APPEAL NO. 93598

Pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001, *et seq*. (1989 Act), a contested case hearing was held in (city), Texas, on June 9, 1993, (hearing officer) presiding as hearing officer. She determined that the great weight of the other medical evidence is to the contrary of the designated doctor report with regard to maximum medical improvement (MMI) and that the respondent (claimant) had not reached MMI. Appellant (carrier) appeals the hearing officer's findings and conclusions that the great weight of the other medical evidence is contrary to the designated doctor's report and that the claimant has not reached MMI, and urges that the claimant's failure to dispute the designated doctor's assessment within 90 days should render it final. No response was filed.

DECISION

Finding the evidence sufficient to support the findings and conclusions of the hearing officer, the decision is affirmed.

That the claimant sustained a compensable injury to his back is not in dispute. The only issue at the contested case hearing was whether the claimant had reached MMI. The case consisted of a number of medical records and the testimony of claimant. Following his injury to his back lifting roofing materials on (date), the claimant was seen by an employee's doctor on (date of injury), who diagnosed unspecified disorders of the back and whose treatment plan included hot baths, a back support and some medication and indicated that the claimant could return to duty. The claimant did not get relief and went to a (Dr. L) who took him off work and subsequently referred him to his treating doctor, (Dr. S) in October 1991. After diagnostic tests, Dr. S diagnosed the claimant with low back pain, a herniated nucleus pulposus at L4-5, and lumbar strain and sprain as well as spondylosis at L5. Although it is not entirely clear from the record, Dr. S apparently treated the claimant conservatively for a period of time with the pain not getting any better. Dr. S ultimately recommended back surgery. The carrier requested a required medical examination which was performed by (Dr. V) on November 21, 1991, who referred the claimant to a work hardening program. Following an examination on April 2, 1992, Dr. V subsequently certified that the claimant reached MMI on April 2, 1992, with an eight percent impairment rating. The claimant disputed this certification and was subsequently seen by (Dr. B), a Commission designated doctor, on June 16, 1992. Dr. B indicates that a discogram shows "some extrapization of dye at the 4-5 level" but that he could not identify any objective findings or evidence of pathology to support the subjective complaints and certified MMI effective April 2, 1992, with a 13% impairment rating.

Following a July 9, 1992, visit with Dr. S, a Texas Workers' Compensation Form, Required Medical Report: Spinal Surgery Recommendations, was prepared with Dr. S's recommendation for spinal surgery on the claimant consisting of: (1) bilateral posterolateral fusion L4-5, (2) additional level L5-S1, and (3) lumbar discectomy L4-5. A second opinion report requested by the carrier resulted in agreement to spinal surgery by a (Dr. D) and his

report dated "8/28/92," which was not inconsistent with the recommendation for surgery, indicated that MMI had not been reached but stated that it was impossible to determine whether the claimant "is really going to benefit from surgical intervention." Spinal surgery was performed in November. In a letter somewhat more threatening than medical in nature dated January 6, 1993, Dr. S urged the carrier to reinstitute benefits to the claimant and in a letter dated May 6, 1993, asks that the claimant be allowed to to undergo further therapy. In a letter dated June 9, 1993, Dr. S reiterates that the claimant has not reached MMI and regarding the assertion that the claimant's surgery was necessitated by a work-related back injury in (year), refers to Dr. V's letter (carrier request doctor) dated November 21, 1991, which stated:

> 6.I believe his current back pain is indeed related to his work as a laborer and the lifting that was involved in it. I doubt that his current complaints represent symptoms of a pre-existing condition even though he had a back injury in (year). By information available to me, it appears he had returned to work successfully following the (year) injury, so I would have anticipated little residual from it.

The claimant testified that he suffered a back injury in (year), but that he returned to work after some months of treatment and that his back had been no problem since that time until his injury in (year). He testified that he has not yet recovered from his back injury and surgery and that he had been denied necessary further therapy by the carrier. The carrier introduced evidence concerning the claimant's prior injury and the remarkable similarity between the injuries and the medical records, clinical test results and treatment plan. Evidence was also introduced that the claimant was scheduled for back surgery for the (year) injury but cancelled it after obtaining a compromised settlement agreement. The settlement included open medicals until October 1993. The carrier also introduced the answers to two questions propounded to Dr. B (the designated doctor) on April 20, 1993, and following his review of all the medical records concerning the claimant's (year) injury and the medical records subsequent to his, Dr. B's, examination of the claimant. In Dr. B's opinion, the claimant's surgery was due to the (year) injury, and he affirms his opinion that the claimant has reached MMI.

The carrier appears to ask on appeal that it be given additional time to obtain another report from Dr. V. This matter was addressed at the contested case hearing and the record was specifically kept open to allow the carrier to submit additional evidence. The carrier did so and a letter from Dr. V was included as a hearing officer's exhibit. We find no merit in or basis for the request for additional time to secure yet another report from Dr. V. The carrier also urges that the failure of the claimant to dispute Dr. B's report within 90 days should render it final. Again, we find no merit to this assertion. Tex. W. C. Comm'n, 28 TEX. ADMIN. CODE § 130.5(e) (TWCC Rule 130.5) provides that "the first impairment rating assigned to an employee is considered final if the rating is not disputed within 90 days

after the rating is assigned." Dr. B's rating was not the first assigned in this case; rather, his was the rating of a designated doctor. As we held in Texas Workers' Compensation Commission Appeal No. 93428, decided July 5, 1993, the TWCC Rule applies to the first impairment rating and the claimant did timely dispute that rating rendered by Dr. V.

