APPEAL NUMBER 94978
FILED SEPTEMBER 8, 1994

This appeal is considered under the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act). On June 21, 1994, a contested case hearing was held in (City 1), Texas, with (hearing officer) presiding as hearing officer. With respect to the three issues before her, the hearing officer determined: (1) that appellant (claimant) had disability as a result of his _____, compensable injury since August 1, 1991; (2) that claimant reached maximum medical improvement (MMI) by statute on August 4, 1993; and (3) that claimant's correct whole body impairment rating (IR) was seven percent in accordance with the report of the Texas Workers' Compensation Commission (Commission) selected designated doctor. Claimant's appeal challenges only the IR, arguing that his IR should be reevaluated to consider the effects of back surgery claimant underwent on March 28, 1994. Respondent (carrier) urges affirmance, arguing that the great weight of other medical evidence is not contrary to the report of the designated doctor in this case; thus, the hearing officer did not err in according his IR presumptive weight.

DECISION

The decision and order of the hearing officer are reversed and the case is remanded for further evaluation by the designated doctor of claimant's IR.

It is undisputed that claimant sustained a compensable back injury on _____, when he was throwing rubber into a bag from a hole about five feet deep. Claimant testified that he grabbed an L-shaped piece of rubber weighing approximately 90 pounds, threw it over his left shoulder, and felt intense pain in his back. Following his injury, claimant was taken to the (Clinic) in (City 2), Texas, for treatment. Claimant returned to the clinic on August 2, 1991, and on August 5, 1991, when he was referred to Dr. E. Claimant began treating with Dr. E on August 7, 1991. Dr. E diagnosed an acute lumbar strain, ordered physical therapy, and prescribed medication. Dr. E sent claimant for an MRI the results of which indicated a small disc herniation centrally and possible L5 spondylolysis. Dr. E referred claimant to Dr. MB for a discogram to determine if he was a surgical candidate.

On August 26, 1991, claimant was seen by Dr. MB who concurred in Dr. E's opinion that a discogram would be helpful to determine if the small L5-S1 disc herniation was the cause of claimant's symptoms and if he was a surgical candidate. On September 10, 1991, claimant was admitted to the hospital for a discogram, which was positive for a herniated disc at L5-S1. Dr. MB discussed the discogram findings with claimant and on September 24, 1991, claimant and Dr. MB agreed that he should undergo a percutaneous discectomy. In progress notes dated February 25, 1992, Dr. MB references a long discussion that he had with claimant about his missing several appointments with the second opinion doctor. Finally, on February 27, 1992, claimant was seen by Dr. CB for a second opinion on surgery. In a report of March 31, 1992, Dr. CB indicated that because of claimant's failure to respond to conservative treatment, he believed that claimant might

benefit from a percutaneous discectomy; however, he also stated that a CAT scan of the lumbosacral spine was needed to rule on the presence of spondylolysis at L5-S1 and to confirm the extent and level of the disc herniation. Dr. MB's progress notes of April 20, 1992, and May 11, 1992, respectively, continue to reference a possible discectomy; however, they also indicate that claimant was in the process of receiving second opinions and that the carrier had not approved the surgery.

On March 25, 1992, claimant was first seen by Dr. D for a "second opinion" on the proposed discectomy. On April 8, 1992, Dr. D stated that his recommendation "is somewhat equivocal as to whether or not [claimant] needs surgery." In progress notes of June 5, 1992, Dr. D reported that claimant indicated his readiness to proceed with the back surgery; however, in the interim Dr. D noted that a thoracic tumor had been noted and it required treatment before the disc procedure could be performed. On June 19, 1992, claimant had surgery, performed by Dr. DR, to remove the tumor. On August 17, 1992, Dr. D stated that in his opinion, claimant was not a candidate for spinal surgery, noting that claimant did not have significant objective findings. Dr. D referred claimant to Dr. G.

During the time period that claimant was being seen by Dr. D, he was also seeing Dr. F. On April 28, 1992, Dr. F ordered more diagnostic tests to evaluate claimant's thoracic spine. It was those tests that revealed a large thoracic tumor. Dr. F opined on May 27, 1992, that claimant did not need a procedure on his lumbar discs. Instead, Dr. F stated that treatment needed to focus on the thoracic tumor.

