APPEAL NO. 002929-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 (CCH) was held on November 8, 2000. With regard to the issues before her, the hearing officer determined that the respondent/cross-appellant's (claimant) "compensable injury of _____" does not include the right shoulder, right forearm, right wrist, and cervical area; that the claimant has disability from May 24, 1999, to the date of the CCH; and that the claimant has not reached maximum medical improvement (MMI).

The appellant/cross-respondent (carrier) appeals the hearing officer's decision on the disability and MMI issues, essentially arguing that the designated doctor's first report assessing MMI on May 24, 1999, with a zero percent impairment rating (IR), is dispositive and that since surgery was not under active consideration at that time, the designated doctor should not be allowed to amend his report. The carrier requests reversal on these two issues. The claimant, in a document entitled "Claimant's Response and Request for Review," principally argues the extent-of-injury issue and, secondarily, requests affirmance on the disability and MMI issues.

DECISION

Affirmed.

The hearing officer's decision on the disability and MMI issues are affirmed. The claimant's "Response and Request for Review" was timely and will be considered as a response, but was not timely as a request for review (appeal) as having been filed more than 15 days after receipt of the hearing officer's decision. *See* Section 410.202. Consequently, the hearing officer's decision on the extent-of-injury issue, not having been timely appealed, has become final pursuant to Section 410.169 and will not be further considered.

The claimant was employed as a laborer and was working on some scaffolding when he felt pain in his groin and right elbow. The parties stipulated that the claimant sustained a compensable injury on _____. That compensable injury was never defined, but the parties and the hearing officer seem to accept that it was limited to an umbilical hernia and right elbow injury. Although the claimant testified, and the parties appeared to agree, that the injury occurred on _____ (not _____), _____, the hearing officer uses a _____, date of injury. The claimant had umbilical hernia repair surgery on January 28, 1999, and that injury has resolved and is no longer at issue.

The claimant's original treating doctor was Dr. C, a chiropractor, who referred the claimant to Dr. P for right elbow pain. Dr. P began treating the claimant's elbow in March 1999 with medication and intramuscular steroid injections. The claimant was also referred to Dr. K, an orthopedic surgeon, who, in a report dated March 24, 1999, recommended continued injections by Dr. P and stated that he would perform an "extensor muscle slide if now [sic, no] relief is received from the injections." Dr. S examined the claimant on May

19, 1999, as the carrier's required medical examination doctor and, in a narrative report and Report of Medical Evaluation (TWCC-69), both dated May 24, 1999, certified MMI on May 19, 1999, with a one percent IR. Dr. S's report does mention "a small joint effusion of the right elbow" which "has improved," but assesses zero percent impairment for the elbow and one percent impairment for "some discomfort in the area of umbilical hernia at lifting." The claimant apparently disputed Dr. S's evaluation.

The claimant apparently continued to receive steroid injections and treatment when Dr. B, a chiropractor, was appointed as the designated doctor. The parties stipulated that Dr. B was the Texas Workers' Compensation Commission (Commission)-appointed designated doctor and that on July 13, 1999, Dr. B certified that the claimant had reached MMI on May 24, 1999, with a zero percent IR. Dr. B commented in his report that he agreed with Dr. S's May 19 MMI date and that he found "no specific disorders for the right upper extremity that would be ratable." Dr. B makes no reference to the ongoing treatment of the right elbow by Dr. P and Dr. K.

The claimant had right elbow surgery in the form of a right elbow arthrotomy with extensor muscle slide on October 7, 1999, by Dr. K. After a benefit review conference, the benefit review officer wrote Dr. B by letter dated October 28, 1999, stating that he was sending "medical reports" from Dr. P, Dr. K and Dr. C and asked if Dr. B's opinion on MMI and IR remains the same. Dr. B's reply of November 2, 1999, makes it fairly clear that the operative reports of the October 7 surgery were not included because Dr. B only references office visits which were "duplicates" of what was previously (before July 1999) available. Dr. B states his opinion of a zero percent IR and "date of MMI (5/28/99) [sic, May 24, 1999] will stand."

