APPEAL NO. 950861
FILED JULY 12, 1995

This appeal arises under the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. ' 401.001 *et seq*. (1989 Act). On September 28, 1994, a contested case hearing (CCH) was held. The record was apparently reopened to allow the designated doctor to re-examine the claimant (respondent), submit his report and allow the parties to respond to the designated doctor's amended report. The record was closed on April 21, 1995. The disputed issues were the date of maximum medical improvement (MMI) and the claimant's impairment rating (IR).

The hearing officer determined that claimant reached MMI by operation of law (Section 401.011(30)(B)) on February 18, 1994, with a 16% IR as assessed by the designated doctor in an amended report. Appellant, carrier, appeals the hearing officer's decision pointing out that the designated doctor had initially assessed an eight percent IR before surgery, that the surgery was intended to improve claimant's condition and that, therefore, a 16% IR after surgery "is absolutely incredible." Carrier requests that we reverse the hearing officer's decision and "render a final judgment that the designated doctor's initial findings be adopted." Claimant did not file a response.

DECISION

The decision and order of the hearing officer are reversed and a new decision rendered.

The factual background regarding claimant's injury was not developed at the hearing; however, it appears undisputed that claimant received a compensable repetitive right upper extremity injury on _____. Claimant apparently saw a number of doctors, including Dr. C. Dr. C, in a letter dated August 12, 1994, stated:

> On 11/9/93, I wrote a TWCC 69 and at that point I awarded her an [IR] for the right wrist, although there was another portion of the injury that had not been rated. She had not reached [MMI] from the standpoint of her elbow injury and elbow nerve problem. She had reached a point of [MMI] from the standpoint of the surgical repair of her right wrist. So I only gave a partial impairment, that just for the wrist.

Dr. C's "TWCC 69" is not in evidence and claimant eventually was seen by a designated doctor (presumably a Texas Workers' Compensation Commission (Commission)-selected designated doctor), Dr. B, who, in a Report of Medical Evaluation (TWCC-69) and narrative dated March 4, 1994, certified MMI on November 9, 1993, with an eight percent IR. Dr. B's narrative report indicates that claimant "underwent surgery on June 3, 1993 with reconstructive repair of the lunotriquetral-innerosseous ligament." Dr. B further noted:

> [Claimant] has been offerred [sic] transposition of the ulnar nerve at the elbow but has declined to have this procedure performed [sic]. I thus feel that she has reached [MMI] as of November 9, 1993.

At the time of the CCH (on September 28, 1994) claimant had changed her mind regarding elbow surgery and an "ulnar nerve transposition" had been performed on August 4, 1994. Claimant testified that she was still in considerable pain and was totally unable to work. Claimant's representative argued that another designated doctor should be appointed to examine and evaluate claimant's entire injury. By letter dated October 11, 1994, the hearing officer wrote Dr. B pointing out claimant's August 1994 surgery and asking the doctor if the fact of surgery had changed his opinion on MMI and IR and whether the doctor needed "to re-examine [claimant]." Dr. B, in a letter dated February 3, 1995, replied that as claimant "has undergone her surgery she would not be at [MMI] until approximately six months post the surgery." Arrangements were made to have claimant re-examined by Dr. B on February 22, 1995. In an amended TWCC-69 and narrative report, both dated March 3, 1995, Dr. B certified MMI on February 22, 1995, with a 16% IR. Although Dr. B did not submit raw test results, he did indicate how he arrived at his assessment. The hearing officer apparently made Dr. B's March 1995 report available to the parties in "correspondence of April 10, 1995" and by response dated April 17th carrier requested Dr. B submit supporting documentation and requested that a CCH be reconvened and that Dr. B be subpoenaed to testify. The hearing officer, in a letter dated April 19, 1995, denied carrier's request to reconvene the CCH and stated "I believe that [Dr. B] very clearly explains how he assesses a 16% IR. . . ." It is unclear whether there was further correspondence with Dr. B, but Dr. B did write carrier and the hearing officer by letter dated April 21, 1995, regarding the methodology used in the rating. (This letter was not in evidence and is merely included in the claim file.)

The hearing officer, in her decision, determined claimant's date of MMI to be February 18, 1994 (by operation of law), with a 16% IR as assessed by Dr. B. Carrier argues that it "is absolutely incredible" that claimant's IR "had actually doubled after her surgery . . . [which was] obviously intended to improve claimant's condition. . . ." (Emphasis in the original.) Carrier argues that the designated doctor's first opinion was proper and (without citing any authority) states "[u]nder these circumstances, a claimant may not reopen the issues of [MMI] and permanent physical impairment nearly a year and a half later. . . ." Carrier did not appeal the hearing officer's determination on the date of MMI and, therefore, that determination has become final. Section 410.169.