Claimant went to Dr. G for a "second opinion" on the spinal surgery recommendation on September 9, 1992. On October 28, 1992, Dr. G recommended that claimant have a provocational lumbar discogram to determine the cause of his back pain. Dr. G stated in his October 28th report that "[i]f this study does not show any abnormalities, then I recommend that he be returned to work without restrictions with no permanent impairment." In a report of December 2, 1992, Dr. G noted that the carrier had not approved the discogram and renewed his recommendation for the procedure. On December 21, 1992, a discogram was performed at the L3-4, L4-5, and L5-S1 levels. The L5-S1 discogram revealed a diffuse bulge with posterior herniation, while the discograms at the other levels were normal. In addition, a post-discogram CT scan revealed evidence of a left paracentral herniation at L5-S1. In a report dated January 21, 1993, Dr. G stated that the discogram did not reproduce claimant's pain symptoms at L3-4, L4-5, and L5-S1, noting that the annular tear and the L5-S1 disc herniation did not affect the nerve elements. Thus, Dr. G concluded that claimant would not benefit from surgical intervention. In addition, Dr. G opined that claimant was at MMI and released him from his care. In February 1993, Dr. G referred claimant to Work Ready (rating service) for an impairment evaluation. On April 8, 1993, Dr. G issued a Report of Medical Evaluation (TWCC-69), stating that claimant reached MMI on January 21, 1993, with an IR of nine percent, in accordance with the rating service impairment evaluation.

Claimant disputed Dr. G's certification and Dr. M was selected by the Commission as the designated doctor. Dr. M examined claimant on August 25, 1993, and certified that claimant reached MMI as of that date, with an IR of seven percent, for a specific disorder of the spine. Claimant's range of motion (ROM) measurements were invalid; therefore, he was not awarded any impairment for loss of ROM. The hearing officer found, and this finding was not challenged on appeal, that the claimant reached MMI by operation of law on August 4, 1993. *See* Section 401.011(30).

Claimant testified at the hearing that he disagreed with Dr. G's assessment that he did not need surgery so he decided to go to Dr. C, for another opinion. The medical records indicate that claimant's initial visit with Dr. C was on October 21, 1993, at which time claimant and Dr. C agreed that he would go through a definitive diagnostic evaluation prior to consideration of surgical care. Dr. C ordered a CT discography of the lower three lumbar disc segments and an EMG of both lower extremities. Treatment notes of January 6, 1994, provide that the MRI, discogram, and post-discogram CT scan demonstrated posterior disc herniation at L5-S1. Dr. C referred claimant for therapy and noted that he was not psychologically stable enough for surgery. Thereafter, claimant was referred by a psychologist he had seen at Dr. C's request to a psychiatrist for treatment of depression. In treatment notes of February 17, 1994, Dr. C indicated that claimant's emotional state was sufficiently stabilized to consider surgery. Claimant was sent by the carrier to Dr. G, who as claimant's treating doctor had earlier recommended against surgery, for a "second opinion" on the proposed spinal surgery. In a report dated March 8, 1994, Dr. G concurred in the recommendation for surgery in light of the findings from the current discogram.

On March 28, 1994, Dr. C performed an anterior L5-S1 discectomy, anterior L5-S1 fusion with femoral and iliac allograft and vertebral autograft, and an internal fixation of L5-S1 bone graft. In progress notes dated June 7, 1994, Dr. C stated that claimant's pain was markedly decreased and he referred claimant to physical therapy with the goal of progressing to work hardening. Dr. C also noted that he could not assign claimant an IR at that time, noting that he had not completely recovered from surgery. Claimant testified that he improved following surgery, until he reinjured his back in therapy about two weeks before the hearing.

The Appeals Panel has previously addressed the question of whether surgery that occurred after statutory MMI could result in the designated doctor reevaluating the claimant and revising his or her IR to reflect the effects of the surgery. In Texas Workers' Compensation Commission Appeal No. 94022, decided February 16, 1994, the Appeals Panel affirmed the hearing officer's decision giving presumptive weight to the IR of the designated doctor which did not consider the effects of back surgery performed following statutory MMI. In so doing the Appeals Panel noted no basis for questioning an IR which was accurate at the time it was rendered where surgery had not been performed nearly a year and one-half after it was first recommended. In Texas Workers' Compensation

Commission Appeal No. 94149, decided March 16, 1994, the designated doctor testified at the hearing that surgery after statutory MMI would not have increased the IR. Noting that the claimant had not presented evidence to the contrary, the Appeals Panel determined that the evidence was insufficient to overcome the presumptive weight assigned to the IR of the designated doctor.

