APPEAL NO. 941168

On July 27, 1994, a contested case hearing was held. The hearing was held under the provisions of the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq*. (1989 Act). The issues at the hearing were: (1) maximum medical improvement (MMI); (2) impairment rating (IR); and (3) whether the appellant (claimant) had disability from March 24, 1992, to January 24, 1993. The hearing officer determined that the claimant reached MMI on March 24, 1992, with a nine percent IR as initially reported by the designated doctor selected by the Texas Workers' Compensation Commission (Commission), and she further determined that the claimant did not have disability after March 24, 1992. The claimant appeals the hearing officer's determinations on MMI, IR, and disability. The respondent (carrier) responds that the hearing officer's determinations on all issues are supported by sufficient evidence and requests affirmance.

DECISION

The hearing officer's decision and order with respect to the date of MMI and the claimant's IR are reversed, and a decision is rendered that the claimant reached statutory MMI on January 23, 1993, with a 22% IR. The hearing officer's decision with respect to disability is affirmed.

The parties stipulated that the claimant suffered a compensable injury on (date of injury), while working for (employer). The claimant testified that he was making $9.00 per hour when he was injured. Medical records recite that the claimant felt pain in his back when he lifted a radiator out of a truck at work on that day. The next day the claimant was examined at a hospital and was diagnosed as having an acute back sprain. The hospital referred the claimant to Dr. VH who, in a report dated January 31, 1991, diagnosed the claimant as having lumbar syndrome without radiculopathy and released the claimant to light duty work with no lifting over 10 pounds. However, the claimant testified that after working for a few days after his injury, he did not return to work until February 21, 1991, when Dr. VH again released him to light duty work. He said he continued to perform light duty work for the employer until he was laid off about the second week of April 1991. Dr. VH noted that the claimant weighed 270 pounds and had him enroll in a weight loss program. Dr. VH also recommended physical therapy which the claimant undertook for about two months.

The claimant began treating with Dr. H, D.O., on March 19, 1991. Dr. H diagnosed foraminal stenosis at L4-5 and L5-S1, a lumbar sprain, and nerve root compression at L5 and S1. He recommended an MRI and EMG of the lumbar spine and stated that the claimant may require a laminotomy and foraminotomy at L4 and L5. In April 1991, Dr. H wrote that the claimant was to remain on light duty with limited lifting. The claimant testified that more than likely he would still be working for the employer if he had not been laid off in April 1991. Dr. S, a neuroradiologist, reported that an MRI scan of the lumbosacral spine done on April 12, 1991, was normal, with no evidence of disc herniation, nor any mention of bulging discs. However, in a report dated May 13, 1991, Dr.

H stated that he had reviewed the MRI and that his impression was that the claimant had bulging discs at L4 and L5. He also recommended laminotomy surgery on those discs, noting that the claimant had a torn sacroiliac joint ligament and rotational slip causing the nerve to stretch. On May 21, 1991, Dr. A reported that an EMG and nerve conduction study demonstrated evidence of nerve root irritation bilaterally at the L5 and S1 discs.

In a report dated July 15, 1991, Dr. O, who practices neurological surgery, reported that the claimant had been referred to him because Dr. H thought he might need surgery. Dr. O reviewed the claimant's diagnostic tests, including the EMG and MRI, and stated that the MRI showed a little stenosis, but no definite disc defects. After performing physical and neurological examinations, Dr. O diagnosed a lumbar strain and sprain with incomplete resolution of discomfort and underlying mild to moderate spinal stenosis. Dr. O stated that he did not think the claimant needed surgery and recommended that the claimant lose 60 pounds. He said that if the claimant did not have improvement after losing 60 pounds, then "we might restudy him in some way at that point." According to Dr. O's patient notes, he saw the claimant three more times during 1991 with the last visit of that year being on October 30, 1991. At that time, Dr. O wrote that the claimant had lost 30 pounds but still needed to lose 40 to 45 pounds "in order to have a good back most likely without surgery." He reported that he told the claimant that he would be happy to see him again when he weighed 210 to 225 pounds and re-evaluate him at that time.