The conflicting factual setting of this case results in a difficult and strained application of the provisions of § 408.122(b) regarding designated doctors and the presumptive weight accorded their reports. Of course, it is unfortunately true that considerable disagreement is frequently found in medical reports. For this reason, it is necessary for the fact finder to resolve such conflicts in medical evidence as well as conflict in the evidence in general. *See* Texas Employers Insurance Association v. Campos, 666 S.W.2d 286 (Tex. App.-Houston [14th Dist.] 1984, no writ). Here, of course, the fact finder must accord presumptive weight to the report of the designated doctor and base the determination of MMI on that report unless "the great weight of the other medical evidence is to the contrary." Section 408.122(b). Although it was not disputed that the claimant sustained an injury in (year), the course of his treatment and his reaching or not reaching MMI were not so clear. Indeed, there is convincing evidence that his (year) injury mirrored to a very great extent the injury to his back in (year). Although he was scheduled for surgery similar to that he had in November, 1992, he cancelled the surgery once a compromise settlement was reached, and apparently was fully capable of returning to work and did so for the next three odd years after conservative, therapeutic treatment. Following a course of therapeutic treatment after the (year) injury, the debate arose as to the advisability or necessity of surgery. Both, Dr. V and Dr. B, following examinations and review of a battery of diagnostic tests, determined that the claimant had reached MMI although not specifically ruling out surgery. The treating doctor, Dr. S, recommended surgery and Dr. D agreed although expressing reservation about the benefits that might result. The surgery was performed and up to the time of the hearing in June, 1993, the claimant was still complaining that he had not recovered. This could reasonably call into question whether the surgery had any effect in altering MMI, that is, "the point after which further material recovery from or lasting improvement to an injury can no longer reasonably be anticipated." The instant case is unlike the situation in Texas Workers' Compensation Commission Appeal No. 93207, decided May 3, 1993, where a subsequent diagnosis and successful treatment placed doubt on the designated doctor's certification of MMI and resulted in a remand. The claimant here has asserted he continues to suffer debilitating back pain. We do not question that the claimant has or continues to suffer back pain, and while we have held that pain is not contrary to having reached MMI (*see* Texas Workers' Compensation Commission Appeal No. 92670, decided February 1, 1993), the basis for pain may affect MMI or the need for surgery. We cannot reasonably conclude that surgery, under circumstances present here, was not aimed at attaining "further material recovery from or lasting improvement" of the injury: that surgery isn't always successful is not the measure as to whether it was an appropriate course of treatment in the quest for MMI. Of course, in medical disputes and disagreements between medical providers, the claimant is frequently on the horns of a dilemma. We tend to doubt that a

claimant would undergo serious surgery unless he was convinced his condition required it and he was confident in the opinions of the doctors providing his treatment. Where there is a recommendation for surgery, following a determination of MMI, and it is concurred in and approved and performed, and there is no evidence of intentional delay of medical treatment for the purpose of prolonging benefits or other improper factors, we cannot say there is an insufficient basis for the hearing officer's rejection of the MMI date determined by the designated doctor when that doctor did not authoritatively reject surgery. As we stated in 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 the delay, if any, in scheduling surgery, and the opinions of doctors may be evaluated in such cases.

We have steadfastly acknowledged the special consideration given to the report of and the unique status occupied by a designated doctor under the 1989 Act. Texas Worker's Compensation Commission Appeal No. 92412, decided September 28, 1992. We have also observed that MMI does not mean there will not be a need for some further or future medical treatment and that the need for additional or future medical treatment does not mean that MMI was not reached at the time it was certified. Texas Workers' Compensation Commission Appeal No. 93489, decided July 29, 1993. And, while we do not intend to detract in any way from our previous holdings in this regard, these unusual cases involving surgery must be evaluated on their own particular factual setting. Here, where there was considerable disagreement between the various medical experts, the claimant continued to be symptomatic, the surgery was recommended, concurred in and approved, the surgical procedure was recognized as one of the "modalities or measure of treatment that might be rendered to try to help" with the symptoms, and there was no indication of intentional or unreasonable delay or other improper action, we cannot say that there is not sufficient evidence to support the hearing officer's findings and conclusions that MMI had not be reached as reported by the designated doctor. That is, there is sufficient support in the medical evidence and the other circumstances surrounding this case for her determination that the great weight of the other medical evidence is to the contrary to the designated doctor's report. Though it might be argued that the evidence could be seen as supporting a different result, we do not substitute our judgment for that of the hearing officer under such circumstances. National Union Fire Insurance Co. of Pittsburgh, Pennsylvania v. Soto, 819 S.W.2d 619 (Tex. App.-El Paso 1991, writ denied).

Accordingly, the decision is affirmed.

Stark O. Sanders, Jr.
Chief Appeals Judge

CONCUR:

Joe Sebesta
Appeals Judge

Robert W. Potts
Appeals Judge