APPEAL NO. 990451

A contested case hearing (CCH) was held on January 27, 1999, pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act), with (hearing officer) presiding as hearing officer, to consider the sole disputed issue from the benefit review conference (BRC), to wit: "What is the impairment rating (IR)?". The hearing officer made certain findings of fact and concluded that the appellant (claimant) is not entitled to have the medical records of his January 28, 1998, spinal surgery and subsequent IR (from the treating doctor) supplied to the designated doctor, and that the IR is 12%, as assigned by the designated doctor selected by the Texas Workers' Compensation Commission (Commission). Claimant has appealed these conclusions and certain findings of fact, contending that the records of the January 1998 spinal surgery, which he underwent after the designated doctor determined in November 1996 that his IR was 12%, should have been sent, upon his timely request, to the designated doctor for his consideration and possible amendment of his IR. The respondent (carrier) urges in its response that the hearing officer correctly resolved the disputed issue, pointing to the length of time that passed from November 1996, when the designated doctor assigned the 12% IR, to October 1998 when claimant sought to dispute the 12% IR.

DECISION

Affirmed as reformed.

According to the report of the BRC held on November 30, 1998, claimant's position on the sole disputed issue was that he believed he had a substantial change in his condition which warrants the 23% IR assigned by Dr. C. The carrier's position was that it accepts the 12% IR of Dr. W, the designated doctor, and requests that it be given presumptive weight. At the outset of the CCH, the hearing officer stated that because of the "long lag here," he assumed that the relief claimant sought was to have the Commission send additional medical evidence to Dr. W for his consideration and possible amendment of his report assigning the 12% IR. The reference to the "long lag" was an apparent reference to claimant's taking issue with the designated doctor's 12% IR in October 1998 notwithstanding that his second surgery for his compensable injury was in January 1998 and the designated doctor's IR was assigned in November 1996. The parties indicated their agreement with the hearing officer's assessment of the disputed issue.

Claimant's date of injury was _____. The parties stipulated that claimant reached maximum medical improvement (MMI) on July 15, 1996. The carrier indicated that this MMI date was first determined by claimant's treating doctor, Dr. D, and adopted by Dr. W.

Claimant testified that while at work on _____, he injured his low back in the process of pulling a hose from a water truck; that he sought medical attention the next day from Dr. D; that he continued working until August 1994; and that he underwent lumbar spine surgery (a laminectomy) in March 1995. Claimant indicated that he went to school to

retrain as a respiratory therapist since he could not resume his former occupation as a truck driver and that he completed his retraining in May 1997. The evidence did not indicate when he began his courses. Claimant further stated that Dr. D assigned a 14% IR and that he disagreed with this IR because it did not include a rating for a second operation which he needed. Dr. D's Report of Medical Evaluation (TWCC-69), dated August 19, 1996, states that claimant reached MMI on July 15, 1996, with an IR of 14%. Claimant said that on June 23, 1996, Dr. W, the designated doctor, assigned a 12% IR with which he disagreed because he needed a second surgery; that he told Dr. W he needed more surgery; that Dr. W told him not to have another operation because he was in pain; and that he, claimant, "did not disagree" with that statement. Dr. W's TWCC-69, dated November 26, 1996, states that claimant reached MMI on July 15, 1996, with an IR of 12% and the accompanying worksheet reflects that the 12% IR included 10% for the specific spinal disorder under Table 49 of the Guides to the Evaluation of Permanent Impairment, third edition, second printing, dated February 1989, published by the American Medical Association (AMA Guides).

Claimant further testified that on or about July 15, 1996, Dr. D recommended a second operation on his spine and that he asked Dr. D to treat him conservatively with medications and injections until he finished school. The carrier introduced a Carrier's Request for Reduction of Income Benefits Due to Contribution (TWCC-33) form reflecting that the Commission approved the carrier's request for contribution on March 14, 1997. According to this form, claimant had a prior compensable back injury on (prior date of injury); he was assigned a 12% IR for his current compensable back injury; and the carrier was ordered to reduce income benefits by eight percent for the effects of contribution of the prior injury. Claimant further stated that after he finished school in May 1997, he called Dr. D, who referred him to Dr. Z, whom he saw on or about July 29, 1997; that the spinal surgery approval process began in September 1997; and that he underwent the second operation in January 1998 by Dr. Z. Dr. Z's Recommendation for Spinal Surgery (TWCC-63) is dated August 7, 1997.

The medical records reflect that on January 22, 1998, Dr. Z performed a laminectomy, discectomy, and fusion procedure at the L4-5 level. Claimant notes in his appeal that the hearing officer's Finding of Fact No. 3 erroneously states that claimant's surgery was performed on January 28, 1998. This is an apparent typographical error which also appears in Conclusion of Law No. 3. We reform that finding and that conclusion to reflect that the surgery was performed on January 22, 1998. Dr. Z's July 29, 1998, report states that claimant has been working full time as a respiratory therapist in a hospital; that he can perform his usual job duties without restriction; that he is completely relieved of his preoperative leg pain; that he has rare episodes of back discomfort when he "overdoes it"; and that he is not taking medication. Claimant stated that after the January 1998 operation, Dr. Z referred him to Dr. C for an IR and that Dr. C assigned a 23% IR with which he agrees. Dr. C's TWCC-69, dated "8-13-98," states that claimant reached MMI on "6-23-95" with an IR of 23%. In his accompanying narrative report, Dr. C stated that claimant's IR included 12% for the specific disorder under Table 49 of the AMA Guides and that the 12% included two percent for the second surgery at the same level.