Dr. H saw the claimant in December 1991 and reported that the claimant continued to have severe pain in his low back and leg. He noted that the claimant had been examined by Dr. O and stated "[s]urgery will not be considered until further weight loss is achieved." In an undated Report of Medical Evaluation (TWCC-69), Dr. H reported that the claimant reached MMI on March 24, 1992, but he also wrote in the space on the form for assigning an IR "[n]eeds lumbar surgery." However, in item 15 of the form, which asks the doctor to list specific body parts if the IR is five percent or greater, Dr. H wrote "10% when the sacroiliac joint is not subluxed, 20% when it is." Dr. H continued to assert that the MRI scan showed a bulging disc at the L4-5 level.

The claimant testified that after he was laid off in April 1991, he did not work again until the summer of 1992 when he worked for about two months doing sheetrocking work for $6.00 per hour.

As previously noted, Dr. O's patient notes for 1991 reflect that he last saw the claimant in that year on October 30, 1991. In an undated TWCC-69, which is date stamped as having been received by "WC Claim Representative" on March 27, 1992, Dr. O reported that the claimant had not reached MMI. Dr. O's next patient note for the claimant is dated November 10, 1992, and in that note he stated: "Hallelujah! [Claimant] is in after about a year and is down to 217 lbs. today." Dr. O noted that the weight loss had "not beneficially affected his back," that the claimant was at a weight where he would stand a reasonable chance of getting a good result if surgery were needed, and he recommended another MRI scan. Dr. D reported that an MRI scan done on November 11, 1992, revealed early degenerative changes of the low thoracic and upper lumbar

interspaces with small Schmorl's nodes, but no extruded fragment was seen at those levels, and that the lower lumbar levels showed only slight degenerative changes without evidence of extruded fragment or foraminal stenosis. In a patient note dated November 16, 1992, Dr. O wrote that he saw the claimant on that date, that the MRI scan "looks great now," that "his discs look fine," and that "[t]here is no significant pathology there that I can see and that is really good." Dr. O also wrote "[l]ooks like that weight loss has allowed him to pretty well cure it. He still has some residual irritation I think." The November 16, 1992, patient note is the last record of the claimant having seen Dr. O.

The claimant testified that after doing sheetrocking work in the summer of 1992, he next worked from the end of January 1993 to June 1993 doing welding work for $6.00 per hour. He said that he went "off work" in June 1993 because the "work ran out basically." He also testified that at that time he was in pain every day and that he was "not really" able to work, although he looked for work but could not find any within his physical abilities.

The parties stipulated that the Commission selected Dr. B as the designated doctor for the purpose of determining MMI and IR. Dr. B examined the claimant on April 19, 1993, and in a TWCC-69 dated April 27, 1993, he reported that the claimant reached MMI on March 24, 1992 (the same date as had been reported by Dr. H), with a nine percent IR. Dr. O reviewed the diagnostic tests, including the MRI scan of November 1992 and the EMG and stated:

> The claimant has a very tiny disc at L5-S1 on my review of his MRI scan. However, basically, I would agree except for the Schmorl's nodes, which is a variation of normal, that the lumbar spine MRI scan is normal with the exception of a very tiny bulging disc at L5-S1. I would agree that this is not a surgical entity.

The benefit review conference (BRC) report indicates that the claimant was paid 27 weeks of impairment income benefits (IIBS), which is three weeks of IIBS for each percentage point of impairment assigned by Dr. B. *See* Section 408.121(a).

