APPEAL NO. 941227

This appeal is brought pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act). A contested case hearing (CCH) was held on August 9, 1994. The issues at the hearing were whether the appellant (claimant) reached maximum medical improvement (MMI), and if so when, and what was the claimant's correct impairment rating (IR). The hearing officer found, in accordance with the report of the Texas Workers' Compensation Commission (Commission) selected designated doctor that the claimant reached MMI on January 3, 1994, and has a 10% IR. The claimant appeals, arguing that he has not reached MMI because surgery was pending at the time of the CCH. The respondent (carrier) replies that the claimant failed to present medical evidence sufficient to overcome the presumptive weight afforded the report of the designated doctor and that the decision and order of the hearing officer should be affirmed.

DECISION

We reverse and remand.

The claimant worked as a warehouseman. It was stipulated by the parties that he suffered a compensable injury to both knees on (date of injury), when he jumped off a forklift. According to his testimony, the claimant was initially treated by Dr. P at the employer's suggestion. On January 7, 1993, Dr. P diagnosed a generalized pain in both knees, but found no lesions or effusions. Bilateral knee x-rays were negative. He prescribed medication and recommended light duty.

Apparently not satisfied with his progress under Dr. P's care, the claimant next sought treatment from Dr. K. He said he reported both a left and right knee injury to Dr. K, but the right knee was never treated. On February 25, 1993, Dr. K diagnosed genu valgum, chondromalacia patella and crepitus. He released the claimant to limited work. In his report, Dr. K refers to complaints of pain in both knees. His prognosis was good "once he gets his knee [singular] strengthened." An MRI of the left knee only was taken which reflected "small joint effusion," but was otherwise normal. Not satisfied with Dr. K, the claimant next saw Dr. H). He said he told Dr. H about his problems with both knees. On May 6, 1993, Dr. H performed arthroscopic surgery on the left knee and placed the claimant in a work hardening program. He also provided non-invasive therapy for the right knee, and, according to the claimant, was going to operate on the right knee, but never did. The claimant considered the left knee surgery a failure which left him in a worse condition than before. In a letter of November 24, 1993, Dr. H stated that he did not believe more surgery was indicated and said he would assign an IR after the claimant completed a work hardening program. On January 3, 1994, Dr. H certified the claimant reached MMI on that day and assigned a 15% IR. In his Report of Medical Evaluation (TWCC-69), Dr. H notes injury to both knees and bases his IR on loss of range of motion (ROM) and specific diagnosis related impairment in both knees.

On October 26, 1993, at the request of the carrier, Dr. B examined the claimant and completed a TWCC-69 in which he found MMI as of that date and assigned a 12

percent IR. His IR consisted of a percentage for ROM deficit in each knee and an additional five percent for "underlying synovial changes and inflammation of the knee" without specifying which knee or both knees. He found the left knee weaker than the right and recommended aggressive physical therapy to the left knee for six to eight weeks and added "[i]f there is no essential improvement, I would recommend that a repeat MRI be performed, and possibly an arthroscopic evaluation."

On February 2, 1994, Dr. A, the Commission selected designated doctor, completed a TWCC-69 in which he found MMI as of January 3, 1994, and assigned a 12% IR consisting of right and left knee ROM deficits. He diagnosed left knee injury with medial plica formation and right knee contusion. By letter of April 5, 1994, as a result of a benefit review conference (BRC), the benefit review officer (BRO) asked Dr. A a series of questions propounded by the claimant about Dr. A's certification of MMI and IR and medical reports that Dr. A may or may not have seen previously. In response, Dr. A issued a "corrected" TWCC-69 on April 8, 1994, in which he did not change the date of MMI, but lowered the IR to 10% based solely on a typographical error pointed out by the BRO. The claimant said he was aware at the time of this examination that he was to have surgery again on his left knee, but did not know if Dr. A knew this.

The claimant requested and received Commission approval to change treating doctors on February 9, 1994. He then was treated by Dr. PO, whom the claimant described as the first doctor who gave serious attention to his right knee. On June 15, 1994, after Dr. A's report, Dr. PO performed corrective arthroscopic surgery on the claimant's left knee and predicted MMI six months after the surgery. He also noted that the claimant had "a history of Chondromalacia and an Internal Derangement of the right and left knees." In a letter of July 29, 1994, introduced into evidence at the hearing, Dr. PO wrote that the claimant would undergo surgery on the right knee "in approximately four weeks" after which he would require physical therapy and would recover "probably" in six months at which time Dr. PO would do an IR.

At the hearing, the claimant also challenged the correctness of Dr. A's TWCC-69 based on the way he conducted the examination, but on appeal asserts that he was not at MMI because of the pending operation. He said he would undergo the operation on his right knee, because he considered Dr. PO's efforts on his left knee so successful.

Based on this evidence, the hearing officer found that the great weight of the other medical evidence was not contrary to Dr. A's corrected TWCC-69 and found MMI to have been reached on January 3, 1994, with a 10% IR in accordance with that report.

