APPEAL NO. 962342

This appeal arises under the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act). On September 17, 1996, a contested case hearing (CCH) was held in (city), Texas, with (hearing officer) presiding as hearing officer. The hearing officer recites that the record was reopened on October 4, 1996 (apparently to accept another of the designated doctor's reports into evidence), and was closed again on October 18, 1996. There were multiple issues and, on those issues appealed, the hearing officer determined that appellant/cross-respondent's (claimant) compensable (date of injury), injury did not extend to an injury of the cervical spine (neck), that claimant reached maximum medical improvement (MMI) on January 20, 1996, by operation of law (Section 401.011(30)(B)) with a seven percent impairment rating (IR) as assessed by the designated doctor and that claimant did not have disability from July 27, 1995, to January 20, 1996 (the date of "statutory" MMI).

Claimant appeals a number of the hearing officer's determinations, essentially contending that the original injury did include the neck, that claimant has a 26% IR as assessed by the treating doctor and that claimant had disability for the period in question. Claimant requests a reversal of the hearing officer's decision or, in the alternative, a remand. Respondent/cross-appellant (carrier) filed a conditional appeal (conditioned on claimant's appeal) contending that claimant's MMI date was some date prior to the January 20, 1996, statutory MMI date. Carrier also files a response urging affirmance of the hearing officer's decision on the other issues.

DECISION

Affirmed in part and reversed and remanded in part.

Claimant was, and had been, employed as a "porter" (janitor) for employer for a number of years. Initially, his duties included shoveling metal shavings off the floor and cleaning the restrooms. It is undisputed that claimant sustained a compensable injury on (date of injury), apparently shoveling the metal shavings. Claimant saw a number of doctors, the medical evidence will be summarized below, and eventually was evaluated by (Dr. F), a Texas Workers' Compensation Commission (Commission)-selected designated doctor. Although claimant testified that he had complained of neck and shoulder injuries to all of his doctors, the doctors only documented and treated a right shoulder injury. Claimant had surgery for a right rotator cuff tear on February 17, 1994, by (Dr. S), who, in a functional capacity evaluation (FCE) of June 17, 1994, limited claimant's activities "from crawling, climbing, pushing, pulling and lifting activities." Dr. S certified claimant reached MMI on July 26, 1994, with a 12% IR based on a right shoulder injury. Dr. F, in a Report of Medical Evaluation (TWCC-69) and narrative, both dated March 21, 1995, concluded claimant had not reached MMI and, for the first time, diagnosed a cervical injury with an impression of "cervical radiculopathy and probable carpal tunnel versus tardy ulnar palsy syndrome." Dr. F commented that claimant "is currently unfit for work." Although Dr. F, and other doctors,

had claimant off work in 1994 and 1995, it is undisputed that claimant returned to light duty on July 13, 1994, at his prior wage. Claimant's duties were modified so that he was only cleaning restrooms and another "porter" was hired to shovel the metal shavings, which was more strenuous than the cleaning duties. Claimant continued working from July 13, 1994, to July 26, 1995, when claimant reached age 65 and voluntarily retired to draw Social Security (SS) retirement benefits. Claimant had additional shoulder surgery on September 18, 1995, consisting of arthroscopy of the right shoulder and subacromial decompression, done by (Dr. R) and on November 30, 1995, for a "Re-do" of a failed rotator cuff tear.

Claimant began treating with (Dr. O), who is claimant's current treating doctor, in November 1994. Dr. O has several reports (Specific and Subsequent Medical Report (TWCC-64)) indicating treatment of a right shoulder injury. A "Letter of Medical Necessity" dated May 17, 1995, refers to a "Cervico-brachial Syndrome Radiculopathy " A note dated July 18, 1995, takes claimant off work, noting a "Rotator Cuff Tear - Neuralgia/Neuritis." In a TWCC-69 and narrative, both dated February 15, 1996, Dr. O certified MMI on "1-15-96 (Statutory)" with a 26% IR based on six percent impairment of the cervical spine from Table 49, of the Guides to the Evaluation of Permanent Impairment, third edition, second printing, dated February 1989, published by the American Medical Association (AMA Guides), eight percent impairment for range of motion (ROM) of the cervical spine, seven percent for neurological disorders and 16% impairment of upper extremity ROM, resulting in a whole person IR of 26%.