The claimant testified that Dr. H referred him to Dr. P, D.O., whom the claimant first saw on August 18, 1993. In a report dated August 26, 1993, Dr. P stated he saw the claimant for complaints of low back pain and left buttocks and posterior thigh pain, that the MRI scans looked normal except for the possibility of a small bulge at L5-S1, and that he recommended a discogram. Dr. HO reported that a discogram performed on September 3, 1993, was "compatible with disruption of the annulus and probable herniated disc at the L5-S1 level." The L3-4 and L4-5 levels were reported to be normal. Dr. HO reported that a CT scan done the same date was "compatible with a herniated disc with a small extruded fragment adjacent to the left nerve root, L5-S1." In a report dated September 21, 1993, Dr. P stated that his impression was that the claimant has an internal disc disruption at the L5-S1 level with a small herniation and he recommended a decompression of the left S-1 nerve root with an interbody fusion with "instrumentation on him." Dr. P completed a TWCC-63 Spinal Surgery Recommendation Report.

The carrier requested Dr. W to provide a second opinion on spinal surgery and in a report dated October 11, 1993, Dr. W concurred with Dr. P's surgery recommendation. Dr. P performed the recommended surgery on November 11, 1993.

On April 12, 1994, the benefit review officer (BRO) advised Dr. B, the designated doctor, of occurrences since he examined the claimant on April 19, 1993, and sent him additional reports. She asked Dr. B to give his opinion as to whether he still felt that the claimant reached MMI on March 24, 1992, and if not, to state the date of MMI. In response to the BRO's request, Dr. B wrote on April 15, 1994, that "[s]ince the patient did, in fact, undergo a major lumbar surgery on 11/11/93 with fusion and fixation devices, in my opinion the patient therefore did not reach [MMI] on 3/24/92." Dr. B further stated that "I believe the [MMI] date would be the statutory date of 3/19/93." The parties stipulated at the hearing that if the hearing officer needed to reach the question of statutory MMI, it occurred on January 23, 1993. Dr. B also stated that "since the patient just had his surgery in November, it is likely that true [MMI] will not occur until May or June of 1994. . . ."

The claimant testified that after the welding work ran out in June 1993, he did not work again until the end of May 1994 when he obtained a job loading trucks for $5.50 per hour.

In a BRC report dated June 13, 1994, the BRO wrote that the claimant would be rescheduled for another examination by Dr. B, the designated doctor, "for his comments and consideration of any additional impairment." Dr. B examined the claimant on June 30, 1994, and in a TWCC-69 dated July 7, 1994, he reported that the claimant reached MMI on January 9, 1993, with a 22% IR. Dr. B's narrative report indicates that it was his understanding that January 9, 1993, was the date the claimant reached statutory MMI. Dr. B noted that since he last saw the claimant on April 19, 1993, Dr. P had performed surgery on November 11, 1993, and that "[s]ince that time, the patient has not had any significant leg pain. He still has some mild back pain but he feels much better." Dr. B's impression was "[r]uptured lumbar disc, L5-S1 treated by posterior laminectomy, interbody fusion, L5-S1 and placement of hardware at L5-S1."

In regard to the issues of MMI and IR, the hearing officer concluded that the claimant reached MMI on March 24, 1992, with a nine percent IR as initially reported by Dr. B, the designated doctor. The claimant contends that the hearing officer erred in making the following findings and conclusion:

FINDINGS OF FACT

7. The attempted recision of MMI and amendment of MMI and IR by designated doctor [Dr. B] was not performed within a reasonable period of time following the original certification of MMI and IR.

8. The attempted recision of MMI and amendment of MMI and IR is not

in accordance with the proper circumstances required by the Appeals Panel in order to be a valid amendment/recision of MMI and IR.

CONCLUSIONS OF LAW

2. The TWCC-69, Report of Medical Evaluation filed by designated doctor [Dr. B] in April of 1992, is a valid certification that claimant reached MMI on March 24, 1992, with a 9% whole person IR and is entitled to presumptive weight.

We note that the hearing officer also found that Dr. B's initial report of MMI and IR was not against the great weight of the other medical evidence. The claimant contends that "the [IR] rating and MMI assigned by the Designated Doctor on July 7, 1994, is the rating and the date to be given presumptive weight in view of the fact that the prior impairment rating given by him was rescinded." The carrier responds that the hearing officer was correct in concluding that the initial report of the designated doctor was not against the great weight of the other medical evidence. Both parties cite numerous Appeals Panel decisions in support of their respective positions.

