APPEAL NO. 93554

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 March 22, 1993, and May 26, 1993, a contested case hearing was held in (city), Texas, with (hearing officer) presiding. She determined that respondent (claimant) has had no disability since February 19, 1992, but did not decide the issues of maximum medical improvement (MMI) and impairment rating. Appellant (carrier) asserts that MMI and impairment should have been addressed pointing out that neither Article 8308-4.25 nor 4.26 requires that a designated doctor must be used before those issues may be decided and further, that claimant by his inaction should not be allowed to delay resolution of the case. Claimant did not respond.

DECISION

We affirm.

At the hearing the issues were stated to be: (1) does claimant have disability, (2) what is the date of MMI, and (3) what is the impairment rating. These issues were stated by carrier to include as sub-issues (a) presumption of MMI under Rule 130.4 and (b) abandonment of medical care without good cause; the hearing officer accepted these as part of the issue of MMI.

Article 8308-6.42(c) of the 1989 Act states that the Appeals Panel "shall determine each issue on which review was requested." Carrier asserts on appeal that MMI and impairment rating should have been determined by the hearing officer.

The Appeals Panel determines:

That the hearing officer did not err in making no determination as to MMI and impairment rating in this case.

There was no dispute that claimant was compensably injured on (date of injury), while working for (employer). Because claimant was not present at the hearing to present evidence and has neither appealed nor responded to the appeal as a result of that hearing, the record will first be examined to determine whether adequate notice was given.

I

The hearing officer recites in the record of hearing held on May 26, 1993, that claimant, when this hearing was first convened on March 22, 1993, requested a continuance "because he had not been examined by the designated doctor." Also recited in the record was the date of claimant's appointment to see the designated doctor in December 1992 (along with a letter to claimant specifying this appointment for December 16, 1992), but no reference was made in the record to show whether claimant received the notice of the December appointment and if he did, what good cause he had for not keeping the appointment. The hearing officer, however, did set another date for claimant to see the

designated doctor. She described the hearing of March 22, 1993, which claimant attended, as including both the making of an appointment for claimant with the designated doctor for May 5, 1993, and the setting of the date for this hearing (May 26, 1993). Both the hearing officer and the benefit review conference report, in evidence, show that claimant did not attend the benefit review conference of February 3, 1993.

The hearing officer also recited that claimant was notified of the date of this hearing through the mail. The record contains no copy of the notice that went to claimant which specified that a hearing was to be held at (city), Texas, on May 26, 1993, at a certain time and place. *See* Texas Workers' Compensation Commission Appeal No. 92237, decided July 22, 1992. However, insufficient evidence as to written notice of the hearing is not controlling here since the record sufficiently shows that the claimant was told of the May 26, 1993 hearing date while at the March 22, 1993, hearing.

Finally, the hearing officer held the record open until June 2, 1993, to allow claimant to show good cause for not attending the May 26, 1993, hearing. The claimant offered nothing and the record was then closed on that date.

There was no error in proceeding to decision without claimant at this hearing.

II

As to disability of the claimant, the carrier presented statements from two employers indicating that claimant resumed working as early as February 29, 1992, and was working in January, 1993; much of the period in between these dates is without evidence either of work or of inability to work. The report of (Dr. E) who performed an examination of claimant for the carrier on May 20, 1992, does not directly address disability, but is not inconsistent with the evidence of ability to work by indicating that claimant reached MMI with no impairment at the time of his examination. With the claimant presenting no evidence, either personally or from his treating doctor, referred to as (Dr. Z) in Dr. E's report, the evidence provided by the carrier is sufficient to sustain the determination that claimant has had no disability since February 29, 1992, (while the hearing officer states "since February 19, 1992", all the evidence points to February 29 as the date of return to work and no evidence points to February 19 as a day of work; the decision and order will be reformed to reflect no disability since February 29, 1992.)

The issues of MMI and impairment rating are only addressed by the report of Dr. E, dated May 21, 1992; a copy of the letter notifying claimant of the December 1992, designated doctor's appointment; and the March 1993 letter from the Texas Workers' Compensation Commission indicating that claimant had another appointment with the designated doctor in May, 1993. While the report of Dr. E, which found MMI, indicates that a copy was sent to Dr. Z, the record contains no information that Dr. Z received it and

commented one way or the other about Dr. E's report of MMI and impairment. *See* Texas Workers' Compensation Commission Appeal No. 92077, decided April 13, 1992, which remanded that case to determine similar information. Also *see* Tex. W. C. Comm'n, 28 Tex Admin Code § 130.3 (Rule 130.3), which requires comment by the treating doctor when another doctor states MMI has been reached.

While the carrier refers to the sub-issue relating to a presumption of MMI, Texas Workers' Compensation Commission Appeal No. 93055, decided March 10, 1993, points out that Rule 130.4 only allows such a presumption to invoke the procedure set forth in Rule 130.4, not to obtain a determination that MMI itself has been reached. Thereafter in Rule 130.4(n) the benefit review officer is instructed to suspend temporary income benefits when certain information about medical treatment is shown - one point that allows such suspension is abandonment of treatment without good cause. The benefit review officer issued an interlocutory order suspending temporary income benefits in February 1993 at the benefit review conference, and the hearing officer's determination of no disability since February 29, 1992, did not overturn that order; therefore the remedy that Rule 130.4 provides for abandonment of treatment has been provided. (Because there is no appeal as to disability or the suspension of benefits, a ruling concerning whether missed appointments with a designated doctor constitute "abandonment of treatment" is not necessary. *Compare* Texas Workers' Compensation Commission Appeal No. 92203, decided July 6, 1992, relating to whether appointments under Article 8308-4.16 are considered "health care appointments".)

Since the decision does not address MMI and impairment rating, the carrier states that claimant has been allowed to control resolution of issues by failing to comply with orders of the commission. This opinion does not say that a hearing officer cannot decide all issues before him or her when a party, properly notified, fails to appear at the hearing without good cause therefor. The hearing officer is not required, however, to decide issues that affect benefits when the evidence submitted is insufficient to support such a decision. *See* Texas Workers' Compensation Commission Appeal No. 92176, decided June 10, 1992, which found a determination of MMI was not ripe for consideration. It is true that neither Article 8308-4.25 nor 4.26 says that MMI and an impairment rating may only be determined after receiving the opinion of a designated doctor. These issues may be addressed, for instance, when medical evidence meets the requirements of commission rules or when ninety days has elapsed from the first impairment rating without dispute. *See* Rules 130.1 through 130.8. In addition to the absence of information concerning the response of the treating doctor to the opinion of Dr. E as to MMI and an impairment rating, no assertion was made that Dr. E's impairment rating had been made final by operation of Rule 130.5(e) which provides 90 days for disputing the rating; as a result, no evidence appears to address how soon Dr. E's rating was disputed after claimant knew of it or was given notice of it. While the hearing officer appears to base her decision for not addressing MMI and impairment rating on the failure of claimant to attend designated doctor evaluations, a basis for which

we find no support, the decision may be affirmed when it can be sustained on any reasonable theory supported by the evidence. *See* Daylin, Inc v Juarez, 766 S.W.2d 347 (Tex. App.-El Paso 1989, writ denied). The evidence presented would not support a decision that MMI was reached.

In the circumstances of this case, the hearing officer did not err in determining that claimant had no disability since February 29, 1992, or in failing to make a determination as to MMI and impairment rating. The decision and order, as modified to reflect no disability since February 29, 1992, is affirmed.

Joe Sebesta
Appeals Judge

CONCUR:

Robert W. Potts
Appeals Judge

Lynda H. Nesenholtz
Appeals Judge