APPEAL NO. 931107

This appeal arises pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act) (formerly V.A.C.S., Article 8308-1.01 *et seq.*). A contested case hearing (CCH) was held on November 10, 1993, in (city), Texas, with (hearing officer) presiding as hearing officer. The issues at the CCH were: 1. whether the respondent (claimant herein) had reached maximum medical improvement (MMI); 2. what was the claimant's correct impairment rating; and 3. whether the claimant had disability from her compensable injury of (date of injury), after September 18, 1992. The hearing officer ruled that the claimant had not reached MMI and had continuing disability due to her compensable injury since (date of injury), and ordered the appellant (carrier herein) to pay accrued temporary income benefits (TIBS) in lump sum with interest.

The carrier files a request for review contending that it should not have to pay TIBS from September 18, 1992, through September 20, 1993. The carrier argues that the claimant delayed deciding whether or not to have surgery during this period and it should not be required to pay TIBS for a period during which the claimant delayed deciding upon surgery. The claimant replies that there is no exception under the 1989 Act that would relieve the carrier from liability for TIBS during any period in which the claimant was not at MMI and had disability. The claimant also contends that the claimant did not delay surgery, but followed the medical advice she was given in regard to surgery.

DECISION

Finding no reversible error in the record and sufficient evidence to support the decision of the hearing officer, we affirm.

The claimant developed bilateral de Quervain's syndrome after working as a seamstress for the employer for six years. The claimant testified that she has been unable to work since (date of injury), due to her de Quervain's syndrome. She was originally seen by a (Dr. J) who referred her to (Dr. W), M.D., a board certified plastic surgeon, who began treating her in February of 1992. Dr. W treated the claimant with a number of modalities, including therapy, medication, steroid injections and Marcaine injections. Dr. W stated in a report that he believed that the claimant had reached MMI on June 26, 1992, and ordered a functional hand study and based upon this study he rated her impairment as 15% of the whole person.

The claimant testified that on August 27, 1992, she was interviewed by a rehabilitation nurse. On August 27, 1992, this rehabilitation nurse noted in a written report that Dr. W had stated that surgical intervention would not help the claimant. The nurse then quoted *Outline of Orthopedics*, 9th Edition, by Adams as follows:

> But Operation [Deroofing of the de Quervain's Tendon] provides so certain a cure that it should always be advised if a disability is severe.

The nurse went on to state that she would contact Dr. W to ask why he did not advise

surgical intervention and stated that the claimant "should be provided with a second opinion." The report reflected that the nurse advised the claimant that she should seek the services of the Texas Rehabilitation Commission (TRC).

The carrier apparently disputed Dr. W's impairment rating and the Texas Workers' Compensation Commission (Commission) appointed (Dr. O), a board certified orthopedic surgeon, as the designated doctor. On September 29, 1992, Dr. O certified on a Report of Medical Evaluation (TWCC-69) that the claimant had reached MMI on September 18, 1992, with a three percent whole person impairment. In a five page narrative attached to his TWCC-69 Dr. O made the following comments regarding surgery:

> As regards to surgical intervention, certainly this is always an alternative . . . . As regards to prognosis, it appears that this will depend largely on the type of work she does. If she continues in this capacity, I believe that she will continue to have discomfort and pain in the wrist and eventually led (sic) to surgical intervention. Even with surgery she may still have residual discomfort with activity.

On December 8, 1992, Dr. W wrote a report strongly criticizing Dr. O's rating and defending his own. The attorney for the carrier sent a letter to Dr. O enclosing him a copy of Dr. W's December 8, 1992, report and asking him to comment.[1] Dr. O replied in a letter dated December 28, 1992, defending his rating.

The claimant testified that Dr. W had recommended against surgery, and that Dr. O told her her condition might improve by refraining from repetitive use of her wrists, but if it did not, she might need surgery. She testified that the rehabilitation nurse told her to seek testing through the TRC. The claimant stated she first saw (Dr. G), M.D., an orthopedic surgeon, after she had obtained permission from the Commission to change treating doctors. Dr. G saw the claimant on July 13, 1993, and stated in his report that in his opinion she had not reached MMI because surgery could improve the condition of both her hands. Dr. G performed surgery on the claimant's right wrist on September 20, 1993.

On September 17, 1993, the Commission wrote to Dr. O and asked him if Dr. G's report recommending surgery affected his opinion as to MMI. Dr. O replied as follows in a letter of September 25, 1993:

> Regarding the above named patient, certainly if the patient is to undergone (sic) surgical intervention, then it would be my opinion that she has not reached maximum medical improvement. However, were surgery not to have been

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[1] We again note our strong disapproval of any unilateral communication between the parties and the designated doctor. We again exhort all parties who need clarification from a designated doctor to seek such clarification through the Commission. *See* Texas Workers' Compensation Commission Appeal No. 93455, decided July 22, 1993; Texas Workers' Compensation Commission Appeal No. 93613, decided August 24, 1993; Texas Workers' Compensation Commission Appeal No. 93702, decided September 27, 1993.

contemplated, then the date of maximum medical improvement of 7/25/92 still stands.

Naturally, if she had decided to undergo the surgical intervention, then this date will, of necessity, change.

The hearing officer grounds his decision on the fact that the designated doctor amended his opinion as to MMI. Section 408.122(b) provides:

> If a dispute exists as to whether the employee has reached maximum medical improvement, the commission shall direct the employee to be examined by a designated doctor chosen by mutual agreement of the parties. If the parties are unable to agree on a designated doctor, the commission shall direct the employee to be examined by a designated doctor chosen by the commission. The designated doctor shall report to the commission. The report of the designated doctor has presumptive weight, and the commission shall base its determination of whether the employee has reached maximum medical improvement on the report unless the great weight of the other medical evidence is to the contrary.