"MMI" means the earlier of: (a) the earliest date after which, based on reasonable medical probability, further material recovery from or lasting improvement to an injury can no longer reasonably be anticipated; or (b) the expiration of 104 weeks from the date on which income benefits begin to accrue. Section 401.011(30). "Impairment" means any anatomic or functional abnormality or loss existing after MMI that results from a compensable injury and is reasonably presumed to be permanent. Section 401.011(23). "IR" means the percentage of permanent impairment of the whole body resulting from a compensable injury. Section 401.011(24). Pursuant to Section 408.123(a), after an employee has been certified by a doctor as having reached MMI, the certifying doctor shall evaluate the condition of the employee and assign an IR using the IR guidelines described in Section 408.l24. When the Commission selects a doctor as the designated doctor to determine MMI and IR, the report of the designated doctor is entitled to presumptive weight and the Commission must base the determinations of MMI and IR on that report, unless the great weight of the other medical evidence is to the contrary. Section 408.122(b) and 408.125(e).

We first address the hearing officer's finding that Dr. B's second TWCC-69 was not in accordance with the proper circumstances required by the Appeals Panel in order to be a valid amendment of his first report. We observe that no one disputes that the claimant's back surgery in November 1993 resulted from his compensable injury of (date of injury). In Texas Workers' Compensation Commission Appeal No. 94124, decided March 15, 1994, we stated:

> The Appeals Panel has held that in certain circumstances both a treating doctor and a designated doctor may amend a previous determination of a date of MMI and the assignment of an IR. *See* Texas Workers'

> Compensation Commission Appeal No. 93200, decided April 14, 1993. For example, an amendment may be appropriate when the first opinion was based on incomplete or erroneous facts, *see* Texas Workers' Compensation Commission Appeal No. 92639, decided January 14, 1993; or a previously undiagnosed medical condition, or inadequate treatment, *see* Texas Workers' Compensation Commission Appeal 93987, decided December 14, 1993; or a significant error or clear misdiagnoses, *see* Texas Workers' Compensation Commission Appeal No. 93489, decided July 29, 1993; or based on the results of subsequent surgery or the need for further surgery, *see* Texas Workers' Compensation Commission Appeal No. 931107, decided January 21, 1994.

In the instant case, Dr. H opined that the claimant may need surgery shortly after the claimant's injury occurred. Based on the results of two MRI scans, Dr. O and Dr. B, the designated doctor, did not feel that the claimant needed surgery. Dr. B believed that the MRI scans only showed a small bulging disc at L5-S1 that did not appear to require surgery. Dr. B's interpretation of the MRI scans was confirmed by Dr. P to whom the claimant was referred by Dr. H after Dr. B had rendered his initial opinion that the claimant had reached MMI on March 24, 1992, with a nine percent IR. However, Dr. P did further diagnostic testing in the form of a discogram and CT scan which revealed that the claimant had a herniated disc at the L5-S1 level. Both Drs. P and W agreed that surgery was needed for the previously undiagnosed herniated disc and surgery was performed in November 1993. Subsequently, Dr. B was asked by the Commission to reevaluate the claimant, which he did, and he issued a second TWCC-69 in which he determined that the claimant had not reached MMI until the claimant had reached statutory MMI and that the claimant's IR is 22%. Dr. B noted that after surgery, the claimant had not had any significant leg pain and that although he still had some mild back pain, he felt much better. Having reviewed the record, we conclude that the hearing officer erred in finding that Dr. B did not have a proper reason for amending his original certification of MMI and assignment of an IR. *See* Texas Workers' Compensation Commission Appeal No. 94492, decided June 8, 1994; Texas Workers' Compensation Commission Appeal No. 93336, decided June 16, 1993; Texas Workers' Compensation Commission Appeal No. 94978, decided September 8, 1994; and Texas Workers' Compensation Commission Appeal No. 94794, decided August 2, 1994.