The Appeals Panel has long held that a designated doctor may amend his report. Texas Workers' Compensation Commission Appeal No. 92441, decided October 8, 1992; Texas Workers' Compensation Commission Appeal No. 92639, decided January 14, 1993. We have held that a hearing officer could give presumptive weight to the designated doctor's amendments and revisions of his report. *See* Appeal No. 92441, *supra*; Appeal No. 92639, *supra*; Texas Workers' Compensation Commission Appeal No. 93827, decided November 5, 1993; Texas Workers' Compensation Commission Appeal No. 94806, decided

July 29, 1994. We have reversed and remanded a decision where it did not appear that the hearing officer had considered the revised report of the designated doctor but adopted instead a treating doctor's IR. *See* Texas Workers' Compensation Commission Appeal No. 92561, decided December 4, 1992. The Appeals Panel has specifically rejected the argument that it is the first, and only the first, report of the designated doctor to which presumptive weight attaches, and that it cannot be changed. Texas Workers' Compensation Commission Appeal No. 94492, decided June 8, 1994; Appeal No. 92639, *supra*. In Appeal No. 92441, *supra* (in which the designated doctor revised his rating after viewing a videotape of the claimant), we stated: "There was no evidence that the information Dr. K considered between his initial submission and the later TWCC-69 was immaterial or irrelevant."

However, in the instant case, there are two factors which distinguish it from the prior cited cases and which require a more detailed analysis. One is that claimant reached MMI by operation of law (statutory MMI) on February 18, 1994, before the designated doctor's initial report and five and a half months before the August 4, 1994, elbow surgery. The other factor is that in the February - March 1994 time frame, when claimant reached statutory MMI, claimant was declining elbow surgery as indicated in the designated doctor's March 4, 1994, report. The hearing officer found, and that finding is not challenged on appeal, that at the time claimant was examined by Dr. B on February 17, 1994, she was refusing surgery to her elbow and that based on that refusal Dr. B determined her MMI status and IR.

The Appeals Panel has addressed post-statutory MMI surgery and the fact that a designated doctor may, with proper reason, amend his original report of MMI and IR. Notably in Texas Workers' Compensation Commission Appeal No. 94492, decided June 8, 1994, from which the following language has frequently been quoted:

> 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. [*See also* Texas Workers' Compensation Commission Appeal No. 941168, decided October 14, 1994.]

The Appeals Panel, in Texas Workers' Compensation Commission Appeal No. 941511, decided December 22, 1994, discussed Appeal No. 94492, *supra*, a case where the injured employee had reached statutory MMI and was assigned an IR, but subsequently had additional spinal surgery and the designated doctor later reevaluated the employee's IR. The Appeals Panel in that case noted decisions wherein it has held both that "[s]ubsequent surgery or the need for further surgery can be a valid basis for a designated doctor to amend his original opinion as to MMI" and that "just because a claimant may be a candidate for surgery does not mean in every instance that MMI or IR may not be found." That decision went on to observe that "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."

Texas Workers' Compensation Commission Appeal No. 94978, decided September 8, 1994, also discussed post-statutory MMI surgery and cited Appeal No. 94492, *supra*, but further was a case where the post-statutory MMI surgery had been recommended and agreed to by the claimant (but was not performed for various reasons). Appeal No. 94978, *supra*, noted a case where the dispute resolution process on the need for surgery was ongoing at the time claimant reached statutory MMI. A concurring opinion in Appeal No. 94978, *supra*, also stated that "a later change of medical condition" may result in another rating being assigned. *See also* Texas Workers' Compensation Commission Appeal No. 941249, decided October 26, 1994, for a case where the dispute resolution process was ongoing at the time claimant reached statutory MMI.

In the instant case, as in Texas Workers' Compensation Commission Appeal No. 941243, decided October 26, 1994, surgery was not being contemplated (much less being considered in a dispute resolution proceeding), having been expressly declined by claimant, at the time of statutory MMI when the designated doctor assigned his initial rating. No substantial change of claimant's medical condition is shown by the evidence, nor is there any evidence as to why or when claimant changed her mind and requested surgery. (We note that necessary medical care is to be provided after MMI has been reached, regardless of the IR.) The Appeals Panel, in Appeal No. 941243, *supra*, affirmed the IR assigned at the time of statutory MMI stating: "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." Similarly, Texas Workers' Compensation Commission Appeal No. 941265, decided November 1, 1994, held that while there may be those rare, exceptional cases where "compelling circumstances," such as the need for further surgery, might affect the claimant's ultimate IR, "it is certainly not open-ended and even surgery undergone at

some future time that was not actively considered at the time of statutory MMI and the rendering of an IR will not necessarily permit an amendment or revision of the IR." *Citing* Appeal No. 941243, *supra*.

Accordingly, the decision of the hearing officer is reversed and we render a new decision that claimant's IR is eight percent as initially assessed by the designated doctor shortly after claimant reached statutory MMI on February 18, 1994. Surgery was not contemplated at that time and claimant, in fact, had declined additional surgery as noted by the designated doctor. Carrier remains liable for reasonable and necessary medical treatment related to the compensable injury.

Thomas A. Knapp
Appeals Judge

CONCUR:

Philip F. O'Neill
Appeals Judge

Alan C. Ernst
Appeals Judge