APPEAL NO. 020187-s
FILED MARCH 18, 2002

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 December 11, 2001. The hearing officer resolved the disputed issues before him by determining that the respondent (claimant) was not at maximum medical improvement (MMI) on January 18, 2001, and that the claimant has not reached MMI per Texas Workers' Compensation Commission (Commission) order and an impairment rating (IR) cannot be determined as of the date of the hearing. The appellant (carrier) appealed and the claimant responded, urging affirmance.

DECISION

We affirm as reformed.

The procedural history leading up to this matter is largely undisputed. The parties stipulated that the claimant sustained a compensable injury on _____, and that Dr. K was the designated doctor for this claim. The medical records submitted into evidence showed that on February 3, 2000, Dr. K initially certified that the claimant had reached MMI on February 3, 2000, with a 7% IR; that on July 25, 2000, the claimant underwent spinal fusion surgery with instrumentation at L5-S1; and that on August 28, 2000, in response to an inquiry from the Commission, Dr. K indicated that the surgery will change the claimant's IR, and most likely his MMI date. Dr. K indicated that he needed to reexamine the claimant no sooner than six months post surgery. On January 24, 2001, Dr. K issued a second certification with an MMI date of January 18, 2001, and an IR of 11%; and on June 14, 2001, the claimant underwent a second spinal surgery, during which the L5-S1 was again fused and a cage was inserted. On August 23, 2001, at the request of the claimant, the Commission issued an order extending the date of statutory MMI from July 25, 2001, until January 9, 2002; on September 11, 2001, the Commission sent a second letter of inquiry to Dr. K, who responded that the second surgery did not change his last certification of MMI; and on November 11, 2001, the claimant underwent a third spinal surgery for the removal of hardware.

The hearing officer determined that the claimant had not yet reached MMI as of the date of the hearing. He based his determination on the Commission order extending the statutory date of MMI to January 9, 2002, and a finding that Dr. K's certification was contrary to the great weight of the other medical evidence.

On appeal, the carrier asserts that the hearing officer's reliance upon the Commission order was clearly wrong. The carrier asserts that the order merely extends the date of statutory MMI, and that it does not mean that the claimant cannot reach MMI prior to January 9, 2002. While we agree with the carrier's technical assertion that the order does not mean that the claimant cannot reach MMI prior to January 9, 2002, we do not agree that the hearing officer erred in using the order as a basis for his determination

that the claimant had not yet reached MMI as of the date of the hearing in this case.

Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 126.11 (Rule 126.11) sets forth the procedure for obtaining a Commission order for the extension of the date of MMI for spinal surgery and the effect such orders have. Rule 126.11(h) states:

> If a request for benefit review conference is not received by the commission within ten days after the date the order granting or denying the extension was received by the disputing party, the parties waive their right to dispute the commission order. In the event that an order is timely disputed, the order shall remain binding pending final resolution of the dispute.

There was no evidence presented, nor was there any argument from the carrier, that the August 23, 2001, Commission order extending the statutory date of MMI to January 9, 2002, was timely disputed. As such, the Commission order was final as of the date of the hearing. Rule 126.11(i) states:

> If the injured employee is certified by a doctor to have reached [MMI] **between the date the extension order was issued and the extended date of [MMI] specified in the order**, any dispute regarding the date of [MMI] shall be resolved through the selection of a designated doctor consistent with the provisions of [Section] 408.122, concerning Eligibility for Impairment Income Benefits; Designated Doctor, and § 130.6 of this title (relating to Designated Doctor; General Provisions). If the certification of [MMI] **during this time period** is not disputed and the date certified is prior to the date of [MMI] specified in the order for the extension, the date of [MMI] from that certification shall apply. If the certification was timely disputed and the resolution of such a dispute determines that the injured employee reached [MMI] at a date which is different than the date of [MMI] specified in the order for the extension, the earlier date shall apply. [Emphasis added.]

Between the date the extension order was issued (August 23, 2001), and the extended date of MMI specified in the order (January 9, 2002), the claimant was not examined and given a certification of MMI and IR pursuant to Rule 130.1 or Rule 126.11(i). The carrier erroneously relied on Dr. K's certification which was done prior to August 23, 2001. All certifications of MMI done prior to the issuance of the order were superceded when the Commission order extending the MMI date was issued and not disputed. As such, during the period of time that would be considered, August 23, 2001, through January 9, 2002, there is no evidence to establish that the claimant had reached MMI and in fact Dr. R states MMI will not be reached until after December 31, 2001.

Based upon the above, we will not address the carrier's assertion that the hearing officer erred in determining that the great weight of the other medical evidence was contrary to Dr. K's second certification of MMI.

The hearing officer's decision and order that the claimant was not at MMI on January 18, 2001, is affirmed. The hearing officer's decision and order that the claimant has not reached MMI per Commission order and that an IR cannot be determined as of this time, are reformed to read that there is no evidence to establish that the claimant has reached MMI and an IR cannot be determined as of this time.

The true corporate name of the insurance carrier is **PACIFIC EMPLOYERS INSURANCE COMPANY** and the name and address of its registered agent for service of process is

ROBIN MOUNTAIN
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Gary L. Kilgore
Appeals Judge

CONCUR:

Chris Cowan
Appeals Judge

Thomas A. Knapp
Appeals Judge