In Texas Workers' Compensation Commission Appeal No. 93856, decided November 4, 1993, the Appeals Panel reversed the decision and remanded the case for further evaluation by the designated doctor of the claimant's post-surgery IR. In that case, claimant reached statutory MMI while a dispute as to the necessity of the proposed surgery was in the process of being resolved by the Commission. The Commission approved the surgery after the date of statutory MMI. Under those circumstances, the Appeals Panel determined that it would be prudent to permit the designated doctor to determine the effect of the surgery on his IR. Therefore, the case was reversed and remanded for further consideration of the claimant's IR following Commission-approved surgery. The Appeals Panel noted that it would have been within the hearing officer's authority to have had the employee re-evaluated by the designated doctor after the surgery. The Appeals Panel also observed that the record did not indicate that the question of surgery was being raised by the employee to prevent or prolong the resolution of the IR issue.

Similarly, in Texas Workers' Compensation Commission Appeal No. 94492, decided June 8, 1994, the Appeals Panel reversed the hearing officer's decision and remanded the case to permit the designated doctor to assess a complete IR. In Appeal No. 94492, the claimant reached statutory MMI on February 2, 1993. In May 1993, the designated doctor assigned an IR of 12%, for which claimant was able to complete range of motion (ROM) testing. It was later determined that further back surgery was indicated and on August 19, 1993, claimant underwent back surgery. In December 1993, at the direction of the Commission, the claimant was reevaluated by the designated doctor, who revised his IR to 16% with the notation that he could not do a ROM study on claimant because of the recency of his back surgery. In remanding the case to permit the designated doctor to assess a complete IR, including ROM testing the Panel stated:

> [T]here will be those rare, exceptional circumstances 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 the compensable injury. And while finality may be delayed somewhat in such circumstance, and income benefits 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 of 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 the 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.

The Panel reversed and remanded, noting that by its own terms the IR, which did not include any ROM ratings due to the recency of surgery, was incomplete and premature and accordingly, there was no sound basis for according it presumptive weight.

Lastly, in Texas Workers' Compensation Commission Appeal No. 94794, decided August 2, 1994, the Appeals Panel affirmed the hearing officer's decision according presumptive weight to the revised report of the designated doctor, which modified the claimant's IR based upon post-statutory MMI surgery. Noting that the dispute resolution process on the need for spinal surgery was ongoing at the time claimant reached statutory MMI, the Appeals Panel stated that the designated doctor was not precluded from reevaluating claimant and revising his IR based upon subsequent surgery and further determined that the hearing officer's decision and order giving presumptive weight to the designated doctor's revised report was supported by sufficient evidence and was not against the great weight and preponderance of the evidence.

Turning to the facts of this case, we believe that it presents a situation more analogous to the cases where we have reversed and remanded for further consideration of the correct IR, taking into consideration the effect of surgery following statutory MMI. In this instance, surgery was recommended and agreed to by claimant quite early on in the course of claimant's treatment; however, it was never performed for various reasons and in fact eventually claimant's treating doctor, Dr. G, recommended against it in January 1993, based upon his interpretation that a discogram did not confirm claimant's pain source. Nevertheless, claimant's back problems persisted and he began treating with Dr. C, who renewed the possibility of surgical intervention. Dr. G, claimant's previous treating doctor, was selected as the second opinion doctor. In that capacity, Dr. G reviewed the current discogram and on the basis of its findings, concurred in the surgery recommendation. We are hesitant to determine that the fact that medical confirmation of an ongoing back problem which necessitated surgery came after the date of statutory MMI means that the Commission, in the name of expediency, must turn a blind eye to the reality of the circumstances surrounding claimant's injury and his treatment for that injury in considering claimant's IR. Rather, we believe that the more prudent course of action is to permit the designated doctor to consider whether, and if so, to what extent, his IR may have changed in light of claimant's surgery. Accordingly, the case is reversed and remanded for further consideration and development of evidence as to claimant's post-surgery IR.

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 the 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.

Philip F. O'Neill
Appeals Judge

CONCURRING OPINION:

We concur in the result in this case based on our prior decisions as cited by Judge O'Neill. We believe the 1989 Act requires that an impairment rating be assigned as of the date of maximum medical improvement, which generally cannot exceed 104 weeks after injury. Should a later significant change of medical condition occur, another rating may be assigned subject to the dispute resolution process. *See* 1 MONTFORD, BARBER & DUNCAN, A GUIDE TO TEXAS WORKERS' COMP REFORM § 4B.26, pp. 4.103 - 4.115. In the case under consideration, a remand to the hearing officer for further evaluation by the designated doctor will bypass some steps in the dispute resolution process suggested in MONTFORD, *supra*, but the end result will likely be the same.

Tommy W. Lueders
Appeals Judge

Alan C. Ernst
Appeals Judge