APPEAL NO. 020543
FILED APRIL 29, 2002

This appeal arises pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act). Following a contested case hearing held on February 11, 2002, the hearing officer made certain factual findings and concluded that the compensable injury of _____, includes the lumbar spine; that the respondent (claimant) had disability beginning on January 6, 1996, and ending on February 27, 1997; that the claimant reached maximum medical improvement (MMI) on February 27, 1997; and that the claimant's impairment rating (IR) is 18%. The appellant (carrier) has requested our review of these determinations. The file does not contain a response from the claimant.

DECISION

Affirmed.

The claimant testified that he was injured on _____, when he fell backwards while carrying a heavy box at his job site; that he stopped working the next day; and that his treating doctor, Dr. A, a chiropractor, took him off work effective February 22, 1995. The parties stipulated that income benefits began to accrue on March 1, 1995. Not appealed are findings that Dr. CD, the carrier's doctor, certified that the claimant reached MMI on January 5, 1996, with a 15% IR; that Dr. A agreed with Dr. CD's MMI date and IR; that Dr. AD, the designated doctor and also a chiropractor, examined the claimant on March 26, 1996, and determined that he reached MMI on January 5, 1996, and assigned an IR of 3% for the claimant's upper spine but did not rate the lumbar spine; and that the claimant changed treating doctors to Dr. M, a medical doctor, and, on September 26, 1996, was diagnosed with a herniated disk at the L4-5 level.

The claimant further testified that he underwent lumbar spine surgery on February 20, 1997, which was paid for by the carrier and which failed. The evidence reflects that the designated doctor reexamined the claimant on May 12, 1997, and on that date issued an amended report stating that the claimant reached MMI on March 1, 1997, the date Dr. AD calculated to be the statutory MMI date (Section 401.011(30)(B)), with an 18% IR. This May 12, 1997, report is addressed to the Texas Workers' Compensation Commission (Commission), refers to prior correspondence of April 20, 1997, which is not in evidence, and reflects that the Commission had sent to Dr. AD certain additional records and reports, including Dr. M's operative report of February 20, 1997. The hearing officer adopted this amended report on the basis that Dr. AD amended his original report for a proper reason and within a reasonable period of time. The claimant stated that the first lumbar spine surgery, a percutaneous discectomy at L4-5 by Dr. B, failed; that he was scheduled for a second lumbar spine surgery on June 20, 1997, but did not undergo that surgery because of a conflict with a court date; that he was incarcerated from July 27, 1999, to August 15, 2001; and that he has not yet undergone the proposed second spinal surgery and doubts that he will.

We observe at this point that the hearing officer found in Finding of Fact No. 6 that "[t]he Claimant underwent laser spinal surgery on February 20, 1997, which failed, and a second (2nd) spinal surgery was performed on June 20, 1997." The only evidence to support the statement that the claimant underwent a second spinal surgery is a statement to that effect by Dr. M in his report of November 27, 2001. However, he also says that Dr. B had died and that Dr. B's records were not available. Consistent with the claimant's testimony that he did not undergo the second surgery is the spinal surgery second opinion report of Dr. CA which supports the recommended additional surgery. That report is dated June 24, 1997. While so much of Finding of Fact No. 6 as states that the claimant underwent a second spinal surgery on June 20, 1997, is clearly erroneous, that finding has not been appealed and the error does not affect our resolution of this appeal.

The hearing officer made findings, challenged by the carrier, that the medical evidence establishes that the claimant injured his lumbar spine on _____, but that this medical condition was not diagnosed until he underwent testing and changed treating doctors; that the designated doctor reexamined the claimant on May 12, 1997, "before the second (2nd) spinal surgery," and amended his first report, determining that the claimant reached MMI on the statutory date with an 18% IR; that a clear misdiagnosis of a medical condition is a proper reason for a designated doctor's second examination and the production of an amended report which assesses an IR for a previously misdiagnosed and unrated condition; and that the claimant was reexamined by the designated doctor less than three months after the spinal surgery performed on February 20, 1997, and this reexamination was performed within a reasonable time and for a proper purpose. The hearing officer further found that the claimant did not work following the first report of the designated doctor, beginning January 6, 1996, and ending February 27, 1997, the date he attained MMI by operation of law, due to the condition of his lumbar spine, his need for surgery, and his recovery from the spinal surgery of February 20, 1997.

In Texas Workers' Compensation Commission Appeal No. 013042-s, decided January 17, 2002, a case involving the post-spinal surgery amendment of a designated doctor's report to extend the MMI date and increase the IR, the hearing officer found that the report was not amended for a proper purpose nor within a reasonable period of time. The Appeals Panel reversed and remanded for the hearing officer to give the amended report presumptive weight based on Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 130.6(i) (Rule 130.6(i)) which provides, in relevant part:

> The designated doctor shall respond to any commission requests for clarification not later than the fifth working day after the date on which the doctor receives the commission's request. The doctor's response is considered to have presumptive weight as it is part of the doctor's opinion.

The carrier contends that the hearing officer should have adopted the designated doctor's original report which determined that the claimant reached MMI on March 26, 1997, with a 3% IR for his cervical spine injury. The carrier further contends that the hearing officer misconstrued the parties having stipulated to the date of statutory MMI,

February 27, 1997, as a stipulation that the claimant, in fact, reached MMI on that date. While certain of the hearing officer's references to the statutory date of MMI in her decision could be read to that effect, we are satisfied that the hearing officer determined the date of MMI by considering that Dr. AD's amended report states that the claimant, though still symptomatic from his February 20, 1997, surgery, reached MMI on the statutory date which Dr. AD had calculated to be "March 1, 1997," but which the parties stipulated to be February 27, 1997.

With respect to the disability issue, the carrier makes no specific argument on appeal but appears to be taking the position that the hearing officer should have ended the claimant's period of disability on January 26, 1996, the date the claimant was first determined by Dr. AD to have reached MMI, and not on February 27, 1997, the date the hearing officer found that the claimant reached MMI. It has long since been settled that disability and MMI are different concepts, and that disability may exist after MMI. Texas Workers' Compensation Commission Appeal No. 91014, decided September 20, 1991, and Texas Workers' Compensation Commission Appeal No. 91060, decided December 12, 1991. As was noted in Texas Workers' Compensation Commission Appeal No. 991481, decided August 30, 1999, "[a] claimant is entitled to temporary income benefits if he or she has disability and has not reached MMI. Section 408.101(a)."

We do not find the challenged determinations of the hearing officer to be so against the great weight and preponderance of the evidence as to be clearly wrong or manifestly unjust. In re King's Estate, 150 Tex. 662, 244 S.W.2d 660 (1951). However, we affirm the hearing officer's determination of the date of MMI and the IR based on Rule 130.6(i) and not on the basis of the "proper reason" and "reasonable time" formula relied on by the hearing officer. We will uphold the decision of a hearing officer if it can be sustained on any reasonable basis supported by the evidence. Daylin, Inc. v. Juarez, 766 S.W.2d 347, 352 (Tex. App.-El Paso 1989, writ denied); Texas Workers' Compensation Commission Appeal No. 950791, decided July 3, 1995.

The decision and order of the hearing officer are affirmed.

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

C.T. CORPORATION SYSTEM
350 N. ST. PAUL STREET
DALLAS, TEXAS 75201.

Philip F. O'Neill
Appeals Judge

CONCUR:

Susan M. Kelley
Appeals Judge

Terri Kay Oliver
Appeals Judge