APPEAL NO. 93252

This appeal arises under the Texas Workers' Compensation Act of 1989 (1989 Act), TEX. REV. CIV. STAT. ANN. arts. 1.01 through 11.10 (Vernon Supp 1993). On December 30, 1992, a contested case hearing convened but was continued on the request of the appellant (claimant) so an attorney could be hired. The hearing was then held on March 5, 1993, with (hearing officer) presiding. He determined that claimant had disability from (date of injury) to December 15, 1991 and from June 12, 1992 to September 26, 1992. He also found that no bona fide offer of light duty was made, that maximum medical improvement (MMI) was reached on September 25, 1992 with seven percent impairment, and that (Dr. Hi) was a treating doctor. Claimant appeals the time period of his disability, and he asserts that he has not reached MMI. Carrier requests that the decision be affirmed.

DECISION

Finding that the decision and order of the hearing officer are supported by sufficient evidence of record, we affirm.

Claimant was employed by (employer) for three years as a sand blaster helper when he felt pain while lifting pieces of metal on (date of injury). After receiving emergency care, claimant was seen by (Dr. Y), beginning on October 21, 1991. Dr. Y took him off work and started physical therapy. Dr. Y referred claimant to (Dr. M) on December 10, 1991 for orthopedic rehabilitation. Dr. M concluded that claimant had a back strain; an MRI showed "some degenerative disc changes." Dr. M called for more aggressive therapy. Dr. Y, in a letter dated November 5, 1992, states that he had released claimant to light duty from December 10, 1991 to June 22, 1992. (Dr. M, on a form dated January 23, 1992, released claimant to light duty on December 10, 1991 with occasional lifting of 20 pounds, frequent lifting of 10 pounds and negligible constant lifting.) Dr. Y then issued a TWCC Form 69 which showed claimant reached MMI on September 25, 1992, with an eight percent impairment.

Claimant testified that he was in prison from December 15, 1991 to June 11, 1992. Claimant began seeing Dr. Hi on October 15, 1992, and requested that he be allowed to change from Dr. Y to Dr. Hi on October 19th. Medical tests in evidence show that on October 16, 1991, a CT scan showed a mild bulge at L5-S1. An MRI dated November 15, 1991 showed desiccation of the L5-S1 disc with a small right posterior disc bulge. A discogram dated July 16, 1992 showed "annular disruptions of the 4-5 and 5-1 discs;" a CT scan also showed "abnormal architecture in the 5-1 and 4-5 discs." A November 19, 1992 myelogram and CT scan showed thickening of some nerve roots, poor filling of a root sheath, and a disc bulge at L5-S1.

The benefit review conference officer, in November 1992, appointed (Dr. O) as a designated doctor to determine whether MMI was reached and if so, what the impairment was. Dr. O performed an extensive evaluation on claimant on December 10 and

December 23, 1992. In his report of the latter date and in an addendum dated January 20, 1993, Dr. O agreed with Dr. Y that MMI had occurred on September 25, 1992, but stated that the impairment rating was seven percent.

Claimant testified that Dr. Y said surgery was possible but thought that it would only make claimant worse. Claimant further said that Dr. Hi thinks surgery would help him and does not think that MMI has been reached. He replied to a question by the hearing officer by saying that Dr. Y never fully released him to work prior to finding that he reached MMI on September 25, 1992. Claimant stated that he felt he was being discriminated against, but he did not raise this question on appeal. (Mr. M), who accompanied claimant at the hearing, is the business manager of Dr. Hi's office; he argued that physical therapy has failed claimant, so claimant should be allowed to try surgery; MMI has not been reached.

The hearing officer is the sole judge of the weight and credibility of the evidence. *See* Article 8308-6.34(e) of the 1989 Act. Articles 8308-4.25 and 4.26 provide that the report of the designated doctor selected by the Texas Workers' Compensation Commission shall be given presumptive weight as to whether MMI has been reached and as to an impairment rating unless the great weight of other medical evidence is to the contrary. The hearing officer correctly applied this standard and in doing so determined that the great weight of medical evidence was not contrary to the designated doctor's report. His decision to give presumptive weight to the designated doctor is sufficiently supported by the evidence, including the thoroughness of the designated doctor's report itself and the fact that claimant's first treating doctor, Dr. Y, also found MMI with a similar impairment rating, eight percent. While Dr. Hi did not issue a report in regard to MMI, his notes indicate that he did not believe MMI had been reached; however, his reports are not so compelling as to cause the Appeals Panel to conclude that the great weight and preponderance of the evidence is against the decision of the hearing officer giving the designated doctor's report presumptive weight. The hearing officer's determination that the claimant reached MMI on September 25, 1992 with seven percent impairment is sufficiently supported by the evidence.

The hearing officer found disability at all times after the injury until MMI was reached with the exception of time spent in prison. *See* Texas Workers' Compensation Commission Appeal No. 92674, dated January 29, 1993, which held that imprisonment, not the compensable injury, caused the loss of wages while a claimant was in prison. *Also see* Article 8308-4.23(a) and (b) of the 1989 Act which provides for temporary income benefits, based on disability, until MMI is reached. The finding of the hearing officer in regard to when disability existed is based on sufficient evidence and is consistent with the governing statute and Appeals Panel decisions.

The decision and order of the hearing officer is affirmed.

Joe Sebesta
Appeals Judge

CONCUR:

Susan M. Kelley
Appeals Judge

Gary L. Kilgore
Appeals Judge