APPEAL NO. 950216

This appeal arises under the Texas Workers' Compensation Act of 1989, TEX. LAB. CODE ANN. § 401.001 *et seq*. (1989 Act). On December 13, 1994, a hearing was held in (city), Texas, with (hearing officer) presiding. He determined that respondent (claimant) has not reached maximum medical improvement (MMI). Appellant (carrier) asserts that the designated doctor advised work hardening as a condition to reaching MMI but that claimant cannot do work hardening; carrier points out that MMI can be reached without work hardening and claimant's condition has been unchanged since the injury. Claimant replies that the decision should be affirmed.

DECISION

We affirm.

Claimant worked for (employer). She stated that on (date of injury), she slipped on some beads that were on a ramp and fell injuring her back. She added that she had a herniated disc. Her doctor, (Dr. Z) advised surgery and a second opinion agreed, but claimant will not have surgery. Dr. Z then found that claimant had reached MMI on October 21, 1993, with a 10% impairment rating (IR). His records show that a copy was sent to claimant.

Claimant had obtained the services of an attorney and that attorney duly notified the Texas Workers' Compensation Commission (Commission) of her status by letter dated October 6, 1993, with copy to the carrier. Tex. W. C. Comm'n, 28 TEX. ADMIN. CODE § 102.4 (Rule 102.4)) provides that the carrier and Commission, after notified of the retention of a representative, will then mail all copies of notices and reports "to the representative and the claimant". Rule 130.2 (b) provides that a treating doctor has to send a copy of his certification of MMI to "the employee, or the employee's representative".

Claimant testified that she received the certification of Dr. Z in November 1993. The carrier mailed a copy of Dr. Z's certification to claimant, without a copy to claimant's attorney, on November 3, 1993, and received a receipt dated November 4, 1993. Claimant's testimony did not make it clear whether she received a copy from both Dr. Z and from the carrier, nor did it identify from whom she received the copy she acknowledged. Claimant's attorney disputed the initial IR on February 18, 1994, more than 90 days after claimant received notice. *See* Texas Workers' Compensation Commission Appeal No. 931011, decided December 10, 1993, which noted the possibility of administrative penalty for a carrier's failure to notify counsel, but stated that communication to counsel was not necessary to start the 90-day period when evidence of communication to the claimant was shown.

While claimant does not appear to have timely disputed the initial IR, the record also shows that on April 4, 1994, a benefit review conference agreement by the parties said that

MMI would be decided by a designated doctor. Under these circumstances, the hearing officer did not have to find that the initial IR (and MMI that accompanied it) became final.

The claimant saw (Dr. B) the designated doctor on April 19, 1994. In his narrative dated May 11, 1994, that accompanied the report, he noted her refusal to have surgery and said, "she should enter an intensified muscle strengthening and endurance program in conjunction with a weight reduction program or a work hardening program. It is felt that the maximum benefits of either of these two programs would be achieved within 90 days . . . ." Dr. B found claimant not to be at MMI. With the claimant not completing work hardening which the designated doctor called for, the carrier asserts that claimant is not progressing and the MMI date of Dr. Z should be used since it comprises the great weight of medical evidence contrary to the finding that MMI has not been reached. With the evidence as developed, the Appeals Panel is not prepared to say that the hearing officer's determination that the designated doctor's opinion as to MMI was not overcome by the great weight of contrary medical evidence, is itself against the great weight and preponderance of the evidence. *See* In re King's Estate, 150 Tex. 662, 244 S.W.2d 660 (1951).

It appears that the claimant refuses to have surgery as medically advised. Texas Workers' Compensation Commission Appeal No. 94022, decided February 16, 1994, affirmed a finding that MMI had been reached notwithstanding that a claimant refused to have surgery that could have improved his condition. (In that appeal the claimant was actively involved in conservative treatment and MMI was not found until statutory MMI). It also appears that claimant has not completed a work hardening program which the designated doctor advised (We note that on May 11, the designated doctor stated that 90 days was needed for that program; another letter of his dated June 30, notes the failure of claimant to complete the program but calls for an added six weeks - either period mentioned would be reached by approximately August 15, 1994.)

While the Appeals Panel acknowledges that a medical expectation can later be changed reasonably - reference repeated statements that presumptive dates of MMI are not certifications of MMI - a claimant who does not, or cannot, follow medically reliable advice, in regard to both surgery and rehabilitation, to improve the effects of injury should within a reasonable time be evaluated by medical personnel to see if the point has been reached wherein "further material recovery from or lasting improvement to an injury can no longer reasonably be anticipated". Failing a determination by a designated doctor that such point has then been reached, it would not be unwarranted for that doctor to opine what lasting improvement is anticipated and how it is to come to pass. (As stated, either program that was suggested by the designated doctor should have been completed by August 15, 1994; the record does not indicate that the Commission queried Dr. B after August 15, 1994, for an update as to MMI; this hearing was then held four months after August 15 on December 13, 1994, and the decision of the hearing officer was distributed on January 27, 1995.) Just as there appears to be no reason why Dr B was not queried on August 15, 1994, there also appears no reason why he should not be queried now for an update of his June 1994 communication as to MMI of this claimant.

Carrier suggests that MMI can be reached without waiting for work hardening and cites Texas Workers' Compensation Commission Appeals No. 94036 and 94368, decided respectively February 14, 1994, and May 6, 1994. Both opinions state that current engagement in work hardening is not inconsistent with a finding of MMI. The determination of MMI is to made upon reasonable medical probability when not based on the statutory time limit (*see* Section 401.011(30); the Appeals Panel is simply stating that it will not place restrictions on the physician's medical judgment; in certain instances, MMI may not be found based on reasonable medical probability when work hardening is progressing.

Finding that the decision and order of the hearing officer are not against the great weight and preponderance of the evidence, we affirm.

Joe Sebesta
Appeals Judge

CONCUR:

Robert W. Potts
Appeals Judge

Gary L. Kilgore
Appeals Judge