Aside from the finding we have reformed, claimant has appealed findings that he accepted the benefits of the 12% IR from the designated doctor assigned on November 9, 1997, and did not attempt to dispute the rating at that time, and that his dispute of his IR is not timely. As noted above, claimant has also appealed the conclusions that he is not entitled to have his medical records of the January 22, 1998, surgery and subsequent IR supplied to the designated doctor and that his IR is 12% as assigned by the Commission's designated doctor.

With respect to the hearing officer's determination that claimant's IR is 12%, as assigned by the designated doctor, Section 408.125(e) provides that the report of the designated doctor selected by the Commission shall have presumptive weight and that the Commission shall base the IR on that report unless the great weight of the other medical evidence is to the contrary, in which case the Commission shall adopt the IR of one of the other doctors.

Claimant did not contend that, aside from consideration of Dr. C's report with the 23% IR, the great weight of the other medical evidence was contrary to Dr. W's report. Rather, he contended that the records of Dr. Z and Dr. C's report should be forwarded to Dr. W for his consideration and possible amendment of his 12% IR based on claimant's January 1998 surgery. Claimant contended, in essence, that his request of the Commission to forward those records for consideration by the designated doctor was proper and that the designated doctor should be afforded the opportunity to review them and determine whether he should amend his IR because claimant's circumstances met the three criteria for approving a change in an IR following surgery as enunciated by the Appeals Panel in Texas Workers' Compensation Commission Appeal No. 971385, decided August 25, 1997. In that case, the designated doctor assigned a seven percent IR on April 18, 1996; on June 6, 1996, the employee's treating doctor began discussing surgical options with him; on October 3, 1996, the treating doctor assigned a 27% IR; on October 16, 1996, the treating doctor performed 360-degree lumbar fusion surgery at two levels; the Commission sometime later directed the employee to return to the designated doctor; and on January 3, 1997, the designated doctor assigned a 19% IR. The Appeals Panel reversed and remanded for the hearing officer to review the evidence and perform the following analysis derived from several cited decisions:

> The determination as to whether a designated doctor's certification based on an intervening surgery should be afforded presumptive weight is to be made based on 1) an analysis of whether the surgery which was eventually performed was 'under active consideration' at the time of the initial designated doctor's evaluation and if the surgery was not under active consideration, it is inappropriate to amend the certification based upon it. Texas Workers' Compensation Commission Appeal No. 962654, decided February 6, 1997; Texas Workers' Compensation Commission Appeal No. 962107, decided December 2, 1996; 2) whether the employee experienced material recovery or lasting improvement from the surgery. *Id*.; and 3)

whether the employee had the surgery in a reasonable amount of time after the initial designated doctor's report.

Claimant urged that the surgery was under "active consideration" by Dr. D in July 1996, prior to Dr. W's assignment of the 12% IR in November 1996; that he has had material recovery and lasting improvement from Dr. Z's January 22, 1998, surgery, as evidenced by Dr. Z's post-surgery reports; and that the surgery was performed within "a reasonable time" after the assignment of Dr. W's 12% IR considering that he was in retraining to become a respiratory therapist because he could not continue to work as a truck driver. The carrier argued that there is no medical evidence to support claimant's assertion that spinal surgery was being actively considered in July 1996 and that even if it was, claimant should then have disputed the designated doctor's IR; that even if surgery was being actively considered in July 1996 as claimant contends, he deferred surgery until after he completed retraining in May 1997; that even when the carrier obtained Commission approval in March 1997 for contribution from his prior injury, which the designated doctor opined was eight percent, claimant still did not dispute the designated doctor's 12% IR; and that even after the surgery in January 1998, claimant did not act to dispute the designated doctor's IR until October 1998.

We are satisfied that the challenged findings are sufficiently supported by the evidence and are not so against the great weight and preponderance of the evidence as to be clearly wrong or manifestly unjust. In re King's Estate, 150 Tex. 662, 244 S.W.2d 660 (1951); Cain v. Bain, 709 S.W.2d 175, 176 (Tex. 1986). We also find no abuse of discretion in the hearing officer's decision not to send the records to the designated doctor as claimant sought. The hearing officer could consider that if indeed additional spinal surgery was recommended in July 1997, as claimant asserted, he deferred it so that he could complete his studies to become a respiratory therapist, and that even after the surgery was performed in January 1998, claimant apparently took no action to raise an issue concerning the designated doctor's IR before October 1998.

The decision and order of the hearing officer are affirmed.

_____
Philip F. O'Neill
Appeals Judge

CONCUR:

_____
Susan M. Kelley
Appeals Judge

CONCURRING OPINION:

I concur with the result reached by the majority, although I find this to be a very troubling case. There is nothing either in the 1989 Act or in the rules of the Texas Workers' Compensation Commission stating a time limit for a party to dispute the IR of a designated doctor. We have imposed a time limit through case law on a designated doctor amending his IR saying that it must done within a reasonable time, but for me that standard does not answer the questions raised by this case. However, in light of that standard and under the particular facts of this case, I do not believe that the hearing officer abused his discretion in not seeking clarification from the designated doctor. I believe that abuse of discretion is an appropriate standard for reviewing, in this particular type of case, whether or not a hearing officer should have sought such clarification.

I will also say, as I have expressed in the past, that while I understand and appreciate the need for finality and the administrative efficiencies that come from finality, I think that the need for justice and administrative accuracy are at least equally important goals. In striving for an efficient workers' compensation system, we must not lose sight of the need for a fair workers' compensation system. In a circumstance, like the present one, where it is undisputed that the claimant underwent a second surgery as a result of his compensable injury, I find it disturbing that, in the end, his IR does not reflect the effect of that surgery. In this particular case, however, I see no clear way to any other result and do not write separately to in any way reflect adversely on my esteemed colleagues in the majority.

_____
Gary L. Kilgore
Appeals Judge