APPEAL NO. 990325

This appeal arises pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq*. (1989 Act). On January 22, 1999, a hearing was held. He determined that the respondent's (claimant) initial impairment rating did not become final under Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 130.5(e). Rule 130.5(e)). Appellant (carrier) asserts that claimant knew of the deferral of treatment based on her pregnancy and therefore cannot assert inadequate treatment after the 90-day period has run. The appeals file does not contain a reply from claimant.

DECISION

We affirm.

Claimant worked for (employer) on _____. She did not testify as to the manner of injury, but a medical record indicates it resulted from a lifting incident at work. There is no dispute that a compensable injury occurred.

Claimant began seeing Dr. N for this injury on July 30, 1997. Dr. N then noted that claimant was three months pregnant with a positive straight leg test and tenderness. He noted no sensory or motor deficits. Dr. N saw claimant twice in August 1997, noting that there were a "limited amount of things we can do" but obtained therapy for her which was then said to have made her worse. On October 1, 1997, which was the date Dr. N later found claimant to have been at maximum medical improvement (MMI), Dr. N stated that the claimant was "worse" and said, "it is going to be another several months (projected to deliver in February) before we can do anything." On October 15, 1997, Dr. N wrote to the carrier saying that when first seen claimant was "three months pregnant . . . and no x-rays were performed at that point nor was she put on any medication," but added that physical therapy was tried. He then related that claimant was worse on October 1, 1997, but "was not projected to deliver until February and I pointed out that there was very little we could do at this point from a treatment point of view and therefore we deferred an MRI." He then added:

> Speaking with the representative from the company, she encouraged us to reach an MMI at this point and certainly without treatment we have reached MMI with this patient, and certainly as we are not going to be able to treat this patient prior to February of '98.

The Report of Medical Evaluation (TWCC-69) was thereafter signed by Dr. N on October 29, 1997, stating that claimant reached MMI on October 1, 1997, with a seven percent impairment rating (IR). Dr. N then saw claimant again on February 11, 1998, after the delivery of her baby, and scheduled an MRI, which turned out negative.

The parties stipulated that claimant received written notice of the initial IR on November 10, 1997. Therefore, the 90 days would have run by February 9, 1998. The

hearing officer found that claimant disputed the initial IR on April 24, 1998, in a phone conversation between claimant and carrier in which the fact that Dr. N had rescinded his MMI was mentioned. (Dr. N on April 24, 1998, signed a TWCC-69 saying that MMI was pending and rescinded the prior MMI date.) Thereafter, Dr. P on March 27, 1998, said that the radiologist did not report early disc desiccation at L5-S1 that Dr. P saw on the MRI provided in February 1998. Dr. P then had a discogram done which showed "concordant pain produced by each of the bottom three discs."

The hearing officer found that claimant received "inadequate or incomplete treatment" after finding that she "was pregnant and could not receive necessary medical treatment or diagnostic testing." The finding of fact regarding not being able to receive necessary medical care is certainly sufficiently supported by the evidence. Carrier disputes that claimant received inadequate care comparing this set of circumstances to the line of cases under Rule 130.5(e) that say a claimant who disputes that an IR was not given for all areas of the body treated must dispute within 90 days when she knows she had been treated for body parts omitted from the IR. We do not think that a claimant necessarily knows that she had inadequate treatment just because she knows that treatment was deferred because of her pregnancy. Claimant did know that she did not receive the testing and medication that Dr. N thought she needed for her back injury but did not provide because of her pregnancy. That does not equate to knowing that inadequate treatment was provided as one knows that a body part was not rated when one also knows that treatment was provided therefore. (We note that even in the body part scenario, the written notice of the initial IR must not only give notice of the IR and MMI but must delineate what the IR was for so that the claimant will know that a body part was omitted. *See* Texas Workers' Compensation Commission Appeal No. 970001, decided February 18, 1997, which requires knowledge that the IR did not contain a rating for the body part in question.)

The author judge views the case under review as consisting of inadequate treatment, at the time of the initial IR, for the back injury, as shown by Dr. N's own notes, but not necessarily inadequate treatment of claimant based on the total condition she presented with. Dr. N had no choice as to treatment. What was inadequate, or premature, in this case was the determination of MMI when necessary diagnostic tests were deferred. Section 401.011(30) defines MMI as occurring when "based on reasonable medical probability, further material recovery from or lasting improvement to an injury can no longer reasonably be anticipated." Dr. N's own records show that claimant had not reached this point when he said that he was "deferring" an MRI, based on the pregnancy, until February 1998. There is nothing in Section 401.011(30) that provides for any "provisional" MMI until pregnancy is over; there is nothing in Section 401.011(30) that provides that MMI is reached if treatment must be delayed--if MMI could be reached based on the necessity to delay treatment, then necessary surgery, identified and recommended prior to the initial IR, could result in MMI also, based on the knowledge that such surgery could not be done for a period of time because of the surgery approval process. This case appears to reflect a determination of MMI for an improper purpose (*see* Texas Workers' Compensation Commission Appeal No. 950014, decided February 14, 1995), which said that MMI could not be found based on a patient's failure to return for care), just as much as it reflects that inadequate care was provided as to the back injury at the time of the initial IR, but not as to

the claimant. However, Texas Workers' Compensation Commission Appeal No. 982212, decided November 2, 1998, said that when MMI was stated to have been reached for an improper reason on the TWCC-69, then there was no valid IR to become final under Rule 130.5(e). The case under review does not include an incorrect basis for MMI on the TWCC-69. Therefore, the improper reason for finding MMI cannot alone invalidate the IR. There is also another basis which may be considered in this case.

While not referred to by the hearing officer in his opinion, claimant testified:

> When the doctor gave me the impairment rating, there was a nurse out of the insurance company that went in with me and she was the one who asked him to go ahead and rate me. And when we walked out, she told me after I had my baby that all of this was going to change. And that was why I didn't dispute any of it, because I thought after I had the baby, just like she said, that we would go in and it was all going to be changed because is wasn't going to be treated.

The hearing officer queried claimant and learned that claimant did not have the above statements "in writing." However, claimant's testimony was unrefuted. The hearing officer is the sole judge of the weight and credibility of the evidence. *See* Section 410.165. Had the hearing officer found against claimant, the above statement of claimant would not be sufficient to allow the Appeals Panel, as an appellate body, to reverse that decision. However, since the hearing officer found for claimant in finding that the initial IR did not become final, the determination may be affirmed 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 decision is affirmed because the carrier is estopped from asserting Rule 130.5(e) based on the statement of its agent that "all of this was going to change," just after that agent told the treating doctor, in claimant's presence, to rate claimant. This evidence sufficiently supports the determination that the initial IR did not become final. In addition, taken as a whole, the conduct of carrier's agent, the lack of treatment of claimant's injury with medical evidence at the time of the initial IR indicating that additional testing should be done, and the determination of MMI for an improper reason, together amount to an "egregious medical condition . . . [that would] compel a finding that the passage of 90 days . . . would not be dispositive." *See* Texas Workers' Compensation Commission Appeal No. 94049, decided February 18, 1994.

Finding that the conclusion of law and the order are sufficiently supported by the evidence, we affirm. *See* In re King's Estate, 150 Tex. 662, 244 S.W.2d 660 (1951).

_____
Joe Sebesta
Appeals Judge

CONCUR:

_____
Philip F. O'Neill
Appeals Judge

_____
Thomas A. Knapp
Appeals Judge