APPEAL NO. 941243

This appeal arises under the Texas Workers' Compensation Act of 1989, TEX. LAB. CODE ANN § 401.001 *et seq*. (1989 Act). On August 9, 1994, a hearing was held. He (hearing officer) determined that appellant's (claimant) impairment rating (IR) was 13%. Claimant asserts that he has had surgery since the hearing and his IR should be greater; he appears to complain that no ombudsman was available to him. Respondent (carrier) replies that the decision should be upheld.

DECISION

We affirm.

Claimant's back was injured on (date of injury), while working at an oil rig when the floor of the rig fell striking his back. He was treated by (Dr. D). Claimant testified that his back got worse so he changed doctors; he did not say when this occurred. The report of the designated doctor, (Dr. W) states that claimant was treated by Dr. D from (month year) to June 1993. Dr. W, in the designated doctor's report of January 3, 1994, then says that claimant has been seeing (Dr. DR) "as of late."

The limited medical records provided show that Dr. DR considered claimant to have a herniated disc at L5-S1 and spondylolisthesis. Dr. W was asked by the Texas Workers' Compensation Commission (Commission) to determine "percentage of impairment only-statutory maximum medical improvement" (MMI). Dr. W noted in her report that statutory MMI was reached on July 19, 1993. This date does not appear significantly inconsistent with the benefit review conference report of June 1994 which shows disability from July 20, 1991, to July 16, 1993, with 104 weeks of temporary income benefits (TIBS) paid and 39 weeks of impairment income benefits (IIBS) paid. (The hearing officer found statutory MMI on July 23, 1993; this finding is not attacked on appeal.) Dr. W assigned 13% IR based on two percent for nerve loss, three percent for lumbar range of motion loss, and eight percent for spondylolisthesis. (Dr. W noted in her narrative that spondylolisthesis is referenced because a claimant cannot be "double impaired" for problems at the same level of the spine.)

At the hearing the claimant stated that he disagreed with the IR of Dr. W because he cannot work; on appeal he only asserts his surgery, performed on or after September 14, 1994, should affect the amount of the IR. IR was the only issue at the hearing.

No medical records were introduced at the hearing from Dr. D. No medical records dated prior to 1994 are in evidence. (Claimant did offer a letter of Dr. DR dated November 9, 1993, which was excluded, but it only attempted to refute an IR assigned to claimant by another doctor; it did not reference surgery, possible surgery, or a need for surgery.) No medical records are in evidence that predate the designated doctor's opinion of January 3,

1994, much less that predate the statutory MMI date of July 23, 1993.

In his medical entry of May 31, 1994, Dr. DR says that claimant still has pain in his back and legs. Dr. DR records, "[h]e is to see (Dr. C) for consideration of lumbar laminectomy." Dr. DR assesses "low back pain secondary to disc herniation at L5-S1" and "grade I spondylolisthesis." An MRI report of March 24, 1994, reflects "spondylosis at L5-S1" and "partial degeneration" and "herniation of the L5-S1 disc." A nerve conduction study was also done in March 1994. Dr. C, on June 1, 1994 (more than 10 months after statutory MMI), referred to his examination of claimant and the MRI of March 1994. His total comment about surgery was, "[i]t is my opinion that the patient is a candidate for resection of the disc".

While there are no medical records in evidence predating 1994, claimant did testify that Dr. D did not recommend surgery. Claimant added at the hearing that he was now trying to have surgery, pointing out that he had recently been scheduled for surgery but the carrier had not approved surgery. Claimant acknowledged that while Dr. DR had gotten the opinion of Dr. C, he was not saying that carrier had obtained a second opinion at the time of hearing.

Dr. W's comments in the designated doctor's report do not indicate that the medical records provided to her suggested that surgery was pending or even being considered. She stated:

> At this point he could have benefited from a surgical stabilizing procedure at L5-S1. If it has not been offered to him at this point, it may still benefit for this patient in the future.

The hearing officer queried the claimant as to the extent of the evidence provided. He specifically asked claimant to check his records and offered to allow claimant to turn in added medical records the day after the hearing, at which time the hearing officer would give the carrier a chance to comment regarding them. Claimant declined. The hearing officer then warned that the Appeals Panel would not issue a decision based on evidence not provided at the hearing. The claimant did not present any evidence that the IR performed by the designated doctor was deficient in any way.

The hearing officer in his Statement of the Evidence acknowledged that claimant was "being evaluated for surgery." He pointed out, in according the designated doctor presumptive weight, that the medical evidence supports the IR of the designated doctor.

