APPEAL NO. 962475
FILED JANUARY 9, 1997

This appeal arises 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 July 11, 1996. Regarding the single issue before him, the hearing officer determined that the respondent's (claimant) impairment rating (IR) was 20% as certified in a second report by a Texas Workers' Compensation Commission (Commission)-selected designated doctor. The appellant (carrier) appeals urging that the hearing officer's adoption of the second report as opposed to the first report of the designated doctor was error as a matter of law. The claimant responds urging that the decision of the hearing officer is supported by the facts and the law and asks for affirmance.

DECISION

Affirmed.

The facts in this case are basically not in dispute and are set forth in the Decision and Order of the hearing officer. Briefly, the claimant testified that she sustained an injury as a result of a slip-and-fall incident at work on _____, resulting in pain from the neck and shoulder region down both arms. The compensability of the injury is not in issue, rather the issue as to the claimant's IR is generated by the difficult and somewhat convoluted path the diagnosis and treatment of the claimant took. It is apparent that the early diagnosis was thoracic outlet syndrome (TOS) and the initial course of treatment was conservative and basically consisted of therapy. The claimant testified that her condition worsened, that her arms and hands swelled severely, that she could not drive and had to be put in a splint. She changed to another doctor, who also diagnosed the claimant with TOS and cervical problems. Conservative treatment continued without success and she was ultimately seen by a Dr. R, who diagnosed traumatic TOS and performed surgery on July 22, 1993. This surgery resulted in some relief of the numbness experienced by the claimant but did not relieve her neck and shoulder pain or the pain in her left arm or numbness in her right hand. With the complained of problems continuing, Dr. R referred the claimant to Dr. O, who indicated on August 30, 1994, that the diagnostic tests showed degenerative changes at C5-6 and subsequently recommended an anterior cervical discectomy and interbody fusion with bone graft from right ilium. Dr. O, in a May 3, 1995, report of examination, describes the complications in cases of this nature and notes that "it is almost the rule, rather than the exception, for people with cervical symptoms and a cervical disc protrusion to develop secondary thoracic outlet symptoms and normally it is not necessary to treat those, but rather address the primary problem in the neck" and that "it very well may be then that she still has primary problems unaddressed." The claimant was examined by a Dr. W on June 30, 1995, and he noted that the development of TOS is almost always the result of cervical problems, that the claimant had a bulging disc at C5-6, and agreed with the recommended surgery, which was performed on November 9, 1995, resulting in significant improvement in her condition, according to the claimant's testimony.

It was stipulated that the claimant reached maximum medical improvement (MMI)

on November 22, 1993. Regarding the claimant's IR, the Commission-selected designated doctor, Dr. B, certified an eight percent IR in a report dated May 5, 1994. The report of his independent medical evaluation on April 14, 1994, lists as one of his impressions: "Asymptomatic C5-6 disc." Dr. B's report also indicates that the claimant is being considered for another surgical intervention of the right side and that he feels further studies should be done to "either include or exclude the diagnosis of neurogenic [TOS] or other problem." In any event, following the claimant's cervical surgery on November 9, 1995, the Commission wrote to Dr. B to see if this would have an effect on his original IR opinion. Dr. B responded that it would, reexamined the claimant and the medical records, and performed another IR study. He arrived at an IR of 20% which included ratings for the cervical surgery and range of motion deficits. He also indicated in his second report dated March 25, 1996, that "[w]hen I saw her last I felt that her protruding disk at C5-6 was asymptomatic" and that "[s]ince she has had surgery at C5-6 by [Dr. W] it has improved but with the symptoms in her left arm it is clear that it is not asymptomatic and she should have an [IR] for the cervical disk surgery."

In his discussion, the hearing officer states that it is clear that the claimant's injury included cervical problems that were "apparently ignored or believed to be asymptomatic" and not resolved until the November 9, 1995, surgery, almost four years later. He states that under the unique circumstance present, it was appropriate for Dr. B to reconsider his first IR and issue a new one. He found that after the November 9, 1995, surgery, Dr. B reviewed the later medical records and determined that the C5-6 disc was not asymptomatic and should have been rated and that Dr. B's second report properly included a rating for the cervical surgery.

Without doubt, the diagnosis and treatment of the injury in this case was very difficult and somewhat convoluted. The parties recognized this and did not attempt to fault any of the treating or examining physicians, and they recognized the difficulties involved. Nonetheless, carrier posits that Dr. B's first IR should be adopted emphasizing that statutory MMI took place in November 1993, that the designated doctor's first IR followed the MMI date, and that the second or revised IR came more than two years after statutory MMI. The carrier further questions if the statutory MMI date means anything if a much later IR is adopted. In this regard, we point out that statutory MMI has a very significant impact; it ends temporary income benefits. Section 408.101. However, any impairment income benefits (IIBS) become payable following the reaching of MMI if there is any permanent impairment as certified in an IR. Section 408.121. As noted in Texas Workers' Compensation Commission v. Garcia, 893 S.W.2d 504, 525 (Tex. 1995), it is rare that a claimant's condition has not stabilized in two years. However, that rare situation can arise, as here, and while it is contemplated that, as a normal rule, an IR will readily follow the reaching of MMI, we do not conclude from our reading of the 1989 Act that an indelible IR can always be made upon the date MMI is reached or that such IR is the only one that must be adopted. To the contrary, we have held that a doctor, including a designated doctor, can amend or change his initial MMI or IR for proper reasons and within a reasonable period of time. Texas Workers' Compensation Commission Appeal No. 94492, decided June 8, 1994; Texas Workers' Compensation Commission Appeal No. 941645,

decided January 23, 1995; Texas Workers' Compensation Commission Appeal No. 92441, decided October 8, 1992. Subsequent surgery or the need for further surgery can be a valid basis for amending an original report. Texas Workers' Compensation Commission Appeal No. 931107, decided January 21, 1994; In Appeal No. 94492, *supra*, we stated that:

> there will be those rare, exceptional cases where compelling circumstances, such as the need for further surgery, might reasonable 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 cannot 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 cannot 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.

As we view the decision of the hearing officer, he determined that the evidence was convincing that a situation somewhat analogous to Appeal 94494, *supra*, was present in the instant case. We cannot conclude that his determination was so against the great weight and preponderance of the evidence as to be clearly wrong or unjust. In re King's Estate, 150 Tex. 662, 244 S.W.2d 660 (1951). *Compare* Texas Workers' Compensation Commission Appeal No. 941518, decided December 29, 1994. While we recognize that this case was quite protracted, and that a lengthy period of time passed between the first IR and the subsequent surgery and second IR, we cannot say that it was unreasonable as a matter of law. The time frame must be viewed with regard to the circumstances present. In this regard, it is clear that the diagnosis and treatment of this case was exceedingly difficult, that the claimant was under constant treatment and evaluation and continued to suffer the effects of her injury, that various treatments were attempted and proved unsuccessful or not sufficiently satisfactory until the surgery of November 9, 1995, and that it was after that surgery that the designated doctor reexamined the claimant and determined that his IR needed to be revised. We simply find no basis as a matter of law, under these particular circumstances, to disturb the

decision and order of the hearing officer. Accordingly, the decision and order are affirmed.

Stark O. Sanders, Jr.
Chief Appeals Judge

CONCUR:

Susan M. Kelley
Appeals Judge

Philip F. O'Neill
Appeals Judge