 S.W.2d 180, 183 (Tex. Civ. App.-Corpus Christi 1980, no writ). The hearing officer judged the claimant to be credible, a function normally not undertaken at the appellate level. Texas Workers' Compensation Commission Appeal No. 93887, decided

November 16, 1993. The claimant's testimony together with the medical opinion of Dr. O, albeit in broad scope and somewhat conclusory, is evidence which satisfies a legally sufficient basis for the determination regarding the causal relationship between the current back condition and the (date of injury), incident.

We have stated that an MMI or IR can be rescinded or amended for proper reason and within a reasonable period of time. Texas Workers' Compensation Commission Appeal No. 94492, decided June 8, 1994; Texas Workers' Compensation Commission Appeal No. 931071, decided January 6, 1994. Here, Dr. K indicated he was rescinding his initial report based upon new medical evidence, and he responded to inquires from the Commission for clarification. While Dr. K does not give an opinion regarding the causal relationship between the claimant's current back condition and the (date of injury), incident, he does indicate that the new medical information alters his initial determination of MMI. Contrary to the carrier's position, we have not held it is required that a designated doctor personally reexamine a claimant to amend or rescind his MMI or IR although it certainly may well be the preferred procedure. We cannot find error on the hearing officer's part in accepting Dr. K's rescission under the circumstances present. However, we do find error in the hearing officer's determination that the claimant has not reached MMI up to the date of the decision, January 13, 1995. By definition, statutory MMI has been reached since 104 weeks have passed from the date on which income benefits began to accrue. Section 401.011(30)(B). That does not necessarily mean an earlier MMI date may not be found by a designated doctor. The hearing officer also determined that the claimant has had disability since (date of injury). There is evidence from which this inference could be drawn and the determination on the period of disability is not so against the great weight and preponderance of the evidence as to be clearly wrong or manifestly unjust. Cain, *supra*; Lopez, *supra*. Again, the hearing officer found the claimant credible and there is some corroborative medical evidence on this issue.

Regarding the finding that "[c]arrier has not borne its burden of proof with regard to the issue of contribution and is not entitled to a reduction with regard to any of Claimant's IIBs and SIBs, if and when they become applicable," we agree with claimant's position that given the current state of the case, this issue is premature. Of course, contribution only potentially applies to IIBs and SIBs. Section 408.084. Therefore, we reverse and set aside this finding and render our decision that it is premature to resolve this issue at this time.

Having found error in the conclusion that MMI has not been reached as of the date of the decision, January 13, 1995, by virtue of Section 401.011(B), we reform the language of the hearing officer that the claimant has not reached MMI to read as follows: "If the date of statutory MMI becomes applicable because a designated doctor does not find that the claimant reached MMI prior to the statutory date, than the latest date the claimant could have reached MMI was at the expiration of 104 weeks from the date on which income benefits began to accrue." *See generally*, Texas Workers' Compensation Commission

Appeal No. 941717, decided February 6, 1995, (Unpublished). Expeditious action should be undertaken by the Commission to resolve the MMI date and the appropriate IR.

Stark O. Sanders, Jr.
Chief Appeals Judge

CONCUR:

Philip F. O'Neill
Appeals Judge

Lynda H. Nesenholtz
Appeals Judge