APPEAL NO. 990500

This appeal arises pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq*. (1989 Act). On February 11, 1999, a contested case hearing (CCH) was held. In response to the issues at the CCH, the hearing officer determined that: (1) respondent (claimant) had disability from February 3, 1997, to the date of the CCH; (2) claimant reached maximum medical improvement (MMI) on April 20, 1998; and (3) claimant's impairment rating (IR) is 20%. Appellant (carrier) appeals these determinations on sufficiency grounds. Claimant responds that the Appeals Panel should affirm the hearing officer's decision and order.

DECISION

We affirm as modified.

Carrier first contends that the hearing officer erred in determining that claimant had disability from February 3, 1997, to the date of the CCH. Carrier did not offer any argument to support this point of error. Claimant testified that he sustained a compensable injury on _____, and that he had continuing pain from his injury and walked with a limp as of February 1997. He testified that on February 3, 1997, he was driving his work truck when he began to experience severe pain in his back. He said another driver had to unload his truck for him, that he went home, that he saw Dr. H the next day, that he was taken off work, and that he has been unable to do his work since that time because he cannot do the required lifting. Disability means the "inability because of a compensable injury to obtain and retain employment at wages equivalent to the preinjury wage." Section 401.011(16). The existence of disability is a question of fact to be determined by the hearing officer from all the available evidence including medical evidence and the claimant's testimony. Texas Workers' Compensation Commission Appeal No. 92147, decided May 29, 1992; Texas Workers' Compensation Commission Appeal No. 91024, decided October 23, 1991. The burden of proof can be met by the injured employee's testimony alone. Texas Workers' Compensation Commission Appeal No. 93858, decided November 9, 1993. Based on the evidence, the hearing officer could and did find that claimant had disability from February 3, 1997, to the date of the CCH. His disability determination is not so against the great weight and preponderance of the evidence as to be clearly wrong or manifestly unjust. Cain v. Bain, 709 S.W.2d 175, 176 (Tex. 1986).

For clarification, we first note that the hearing officer arrived at the 20% IR found in this case by recalculating the 21% IR found by the designated doctor. The hearing officer used the combined values table of the Guides to the Evaluation of Permanent Impairment, third edition, second printing, dated February 1989, published by the American Medical Association (AMA Guides) and determined that combining the 10% impairment under Table 49 with the 11% impairment for sensory loss combines to a 20% IR rather than a 21% IR. We note that carrier challenged the determination that "it is permissible to correct [the designated doctor's] arithmetic error"; however, carrier's own expert, Dr. S, testified that use of the combined values table would result in a 20% IR rather than a 21% IR. We

perceive no error in the hearing officer's recalculation of the IR in this case. Texas Workers' Compensation Commission Appeal No. 950838, decided July 5, 1995.

Carrier next contends that the hearing officer erred in determining that:

> on April 20, 1998, [Dr. R), the designated doctor], referred to the facts that claimant had a previously undiagnosed herniated disc at L4-5, surgery, and scar tissue and certified that claimant reached [MMI] on April 20, 1998, with a 21% whole body [IR].

The record reflects that Dr. H certified that claimant reached MMI on June 5, 1996, with a four percent IR, and that carrier disputed the four percent IR. The designated doctor then examined claimant and certified on October 4, 1996, that claimant reached MMI on June 5, 1996, with a nine percent IR. In the accompanying report, the designated doctor stated that claimant may need diagnostic testing to "rule out" a herniated disc. On October 25, 1996, the designated doctor filed an amended Report of Medical Evaluation (TWCC-69) certifying that claimant reached MMI on June 5, 1996, with a 12% IR, which consisted of impairment for loss of range of motion and for sensory deficit. On August 28, 1997, the designated doctor noted that claimant had undergone MRI testing and that he was found to have a herniated disc at L4-5 on the left. On December 10, 1998, the designated doctor filed a second amended TWCC-69 certifying that claimant reached MMI on April 20, 1998, with an IR of 21%. In an accompanying report, she noted that claimant had undergone MRI testing on September 1, 1998, which revealed scar tissue and what "could have been a recurrent disc herniation." She also noted that claimant underwent laminectomy surgery on June 22, 1998. Based on this evidence, we perceive no reversible error in the hearing officer's determination. We note that the hearing officer did state that the designated doctor filed her last TWCC-69 on "April 20, 1998," but the TWCC-69 itself states that it was filed on December 10, 1998. We modify Finding of Fact No. 10 to begin with the words, "[o]n December 10, 1998," rather than with the words "[o]n April 20, 1998."