The Commission again wrote Dr. B by letter dated April 27, 2000, advising that subsequent to Dr. B's examination the claimant had had surgery on his right elbow and forwarding the operative report "as well as reports from the treating doctor and referrals." Dr. B responded on May 10, 2000, stating:

> Given that such a great deal of time has passed, and that surgery has occurred since [claimant's] first evaluation, it is deemed necessary that he be rescheduled for another evaluation in order to accurately assign him a current status permanent [IR] and date of [MMI].

Dr. B, in a report dated July 5, 2000, certified that the claimant was not at MMI.

The hearing officer gave presumptive weight to Dr. B's report of July 5, 2000, and, based on various reports and the claimant's testimony, found that the claimant had disability from May 24, 1999 (apparently the claimant had been paid temporary income benefits (TIBs) until that date) to the date of the CCH. The carrier contends that the Commission "abused its discretion in writing to the designated doctor a second time." The carrier asserts that whether to "afford presumptive weight to a designated doctor's amended certification which was based on employee's [subsequent] surgery . . . [depends]

on an analysis of whether the surgery was 'under act of consideration' at the time of the initial evaluation," citing some Appeals Panel decisions, including Texas Workers' Compensation Commission Appeal No. 971385, decided August 25, 1997.

We disagree with the carrier's contention; one of the purposes of designating this a significant case is to point out that the Appeals Panel has declined to follow Appeal No. 971385 which refers to an analysis of a change of a designated doctor's report if surgery was "'under active consideration' at the time of the initial designated doctor evaluation and if the surgery was not under active consideration, it is inappropriate to mend the certification based on it." (Emphasis added.) *See* Texas Workers' Compensation Commission Appeal No. 002400, decided November 28, 2000; Texas Workers' Compensation Commission Appeal No. 000389, decided April 3, 2000; Texas Workers' Compensation Commission Appeal No. 992672, decided January 18, 2000 (Unpublished); and Texas Workers' Compensation Commission Appeal No. 991081, decided July 8, 1999. Particularly, Appeal No. 992672, *supra*, gives our reasoning and why we have moved away from the position of Appeal No. 971385, *supra*. Instead, we have held, in the cases cited and others, that the key factor in such cases is whether surgery was contemplated ("under active consideration") at the time of statutory MMI. *See also* Texas Workers' Compensation Commission Appeal No. 990833, decided June 7, 1999. Where surgery and the amendment of a designated doctor's report take place before statutory MMI, the hearing officer should consider whether the designated doctor amended his report for a proper reason and within a reasonable amount of time. Texas Workers' Compensation Commission Appeal No. 992288, decided December 1, 1999, and Appeal No. 992672, *supra.* In this case, while the hearing officer does not specifically use language of a proper reason within a reasonable time, the hearing officer does make clear that she believed that the claimant was not at MMI on May 24, 1999, because he was still getting steroid injections for his elbow, and that Dr. K had stated that if the steroid injections were unsuccessful surgery would be considered. At the time of the Commission's first request for clarification in October 1999, the claimant had had surgery and the designated doctor fairly clearly was not aware of that fact. We also affirm the hearing officer's determinations on disability as being supported by various reports from Dr. P and Dr. K, and the claimant's testimony. The carrier appears to equate MMI with disability, which is not necessarily the case, although TIBs are not payable after MMI is reached. *See* Section 408.101(a).

Upon review of the record submitted, we find no reversible error and we will not disturb the hearing officer's determinations unless they are so against the great weight and preponderance of the evidence as to be clearly wrong or unjust. In re King's Estate, 150 Tex. 662, 244 S.W.2d 660 (1951). We do not so find and, consequently, the decision and order of the hearing officer are affirmed.

Thomas A. Knapp
Appeals Judge

CONCUR:

Robert E. Lang
Appeals Panel
Manager/Judge

Gary L. Kilgore
Appeals Judge