The fact that the surgery occurred after the date of statutory MMI does not preclude the designated doctor from having a proper reason for amending his original report of MMI and IR. This question was addressed in Appeal No. 94492, *supra*. In that case we stated:

> However, there will be those rare, exceptional cases where compelling circumstances, such as the need for further surgery, might reasonably be expected to, or necessarily will, affect the claimant's ultimate IR resulting from a compensable injury. And while finality may be delayed somewhat in such circumstance, and income benefit adjustments will have to be made at a later date, we can not conclude that a properly revised IR (premised on a

> clinical or laboratory finding, Section 408.122) should be sacrificed solely for the expediency or finality. We can not read that into the 1989 Act. This is particularly so when we observe that Section 410.307 provides that if a case is appealed to the courts, the "[e]vidence of the extent of impairment is not limited to that presented to the commission if the court, after a hearing, finds that there is a substantial change of condition." It does not seem reasonable to us to conclude that a substantial change of condition, such as occasioned by required surgery subsequent to an initial IR determination following statutory MMI, must be ignored by the Commission thereby forcing the parties into court. It is our understanding that the 1989 Act desires and attempts to facilitate early resolution in the administrative arena, if at all possible, rather than forcing parties into court on an issue.

In other decisions we have remanded cases in order for the designated doctor to reevaluate the claimant when the claimant had surgery after reaching statutory MMI. *See* Appeal No. 94978, *supra*; Appeal No. 94794, *supra*; Texas Workers' Compensation Commission Appeal No. 93856, decided November 4, 1993.

We next address the hearing officer's finding that Dr. B's second TWCC-69 was not performed within a reasonable period of time following his original certification of MMI and IR. In Texas Workers' Compensation Commission Appeal No. 92441, decided October 8, 1992, we affirmed a hearing officer's decision which gave presumptive weight to an amended report of the designated doctor, and in doing so we noted, among other things, that "the revision was prepared within a short period of the initial submission . . . ." Then, in Texas Workers' Compensation Commission Appeal No. 92639, decided January 14, 1993, we affirmed a hearing officer's decision which gave presumptive weight to an amended report of a designated doctor, and in doing so stated "a correction or amendment of the first report generated by a designated doctor, especially when the first document was based upon incomplete or erroneous facts, which is done fairly soon after the first report, may be given presumptive weight," citing Appeal No. 92441, *supra*. We do not read these decisions as putting any particular outside limit on the amount of time that may pass between a certification of MMI or IR and an amendment of that certification. As we stated in Appeal No. 94124, *supra*:

> While a subsequent amendment of a medical report by necessity compromises somewhat the goal of the 1989 Act that decision on benefits be determined with finality as expeditiously as possible, the statute itself places an outside limit on the uncertainty of the date of MMI by establishing a statutory date of MMI at 104 weeks from the date benefits begin to accrue. We are, therefore, unwilling to hold, as the carrier invites us to, that "[r]egardless of subsequent medical developments, . . . simply too much time passed between the date the treating doctor rendered his opinions on [MMI] and impairment and the date he purports to withdraw those opinions," and observe that in Texas Workers' Compensation Commission Appeal No. 93702, decided September 27, 1993, the Appeals Panel found valid an

amendment that was made approximately 16 months after the original certification of MMI.

Appeal No. 94124, *supra*, found that a treating doctor's amendment of MMI date and assignment of IR done 11 months after the original certification was not unreasonable, and Appeal No. 93702, *supra*, which is cited in that decision, involved an amendment of MMI date by a designated doctor. We also note that a seven month period elapsed between the original assignment of an IR by the designated doctor in Appeal No. 94492, *supra*, which decision has been previously quoted herein, and his amendment of that IR. Additionally, in Appeal No. 94978, *supra*, we reversed a hearing officer's decision which accorded presumptive weight to the IR report of the designated doctor and remanded the case for further evaluation by the designated doctor where surgery for the compensable injury occurred seven months after the designated doctor had rendered his opinion on IR. In the instant case, Dr. B, the designated doctor, issued his first report at the end of April 1993; the claimant was diagnosed with a herniated disc in September 1993 and had surgery in November 1993, the Commission did not ask Dr. B to reevaluate the claimant until June 1994, and Dr. B issued his second report at the beginning of July 1994, after having previously stated in April 1994 that the claimant had not reached MMI on March 24, 1992, as he had previously reported.

