APPEAL NO. 001411

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 February 7, 2000. The Appeals Panel, in Texas Workers' Compensation Commission Appeal No. 000499, decided April 24, 2000, remanded the case to decide "[w]hat is the date of maximum medical improvement [MMI]?". No further hearing was held. The hearing officer determined that the date of MMI is April 9, 2000, calculated from the date when income benefits began to accrue.

The appellant (carrier) appeals and argues that because the MMI date was not disputed at some earlier point in the dispute resolution process, it was not properly before the hearing officer to decide. The carrier also argues that the medical records under consideration show that the respondent (claimant) reached MMI under the definition set forth in Section 401.011(30)(A) on the date originally certified by the treating doctor. The claimant responds that the designated doctor's first report that the claimant did not reach MMI was entitled to presumptive weight. The claimant asserts that the decision is sufficiently supported by the record.

DECISION

We affirm the hearing officer's decision.

The claimant injured his back on _____; he was able to continue working until April 5, 1998, under conservative treatment, but eventually had surgery on June 8, 1998. As noted in our prior decision, the claimant's treating doctor rendered a Report of Medical Evaluation (TWCC-69) certifying that the claimant reached MMI on April 7, 1995, with a ten percent impairment rating (IR), within a month after first being treated. The carrier disputed this IR and assessed its own IR of three percent. However, the designated doctor for the Texas Workers' Compensation Commission (Commission), Dr. M, noting that the claimant had not been prescribed physical therapy or other conservative management for his chronic pain, opined that such treatments were appropriate for the claimant to achieve MMI. Dr. M stated that the claimant was not at MMI and offered to reexamine the claimant when the conservative treatments he suggested were tried.

The Commission asked Dr. M on May 13, 1998, to reevaluate his report in light of the fact that the MMI date was August 7, 1995. However, this same letter also stated that an amendment to his report should be made if his opinion on "MMI and IR" (emphasis added) was changed. He was also asked to contact the Commission if a reexamination should be conducted. There apparently was no response to this but the Commission did not move to follow up until August 12, 1999. Dr. M reexamined the claimant on October 19, 1999, and considered additional medical records relating to his treatment. Dr. M noted that his suggestions had not been followed, and that the claimant had become progressively worse. He noted that the treating doctor was also recommending surgery. Therefore, Dr. M again stated that MMI had not been reached.

In our previous decision, the hearing officer had found that the claimant reached MMI by statute, under the definition set forth in Section 401.011(30)(B). As we noted, the hearing officer found a date essentially 104 weeks from the _____, date of injury. However, the evidence suggested that income benefits did not begin to accrue at or near the time of injury, but some time after that, and we remanded for further consideration of the evidence on this matter. The hearing officer reconsidered the evidence, and determined that in fact income benefits began to accrue on April 5, 1998, so that statutory MMI was actually April 9, 2000.

It is interesting to note that had the carrier simply accepted the treating doctor's assessment of MMI and IR, the matter before the hearing officer would have long since resolved. The issue reported from the benefit review conference, and that was before the hearing officer to determine, was the date of MMI. It is not the power of either party to unilaterally declare that the matter is not in dispute and, absent a settlement or agreement as set out in Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE §142.9 (Rule 142.9), the Commission may act to resolve matters pertinent to payment of the benefits (including the accrual, amount, payment, and duration of income benefits) on which the parties cannot agree.

Generally, MMI can only become "final" and beyond the power of the Commission to adjudicate in a later proceeding if the IR has become final due to the application of Rule 130.5(e). When a designated doctor is asked to determine IR, but responds that IR cannot be determined because the worker is not at MMI, then MMI is necessarily "in play" and the proponent of MMI would have to show that the great weight of medical evidence is against the designated doctor's failure to assign an IR. *See* Section 408.125(e).

While we agree that there could be in some instances an equitable "waiver" imposed for failure to dispute an MMI date until a few years have passed, Texas Workers' Compensation Commission Appeal No. 981988, decided October 8, 1998, we do not believe that this case applies where the Commission's designated doctor has stated at the outset that MMI has not been reached and therefore does not assign an IR. The rationale articulated in Appeal No. 981988, that an injured employee should look after his interests by asserting a challenge to an MMI date where the designated doctor has assessed an IR, does not apply here, even if the designated doctor was not specifically asked to address the date of MMI.

The hearing officer has considered all the evidence, and the arguments advanced by the carrier as to why April 7, 1995, should be found as the date of MMI, and rejected them in favor of a finding that statutory MMI applies. We cannot agree that this decision

is against the great weight and preponderance of the evidence, or that it was wrong as a matter of law, and we affirm the decision and order.

Susan M. Kelley
Appeals Judge

CONCUR:

Tommy W. Lueders
Appeals Judge

CONCUR IN RESULT:

Robert W. Potts
Appeals Judge