(Dr. L), carrier's required medical examination (RME) doctor, in a TWCC-69 dated June 2, 1995, and narrative dated May 23, 1995, certified MMI on May 23, 1995, with a 10% IR (the narrative is unspecific on how the IR was calculated). Claimant was reexamined by Dr. F who, in a report with attachments and narrative dated March 25, 1996, certified MMI on that date with an 11% IR based on a four percent cervical impairment from Table 49, and an 11% impairment of the right upper extremity (translated to a seven percent whole body impairment). Dr. F noted "obvious gross symptom magnification." The four percent cervical and seven whole body impairment of the right upper extremity were combined for the 11% IR. Dr. O, in an undated letter, referenced Dr. F's evaluation, commented that the right shoulder ROM "portion did not vary significantly" but disagreed on the neurological involvement and the cervical impairment. Dr. O referenced and reaffirmed his 26% IR. In a letter and report dated July 1, 1996, Dr. F referenced a letter from Dr. O, discussed his IR and concluded "I, therefore, would not change my assessment of his total remain; it would remain 11% to the whole person - that is 7% with his shoulder and 4% to the cervical spine."

The hearing officer determined that claimant's compensable injury does not extend to the cervical spine, citing "the long interval between the date of injury and the claimant's first complaint of a neck problem due to the [compensable] injury." Claimant points to reports of the designated doctor which indicate that Dr. F believed there was a causal connection between the original compensable shoulder injury and Dr. O's comments which

"clearly linked the shoulder and cervical injuries." The hearing officer is the sole judge of the weight and credibility of the evidence. Section 410.165(a). As such, the hearing officer determines questions regarding the extent of injury when that issue is in dispute. Texas Workers' Compensation Commission Appeal No. 94015, decided February 11, 1994. The hearing officer made it clear that she did not believe the cervical injury was related to the original injury because claimant had seen a number of doctors and had shoulder surgery without any documentation of a cervical injury or complaints. It was over a year after the original injury, and after claimant had returned to work, that Dr. F first brought a possible cervical injury into question. We find the hearing officer's determinations on this issue to be supported by sufficient evidence, although another fact finder might have reached another conclusion. That alone is insufficient for us to reverse the hearing officer's decision on this point. Salazar v. Hill, 551 S.W.2d 518 (Tex. Civ. App.-Corpus Christi 1977, writ ref'd n.r.e.).

Claimant appeals the designated doctor's seven percent IR and carrier, in its conditional appeal, appeals the hearing officer's determination of a January 20, 1996, date of MMI. (We note the designated doctor certified a March 26, 1996, MMI date and it appears that if claimant had not reached MMI by January 20, 1996, that date is the date claimant would have reached MMI by operation of law.) The Appeals Panel has consistently noted the unique position that a designated doctor's report occupies under the 1989 Act. The designated doctor's report is entitled to presumptive weight under Sections 408.122(c) and 408.125(e), unless the great weight of the other medical evidence is contrary thereto. *See* Texas Workers' Compensation Commission Appeal No. 92495, decided October 28, 1992, and Texas Workers' Compensation Commission Appeal No. 92412, decided September 28, 1992. In addition, we have noted that "it is not just equally balancing evidence or a preponderance of the evidence that can outweigh [a designated doctor's] report but only the `great weight' of the other medical evidence that can overcome it." Appeal No. 92412. The hearing officer, in her statement of the evidence, comments that the "great weight of the other medical evidence is not contrary to [Dr. F's] March 25, 1996, report." Although Dr. O disagrees with Dr. F (while Dr. L generally has a similar finding to Dr. F's), that is insufficient to overcome the presumptive weight of the designated doctor's report. In that Dr. F clearly breaks down his IR to consist of seven percent for the right shoulder and four percent for the cervical injury, we find the hearing officer's determination of a seven percent IR for the right shoulder alone (having determined the shoulder injury did not extend to the cervical spine) to be affirmable as being supported by the evidence. Further, the hearing officer could, and apparently did, accept the designated doctor's assessment of MMI, adjusting it to the date claimant reached MMI by operation of law.