The Appeals Panel has held that an IR does not become final absent a determination of MMI and that an attack on the certification of MMI is also an attack on the IR. Texas Workers' Compensation Commission Appeal No. 92366, decided September 10, 1992. We have also addressed, most recently in Texas Workers' Compensation Commission Appeal No. 941168, decided October 14, 1994, the impact

of subsequent surgery on the continuing validity of a previous certification of MMI and the assignment of an IR. In the case now appealed, it was not disputed that the claimant's previous and planned surgeries were related to his compensable injury, nor that the claimant anticipated with certainty surgery on his right knee as described by Dr. PO. The carrier's argument in support of the decision and order of the hearing officer is that the resolution of disputes over MMI and IR by means of the designated doctor process is not open-ended and that finality must attach to these proceedings at some point. The carrier also stated that the claimant challenged the validity of Dr. A's report at the BRC when he raised certain issues (not including the proposed surgery) which the BRO then addressed with Dr. A. In Texas Workers' Compensation Commission Appeal No. 94492, decided June 8, 1994, a case involving a revision to an IR after statutory MMI, but nonetheless relevant to the case under consideration, we recognized the importance of finality in these certifications, but were unwilling to sacrifice the correctness of an IR solely for the sake of finality when there is a compelling basis not to do so.

The Appeals Panel has also observed in numerous cases that pending or scheduled surgery may require a remand to obtain the designated doctor's opinion on whether and how that surgery would affect his or her opinion as to MMI and IR. *See* Texas Workers' Compensation Commission Appeal No. 94288, decided April 26, 1994, and cases cited therein. Important in the consideration of a remand is whether the future surgery is only a speculative possibility; whether the suggestion of surgery could reasonably be considered more a delaying tactic to forestall the decision on MMI and IR; and whether the designated doctor was aware of the pending surgery and addressed its potential impact on the certification of MMI and IR. We have also cited Texas Workers' Compensation Commission Appeal No. 93293, decided June 1, 1993, for the proposition that the fact of proposed surgery does not overcome the presumptive weight afforded a report of a designated doctor under Sections 408.122(b) and 408.125(e) of the 1989 Act, but that the more or less certainty of the surgery makes it "prudent" to determine if the designated doctor's opinion has changed after the surgery.

In Appeal No. 94288, *supra*, we affirmed a decision of a hearing officer that the report of the designated doctor was entitled to presumptive weight because in that case surgery was discussed as a speculative possibility, and various doctors, including most importantly the designated doctor, were aware of the discussions about surgery and that it was a disfavored option. In the case now appealed, the uncontradicted testimony of the claimant was that he suffered a compensable injury to both knees, but that he had trouble getting treating doctors to address his right knee problems until he saw Dr. PO. No doctor, including Dr. A, who gave an opinion on MMI indicated in any way that surgery on the claimant's right knee was an option or even being considered or that corrective surgery on the left knee was in any way indicated. In addition, the Commission approved a change of treating doctors to Dr. PO after Dr. A examined the claimant and initially certified MMI and IR. Dr. A thus was not aware of any contemplated surgery. The claimant subsequently underwent surgery again on his left knee. The proposed surgery on his right knee could hardly be considered speculative as to either a decision to go-

ahead with the surgery or a date in light of the claimant's testimony and Dr. PO's letter of July 29, 1994.

We consider this case remarkably similar to Texas Workers' Compensation Commission Appeal No. 93293, *supra*, where the Appeals Panel said:

> Given the medical evidence that the claimant is a candidate for spinal surgery; the claimant's testimony that he intends to have surgery, but wants Dr. C's opinion on that matter and had an appointment scheduled with Dr. C to obtain his opinion; the absence of any opinion from the designated doctor as to whether spinal surgery would result in further material recovery from or lasting improvement to the claimant's injury, despite his reference to surgery; and the absence of any medical evidence of record that the claimant does not need surgery, we are of the opinion that the case should be remanded to the hearing officer for further consideration and development of evidence, as appropriate, on the matter of whether the claimant has reached MMI.

In the instant case, the claimant states he intends to have right knee surgery and that he had left knee surgery since his examination by Dr. A; Dr. PO is of the opinion that such surgery is indicated; Dr. A's report does not reflect any awareness that further surgery is contemplated or indicated; and there is no medical evidence that surgery is not appropriate in this case. Thus, consistent with our opinion in Appeal No. 93293, *supra*, we reverse and remand the decision of the hearing officer for further consideration and development of evidence, as appropriate, to include contact with the designated doctor to determine if his opinion as to either MMI or IR has changed because of claimant's surgery.

Pending resolution of the remand, a final decision has not been made in this case. However, since reversal and remand necessitate the issuance of a new decision and order by the hearing officer, a party who wishes to appeal from such new decision must file a request for review not later than 15 days after the date on which such new decision is received from the Texas Workers' Compensation Commission's division of

hearings, pursuant to Section 410.202. *See* Texas Workers' Compensation Commission Appeal No. 92642, decided January 20, 1993.

Alan C. Ernst
Appeals Judge

CONCUR:

Stark O. Sanders, Jr.
Chief Appeals Judge

Robert W. Potts
Appeals Judge