Texas Workers' Compensation Commission Appeal No. 94022, decided February 16, 1994, affirmed a hearing officer's decision which found only seven percent IR based on the designated doctor's opinion; that designated doctor saw the claimant approximately one and one-half months after statutory MMI; surgery had been approved a month before statutory MMI, but claimant was ambivalent about surgery. In assigning seven percent, the designated doctor commented that the recommendation for surgery was long

standing, and claimant "may well require surgery"; the designated doctor also said surgery was claimant's election, and found that he reached MMI "by statute" with seven percent IR. The Appeals Panel affirmed that decision saying that there was no basis to question an IR that was accurate at the time MMI was reached statutorily. *Compare to* Texas Workers' Compensation Commission Appeal No. 93336, decided June 16, 1993, which said that the designated doctor should be queried to see if his IR would change based on surgery scheduled and ordered by the Commission as of the date of the hearing. While statutory MMI was not a complicating factor in Appeal No. 93336, *supra*, the decision to remand that case for further consideration by the designated doctor was based on surgery that was both scheduled and ordered.

Surgery performed after a designated doctor has found MMI and IR but before statutory MMI clearly presents an issue of whether the designated doctor's determination was, in fact, contrary to the great weight of the medical evidence; a different question arises when statutory MMI has passed without significant development of the surgical option before the Commission. An impairment rating is to be assigned when MMI is reached. *See* Sections 408.123(a) and 408.121(a) which instruct a doctor certifying MMI to assign an IR and provide for IIBS to start the day after MMI is reached. Statutory MMI is not subject to being weighed against the great weight of other medical evidence. *See* Section 401.011(30)(B). However, Section 408.123 neither precludes nor provides for issuance of another, later IR. *See* Texas Workers' Compensation Commission Appeal No. 94149, decided March 16, 1994, which called for assigning an IR at the time of MMI. That case did not rule out a subsequent IR, however, allowing the designated doctor to consider surgery after statutory MMI; he then opined that such surgery decreased the IR in that case.

Confronted with another IR question after statutory MMI, Texas Workers' Compensation Commission Appeal No. 93856, decided November 4, 1993, in calling for the designated doctor to consider spinal surgery performed less than three months after statutory MMI and before the hearing, said:

> Clearly a dispute regarding the necessity of surgery was in the process of being resolved by the Commission <u>on the date of statutory MMI</u>. [Emphasis added.]

Appeal No. 93856, *supra*, refused to only consider the IR assigned at time of statutory MMI when the process for approval of necessary surgery was in being when MMI was reached. *See also* Texas Workers' Compensation Commission Appeal No. 941168, decided October 14, 1994, which reversed a hearing officer's decision that a designated doctor's reconsideration of IR based on an undisclosed, undiagnosed herniated disc found after statutory MMI was not entitled to presumptive weight. Appeal No. 941168, *supra*, is consistent with language in Section 410.307 concerning "substantial change of condition" as a basis for changing the IR by court action. *Also see* the concurring opinions of Judges Lueders and Ernst in Texas Workers' Compensation Commission Appeal No. 94978, decided September 8, 1994, which would allow another IR based on a "<u>significant</u> change

of medical condition" (emphasis added)--which does not approve such a change based on any decision to have surgery--after statutory MMI. This concurrence cited 1 MONTFORD, BARBER & DUNCAN, A GUIDE TO TEXAS WORKERS' COMP. REFORM 4-114 (1991), which used "substantially changed," in the context of a change to IR after statutory MMI but before court action. *Compare to* Texas Workers' Compensation Commission Appeal No. 94492, decided June 8, 1994, which remanded the hearing officer's decision for re-examination of IR after statutory MMI when multiple surgeries had been performed for the compensable injury, when significant problems still continued after statutory MMI, and when surgery again was performed six months after MMI. In remanding, Judge Sanders pointed out that reconsideration of IR was appropriate in "rare, exceptional cases." The criteria of Section 410.307 were cited as guidance in this area. As a result, revision of IR may be considered after statutory MMI when a substantial change of medical condition occurs or when certain treatment is provided, such as surgery, which was being processed at the time of statutory MMI.

In the case under review there is no evidence that any surgery was even being considered (much less being processed before the Commission) at the time of statutory MMI when an IR should have been assigned. The record does not even indicate that surgery was being considered by claimant or his treating doctor at the time the designated doctor mentioned surgery as a possibility almost six months after statutory MMI. No substantial change of claimant's medical condition is shown by the evidence. The findings of fact that support the conclusion of law that MMI was statutorily reached on July 23, 1993, with a 13% IR are sufficiently supported by the evidence of record. (We note that necessary medical care is to be provided after MMI has been reached regardless of the IR.)

The claimant also questions assistance by the ombudsman. He did not raise any question of help by an ombudsman at the hearing when the hearing officer noted that he was unrepresented, so availability of an ombudsman will not be considered for the first time on appeal. *See* Texas Workers' Compensation Commission Appeal No. 91100, decided January 22, 1992.

Finding that the decision and order are sufficiently supported by the evidence, we affirm. *See* In re King's Estate, 150 Tex. 662, 244 S.W.2d 660 (1951).

Joe Sebesta
Appeals Judge

CONCUR:

Stark O. Sanders, Jr.
Chief Appeals Judge

Robert W. Potts
Appeals Judge