As the hearing officer notes, the issue of disability is the most problematical. Disability is defined in Section 401.011(16) as being "the inability because of a compensable injury to obtain and retain employment at . . . the preinjury wage." The record contains

several notations in 1994 and early 1995 indicating claimant was unable to work, including a slip, dated July 18, 1995, which states "[p]atient unable to work at this time." Nonetheless, it is undisputed that claimant returned to work, working modified duties, on July 13, 1994, and continued working until July 27, 1995, when he voluntarily retired in order to draw SS retirement benefits. The employer's testimony is that claimant could have continued in his light-duty position indefinitely. Claimant's position is that on July 27, 1995, he became unable to obtain and retain "the preinjury wages as a result of the injury." The hearing officer, in the statement of evidence, concluded that :

> [Claimant] retired solely to make himself eligible to receive retirement benefits from the Social Security Administration (SSA) and <u>not</u> because of his injury or the effects thereof. It is important to note that according to the evidence, the claimant's eligibility for SSA retirement benefits required him to lower his income, which is what prompted him to retire from [employer].

The hearing officer made the following factual determination:

5. Despite the fact that the claimant continued to suffer from the effects of his (date of injury), injury on and after July 27, 1995, his inability to earn his preinjury wage on and after July 27, 1995 was the result of his personal choice to remove himself from his employment to become eligible for SSA retirement benefits and not the (date of injury) injury.

We disagree with the hearing officer's analysis on this point. Unlike the eligibility for supplemental income benefits (SIBS), a finding of disability does not include a job search requirement or a "direct result" determination. What the hearing officer is required to determine is whether claimant was physically unable to obtain and retain employment due to the compensable injury, regardless of whether the claimant was receiving other nonemployment-related income. The hearing officer could well have found that claimant did have the physical ability to obtain and retain employment on July 27, 1995, because claimant had clearly been working up to that date and nothing related to the compensable injury precluded claimant from continuing his job. It is, however, the hearing officer's disregard of the circumstances of claimant's additional surgeries on September 18 and November 30, 1995, that gives us concern and causes us to remand the case on the belief that the hearing officer applied the wrong standard. The hearing officer must determine, based on the record before her (she may ask for additional oral or written argument), whether claimant had a physical inability to obtain and retain employment due to the compensable injury, regardless of whether claimant was receiving nonemployment-related income (i.e., the SS benefits). It is difficult for us to conceive that claimant could have shoulder surgery on September 18 and November 30, 1995, and still have the physical capability of working on those days, and whatever time it took to recover from those surgeries. It is also possible that because of a need for surgery, the claimant was unable

to work prior to surgery. We note that it is possible for an injured worker to go in and out of disability over a course of time. Texas Workers' Compensation Commission Appeal No. 93707, decided September 16, 1993.

We reject carrier's arguments in support of affirmance on this point, distinguishing cases cited by the carrier. Texas Workers' Compensation Commission Appeal No. 93794, decided October 20, 1993, held that a carrier was not liable to pay TIBS twice for two different injuries for the same time period, a situation clearly distinguishable from the present case. Similarly, Texas Workers' Compensation Commission Appeal No. 93989, decided December 16, 1993, involved two injuries during the same time frame. Had the claimant in this case had independent, non work-related, disability insurance, then presumably claimant could receive those benefits as well as TIBS during the time claimant was unable to obtain and retain employment due to the compensable injury.

Consequently, we reverse the hearing officer's determinations regarding disability and remand the case for the hearing officer to make new determinations of disability during the period from July 27, 1995, to January 20, 1996. The issues of extent of injury, MMI and IR have been resolved and are not to be revisited in any proceeding on remand.

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 Texas Workers' Compensation Commission's division of hearings, pursuant to Section 410.202. *See* Texas Workers' Compensation Commission Appeal No. 92642, decided January 20, 1993.

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Thomas A. Knapp
Appeals Judge

CONCUR:

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Tommy W. Lueders
Appeals Judge

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Christopher L. Rhodes
Appeals Judge