Carrier contends the hearing officer erred in determining that:

> [b]ecause claimant had a previously undiagnosed herniated disc at L4-5, surgery, and scar tissue, [the designated doctor] acted properly in rescinding her [October 4, 1996 and October 25, 1996, MMI and IR certifications].

We have held that "[a] designated doctor may, with proper reason, and in a reasonable amount of time, amend his original report of MMI and IR, for various reasons which can include, but are not limited to, the need for surgery." *See* Texas Workers' Compensation Commission Appeal No. 941168, decided October 14, 1994. The report may be amended to consider the entire compensable injury, Texas Workers' Compensation Commission Appeal No. 94435, decided May 27, 1994, or where there are incomplete or erroneous facts when the first report is rendered that are subsequently taken into account in amending the report. Texas Workers' Compensation Commission Appeal No. 941600, decided January 12, 1995. Whether a doctor has amended his report for a proper reason

and within a reasonable amount of time is essentially a question of fact. Texas Workers' Compensation Commission Appeal No. 960888, decided June 18, 1996.

Carrier made no argument other than to state that the hearing officer's determination is not supported by the evidence. We will assume that carrier contends that the designated doctor did not properly amend her IR certification. The designated doctor's December 10, 1998, report was made about 25 months after the October 25, 1996, TWCC-69 in which the designated doctor certified a 12% IR.

Carrier does not contend that claimant was at statutory MMI at the time of the designated doctor's last report in December 1998. The designated doctor's September 4, 1996, report indicated that claimant was working regular duty and claimant said he was working until September 3, 1997. The designated doctor indicated that claimant was off work for "two weeks" after his _____, compensable injury and that he was on light duty before September 4, 1996. It is not clear whether he was earning his preinjury wage from _____ to September 1996.

The hearing officer could consider any delay that occurred in the amendment of the IR that was due to a delay in obtaining surgery. Texas Workers' Compensation Commission Appeal No. 981622, decided August 26, 1998. Claimant testified that in February 1997, Dr. B told him that he needed surgery as soon as possible, but that carrier denied the request. A March 1997 medical report from Dr. B states that he recommended surgery. The designated doctor noted that there was a "long delay in him receiving treatment because he had to go to a [CCH] in April 1998 in which it was approved that the back problem he was having . . . [is related to his] compensable injury." There is a decision and order dated in April 1998 in which it was held that claimant's disc herniation is a result of his _____ compensable injury. In April 1997, a Texas Workers' Compensation Commission (Commission) benefit review officer wrote to the designated doctor and asked her to review additional medical records. The designated doctor replied in August 1997 that claimant had undergone an MRI, that he had a herniated disc, and that a CCH was needed to determine what "can be attributed to" the _____ compensable injury. In October 1998, the designated doctor noted that she had reexamined claimant, that claimant had not had his surgery until June 1998, and that as of October 1998, he was not yet at MMI. In this case, given the delays involved in obtaining surgery, recovery from the surgery, and reexamination, we conclude that the designated doctor's final amendment was done within a reasonable time. Given the surgery and the designated doctor's amended report, we conclude that the hearing officer's determination that the amendment was proper is not so against the great weight and preponderance of the evidence as to be clearly wrong or manifestly unjust.

Carrier contends that the hearing officer erred in determining that the great weight of the other medical evidence does not "contradict" the 21% IR certified by the designated doctor in her third report in 1998. Carrier asserts that Dr. S testified that the designated doctor improperly included impairment for sensory loss in the 21% IR she certified. In a January 1999 report, Dr. S stated that the designated doctor included impairment for sensory loss that is not supported by the evidence. Dr. S testified at the CCH that,

considering the record as a whole, he concluded that there may be malingering or that any actual sensory loss would be due to diabetic neuropathy, and not due to injury to the spinal nerves of the lumbar plexus. Dr. S further said that claimant did not have any injury that could affect the lumbar plexus nerves. In her December 10, 1998, report, however, the designated doctor did consider claimant's diabetic neuropathy. She stated that claimant's current "symptoms of one-sided [sic] are not consistent with the pain due to diabetes." She noted claimant's left foot drop and his sensory loss which she stated was a new finding since his 1996 examinations. It appears that this issue involves a difference in medical judgment between Dr. S and the designated doctor. The hearing officer considered the evidence before him and determined that the great weight of the other medical evidence is not contrary to the designated doctor's report. We have reviewed the hearing officer's determinations and we conclude that his determinations are not so against the great weight and preponderance of the evidence as to be clearly wrong or manifestly unjust.

As modified, we affirm the hearing officer's decision and order.

_____
Judy L. Stephens
Appeals Judge

CONCUR:

_____
Thomas A. Knapp
Appeals Judge

_____
Tommy W. Lueders
Appeals Judge