Thus, approximately 14 months elapsed between the first and second reports of Dr. B. However, the latter half of that period was during a time when the claimant had already had surgery, but the Commission had not asked for a reevaluation. Considering our previous decisions as to what does not constitute an unreasonable period of time between an initial certification and an amendment thereto, and considering that the surgery in this case involved a herniated disc that was not diagnosed until five months after the designated doctor issued his initial report, we conclude that the hearing officer's finding of an unreasonable period of time between the initial and amending reports of the designated doctor to be not supported by the evidence.

Having extensively reviewed the evidence in light of the points raised on appeal we conclude that the hearing officer erred in failing to give presumptive weight to the designated doctor's amended certification of MMI and assignment of a 22% IR. The only medical evidence contrary to the designated doctor's amended report is his original report which was made without the benefit of the subsequently diagnosed herniated disc which resulted in surgery; Dr. O's opinion that the claimant did not need surgery, which opinion was also made without the benefit of the subsequently diagnosed herniated disc; and the report of Dr. H that the claimant had reached MMI on March 24, 1992, which certification was made upon the express condition that the claimant needed lumbar surgery. We cannot conclude that such evidence constitutes a "great weight" of the medical evidence contrary to the amended report of the designated doctor which was the only report on MMI and IR to take into account the herniated disc and the completed surgery.

We now turn to the issue of disability, which is defined in Section 401.011(16) as the inability because of a compensable injury to obtain and retain employment at wages

equivalent to the preinjury wage. With regard to the issue of whether the claimant had disability from March 24, 1992, to January 24, 1993, the hearing officer found and concluded that the claimant has not had disability as a result of his (date of injury), injury at any time following March 24, 1992. Since entitlement to temporary income benefits (TIBS) is predicated upon disability and not having reached MMI, the claimant would not have been entitled to TIBS after having reached statutory MMI on January 23, 1993, even if he had disability after that date. *See* Section 408.101. The claimant has the burden to prove that he has disability. Texas Workers' Compensation Commission Appeal No. 91122, decided February 6, 1992; Texas Workers' Compensation Commission Appeal No. 941146, decided October 7, 1994. In the instant case, the claimant testified that he would probably still be working for the employer if he had not been laid off. In a December 1991 report, Dr. H anticipated that the claimant would be able to return to full time work in April 1992, and in his TWCC-69 of March 1992, Dr. H noted that the claimant had constant low back pain on the right side, but he did not indicate that the claimant was unable to work. Contrary to the claimant's assertion in his appeal, he did not testify that he was unable to work due to severe pain in his back from March 1992 to January 1993. He testified that he was "not really" able to work after June 1993. Likewise, there was no evidence that the claimant's reduced wage rate doing sheetrocking work was because of his injury. Also, there was no evidence that between the time the claimant stopped doing sheetrocking work in August 1992, and the time he started doing welding working in January 1993, that his inability to obtain and retain employment was because of his compensable injury, nor was there evidence that the claimant's reduced wage rate doing welding work was because of his compensable injury. Having reviewed the evidence, we conclude that the hearing officer's finding and conclusion on the issue of disability are not so against the great weight and preponderance of the evidence as to be manifestly wrong and unjust. In re King's Estate, 150 Tex. 662, 244 S.W.2d 660 (1951).

We reverse the hearing officer's decision and order that the claimant reached MMI on March 24, 1992, with a nine percent IR, and we render a decision that the claimant reached statutory MMI on January 23, 1993, with a 22% IR. We affirm the hearing officer's decision that the claimant did not have disability after March 24, 1992.

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Robert W. Potts
Appeals Judge

CONCUR:

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Susan M. Kelley
Appeals Judge

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Alan C. Ernst
Appeals Judge