APPEAL NO. 010297-S

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 January 25, 2001. On the disputed issues, the hearing officer held that the respondent's (claimant) date of maximum medical improvement (MMI) was August 14, 2000, the date certified by the designated doctor in an amended report, and that the claimant had disability from his injury for the period from March 13 through August 14, 2000.

The appellant (carrier) has appealed, and argues that the hearing officer erred in giving presumptive weight to the designated doctor's amended report, which it states was not based on examination nor done for a proper purpose. The carrier disputes that an MMI date can be changed without an examination. There is no response from the claimant.

DECISION

We reverse the hearing officer's decision as to the date of MMI and remand.

A brief recitation of facts is included here. The claimant injured his back on _____, in a motor vehicle accident. An MRI of August 20, 1999, was normal. His operative diagnosis was lumbosacral strain. He was treated by Dr. C, who certified on January 21, 2000, that the claimant had reached MMI on that date with a 4% impairment rating (IR), attributable solely to lateral range of motion deficits. The claimant disputed this, and a designated doctor, Dr. K, examined the claimant and certified that he reached MMI on March 13, 2000, with a 5% IR. This was based on 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) for a specific condition and six months of documented pain. Dr. K noted positive Waddell's signs on every test. The claimant testified that he did not believe that Dr. K had all of his medical records.

The claimant testified that he worked for a month from January 10 to around February 27, 2000, and was then taken off work by Dr. N, who was apparently a new treating doctor. Dr. N referred the claimant to Dr. J, who administered a series of injections to the claimant over the next few months. The claimant also began undergoing physical therapy in July 2000. The claimant testified, and reports of Dr. J and Dr. N also state, that he improved significantly during this time (Dr. J states 50 to 60%). The claimant returned to work on September 1, 2000.

On August 9, 2000, the benefit review officer for the Texas Workers' Compensation Commission (Commission) wrote to Dr. K and asked him to review "the attached clinic notes," none of which were identified in the letter, and "determine if your opinion as to [MMI] remains the same." Dr. K responded on August 14, 2000, with a new certification of MMI for that date. There was no new examination and the IR remained at 5%. Dr. K stated as the basis for his change:

> With respect to my former medical resident [Dr. N], I will change the date of MMI in accordance with his request. However I would like to point out that [claimant] is one of the very few patients, that I have tested, that was found to be positive on every test for symptom magnification. I trust that requested MMI date of 8-14-00 should put closure to this case and that [claimant] will return to work.

The hearing officer stated that the amended report of Dr. K was done for a proper purpose and that his date of MMI was not "prospective." He also found that when Dr. K conducted his original, and only, examination, he had "appropriate medical records" before him. However, the hearing officer did not evaluate each report of Dr. K but stated that "taken together," the reports were in substantial compliance with appropriate provisions of the AMA Guides and were entitled to presumptive weight. We believe this was error.

There is no basis for according presumptive weight to Dr. K's two distinct reports on MMI "together." What the hearing officer has actually done was accord presumptive weight to the second report of Dr. K, impliedly rejecting the first report as against the great weight of contrary medical evidence. If not, then, indeed, he has adopted a "prospective" date of MMI by reading together a March 13, 2000, examination with an August 14, 2000, MMI date.

Effective June 7, 2000, the Commission amended Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 130.1 (Rule 130.1) substantively from what it had been before. Applicable to this case is Rule 130.1(b)(4) which states that:

> (4) To certify MMI the certifying doctor shall:
>
> (A) review medical records;
>
> (B) perform a complete medical examination of the employee for the explicit purpose of determining MMI (certifying examination);
>
> (C) assign a specific date at which MMI was reached.
>
> (i) The date of MMI may not be prospective or conditional.
>
> (ii) The date of MMI may be retrospective or the date of the certifying exam; and
>
> (D) complete and submit required reports and documentation.

The rule further explicitly states that a certification of MMI is a finding made by a doctor that the injured employee has reached MMI as defined by the 1989 Act. We cannot agree that an amended opinion on the existence of MMI on a date certain, that is plainly

intended to substitute for an earlier report and does not represent a mere clerical correction, is not itself a "certification" that Rule 130.1 states cannot be done without a complete medical examination of the employee. An examination did not occur prior to the August 14, 2000, report of Dr. K. The respect that Dr. K may have had for the treating doctor does not satisfy the requirements of Rule 130.1(b)(4)(B). Therefore, the carrier is correct in pointing out that the hearing officer erred by adopting the date of MMI from this report.

We reverse the hearing officer's decision and, as this appears to be a case of first impression applying Rule 130.1, we remand the decision for further proceedings. The hearing officer should order a reexamination by Dr. K. After reexamination, Dr. K may adopt his original MMI/IR certification or make a new MMI certification in accordance with Rule 130.1. Certification of MMI will also require the assignment of an IR.

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. *See* Texas Workers' Compensation Commission Appeal No. 92642, decided January 20, 1993.

Susan M. Kelley
Appeals Judge

CONCUR:

Judy L. S. Barnes
Appeals Judge

Thomas A. Knapp
Appeals Judge