We have held that a designated doctor may amend his findings as to MMI. Texas Workers' Compensation Commission Appeal No. 92441, decided October 8, 1992; Texas Workers' Compensation Commission Appeal No. 92639, decided January 14, 1993. The real question in the present case is whether the designated doctor's amendment of his finding of MMI was proper under the circumstances of this case. We have held that subsequent surgery or the need for further surgery can be a valid basis for a designated doctor to amend his original opinion as to MMI. Texas Workers' Compensation Commission Appeal No. 93702, decided September 27, 1993; Texas Workers' Compensation Commission Appeal No. 93391, decided July 5, 1993. We have also found that a designated doctor validly amended his opinion as to MMI when there was a considerable lapse of time between his original certification and the amendment. Thus in Appeal No. 93702, *supra*, we held that the designated doctor's letter of July 1, 1993, constituted a valid amendment withdrawing his original certification of MMI on February 25, 1992. This is a longer time lapse than in the present case where Dr. O certified MMI on September 29, 1992, and amended his opinion withdrawing certification on September 25, 1993. We have never held that the amendment of the opinion of the designated doctor must be accomplished in a particular time frame to be effective.[2] The appropriate

[2]In Appeal No. 92441, *supra*, we pointed out that the amendment took place in a relatively short period of time. *See also* Texas Workers' Compensation Commission Appeal No. 93130, decided April 7, 1993.

standard would be whether the time between the original certification and the amendment is reasonable under the circumstances of a particular case.

In the present case the hearing officer found that amendment was proper and we see no reason to overturn his decision in this regard. Just as in Appeal No. 93702, *supra*, the designated doctor's amendment was in response to an inquiry by the Commission. And as in Appeal No. 93702, *supra*; and Appeal No. 93391, *supra*, it was due to surgery. Nor is the case upon which the carrier relies, Texas Workers' Compensation Commission Appeal No. 93427, decided July 14, 1993, germane to this issue.

In Appeal No. 93427 the hearing officer based his finding of MMI and impairment on the assessment of a designated doctor selected by the Commission. The claimant appealed the decision of the hearing officer contending that the opinion of the designated doctor had been overcome by the other medical evidence when three other doctors had recommended surgery. In affirming the decision of the hearing officer we noted that one concern we had with the position of the claimant was his delay in obtaining surgery. We then pointed to cases where the issue was whether surgery or the need for surgery either showed the earlier finding of MMI by the designated doctor to be against the great weight of the other medical evidence or required us to remand so that the opinion of the designated doctor as to MMI could be obtained in light of the surgery or evidence of the need for surgery. We stated in Appeal No. 93427 that the claimant's failure to obtain or schedule surgery from the time it was first recommended in January 1992 and the time of the CCH in that case on April 1993 was a factor in our decision, citing the following language from Texas Workers' Compensation Commission Appeal No. 93293, decided June 1, 1993:

> We do not take the position that simply because a treating doctor indicates that a claimant is a candidate for surgery that MMI may not be found. Each case must be decided on its own merits and factors such as when the claimant first learned of the need for surgery, the claimant's actions after obtaining that information, the reason for delay, if any, in scheduling surgery, and the opinions of doctors may be evaluated in such cases.

These cases and this standard do not necessarily apply to the circumstance, as in the present case, where the designated doctor has already issued an amended opinion as to MMI. The question then, as discussed *supra*, is whether it was proper for the designated doctor to amend his opinion, not whether that opinion was outweighed by the other medical evidence. Further, even presuming *arguendo*, that the above standard articulated in Appeal No. 93293 does apply in the present case, we cannot see how it would preclude the claimant from obtaining benefits. The claimant testified that she followed her doctor's advice in regard to surgery and no one told her she needed to have surgery until she saw Dr. G, after which she scheduled surgery. While the carrier at times argues that the claimant should have known she might need surgery after she saw the designated doctor in September 1992, the attorney for the carrier concedes in final argument that the claimant did not unreasonably delay her surgery.[3] Thus we do not understand why the claimant

[3]He states as follows in final argument:

should be penalized for this delay. Nor, like the hearing officer, do we find any authority under the 1989 Act to suspend weekly benefits prior to claimant reaching MMI when the claimant has disability. Any unfairness this works on the carrier is greatly mitigated by the operation of Section 401.011(30)(B) providing for statutory MMI 104 weeks from the date on which income benefits accrue.

The decision of the hearing officer is affirmed.

Gary L. Kilgore
Appeals Judge

CONCUR:

Stark O. Sanders, Jr.
Chief Appeals Judge

Lynda H. Nesenholtz
Appeals Judge

I wanted to bring to the hearing officer's attention what I think is an important policy consideration not only for this case but for other similar cases, because it is not an unusual turn of events for a designated doctor or a treating doctor or an RME doctor to examine a patient and be of the opinion that you have reached MMI unless you are going to have surgery.

I think it is common knowledge that that is something that can happen in a wrist case, in a back case, in a hernia case, et cetera, et cetera. The question here is what happens in the period of time while the claimant decides whether or not to have surgery. I submit to the hearing officer that you should determine that maximum medical improvement is, in fact, reached on the date originally indicated and remains in effect until such time as the claimant does opt to have surgery, in effect, has the surgery and the reason is this.

Otherwise, the claimant has an incentive to wait for a period of weeks, months, or years to delay the surgery and then have the surgery later in their period of time they would be entitled to TIBS and pick up the TIBS for the past accrued period. I don't mean to suggest that that is what happened in this case, because it's not and I think the obvious distinction is that [Dr. O] did not strongly advise her initially but that I think is the policy consideration that the hearing officer has to weigh in writing his opinion on what happens when a designated doctor gives us a sort of contingent opinion that [Dr. O] did here.