APPEAL NO. 990619

A contested case hearing was held on February 22, 1999, pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act), with hearing officer, to resolve the two disputed issues, namely, has the respondent (claimant) reached maximum medical improvement (MMI) and, if so, what is the impairment rating (IR). The hearing officer concluded that claimant has reached statutory MMI (date not stated) and that "a new IR should be performed taking into consideration the proper date of MMI." The appellant (carrier) has not only appealed from these two conclusions but also globally challenges all the factual findings except for the three stipulated findings and a finding that claimant sustained a compensable injury on _____. The carrier contends that the challenged findings and conclusions are against the great weight of the evidence and that the evidence established that claimant reached MMI on May 14, 1998, the date determined by the designated doctor, Dr. C, before he rescinded it or, in the alternative, on July 9, 1997, the date determined by the treating doctor, Dr. SH. Claimant's response asserts that the carrier's appeal is insufficient to constitute an appeal of each of the appealed findings and that the challenged findings are sufficiently supported by the evidence.

DECISION

Affirmed.

As mentioned above, it is undisputed that claimant sustained a compensable injury on _____. Claimant testified that before his _____, neck injury, he had previously injured his neck but he denied that surgery had been recommended following that injury; that since the _____, neck injury, he has not returned to his work as an electrician nor worked anywhere else for pay; and that he resides on a ranch where he and his wife raise some horses and cattle. As noted above, the hearing officer did not state the date of statutory MMI nor were the parties asked to stipulate to the statutory MMI date. The hearing officer and the parties apparently felt that the actual date of statutory MMI could be readily calculated since claimant testified that he did not return to his employment after the accident and has not worked for wages elsewhere. *See* Section 401.011(30)(B). Claimant indicated that in August 1997, his treating doctor, Dr. SH, a chiropractor, determined that he had reached MMI and assigned a 13% IR and that he was examined by Dr. S, a carrier doctor, who determined he had reached MMI and assigned an eight percent rating. In evidence is Dr. SH's Report of Medical Evaluation (TWCC-69), signed on August 5, 1997, stating that claimant reached MMI on "7/9/97" with an IR of 13%, and Dr. S's TWCC-69, signed on August 2, 1997, stating that claimant reached MMI on "8/1/97" with an IR of "8%." In his narrative report of August 6, 1997, Dr. S, who noted that claimant was then 53 years of age, stated the diagnosis as cervical strain superimposed on some degenerative changes.

Claimant further testified that the carrier disputed Dr. S's IR and assessed a five percent IR and that in March 1998, Dr. SH determined that he had reached MMI and assigned an IR of 13%. In evidence is Dr. SH's TWCC-69 signed on March 31, 1998, stating that claimant reached MMI on "3/30/98" with an IR of 13%. Claimant stated that on

May 14, 1998, when he was evaluated by Dr. C, also a chiropractor, who assigned a 13% IR, Dr. C advised him that if he did not improve with further treatment from Dr. SH, he would be a candidate for surgery; that the carrier subsequently resisted authorizing his examination by Dr. M, a neurologist; that when he was eventually seen by Dr. M and a myelogram obtained on July 6, 1998, Dr. M told him he needed surgery; that Dr. M had a heart attack and he was referred to Dr. WB, a neurologist; that Dr. WB later died and he again saw Dr. M who referred him to Dr. W, a surgeon; that the Texas Workers' Compensation Commission's (Commission) spinal surgery process was commenced and second opinion doctors examined him and concurred with Dr. W's recommendation for surgery; and that he underwent a cervical fusion operation with insertion of hardware on October 15, 1998. Claimant indicated that while the carrier contends his surgery was not performed within a reasonable time after the designated doctor's May 1998 determinations of MMI and the IR, it was the carrier that thereafter "held everything up."

Claimant further stated that shortly after the surgery, plate screws worked loose and interfered with his swallowing, and that three weeks before the hearing, he had a second operation to remedy that problem. He stated that he had improved since his neck surgery, specifically mentioning the easing of neck pain and numbness in his arm and fingers.

Dr. RH, a neurosurgeon, testified by telephone that he reviewed claimant's medical records; that he agrees with Dr. C's MMI date of May 14, 1998; and that he disagrees with Dr. C's having rescinded that date because, based on his record review including an initial scan and a subsequent MRI, he saw no substantial change in claimant's condition and he felt claimant had a preexisting, chronic, degenerative disc condition. Dr. RH also said that without seeing claimant, knowing more about how he was doing, and following up with him, he "can't really say" when claimant reached MMI; that without examining claimant, he could not say what claimant's IR should be; that he would not disagree with two neurosurgeons (Dr. M and Dr. B) and an orthopedic surgeon (Dr. W) who felt that claimant required the surgery; and that he would not know if claimant had any material recovery after May 14, 1998, or improved after the surgery.

Dr. SH's Initial Medical Report (TWCC-61) dated January 10, 1997, states that claimant was pulling welding leads through an opening of a lighting tunnel and stepped off backwards into a dark, unbarricaded ditch, hitting the right side of his head, and that the diagnosis is acute cervical sprain, brachial neuritis, and rule out neck fracture or disc herniation. Dr. SH's extensive treatment records reflect that claimant was referred to Dr. G, D.O., for evaluation in February 1997 and that Dr. SH added diagnoses of neuralgia, neuritis, unspecified radiculitis, cervical degenerative disc disease, and cervical spondylosis. On August 5, 1997, Dr. SH signed a TWCC-69 stating that claimant reached MMI on "7/9/97" with an IR of 13%. Dr. SH wrote on October 10, 1997, that claimant had recently been evaluated by Dr. S and Dr. C and that Dr. C suggested that claimant had not reached MMI and probably would not reach it before February 1, 1998. On March 31, 1998, Dr. SH signed a TWCC-69 stating that claimant reached MMI on "3/30/98" with an IR of 13%. On May 13, 1998, Dr. SH wrote that he had referred claimant to Dr. M who will perform further testing to determine if a surgical procedure would benefit claimant and that he did not

recommend further conservative treatment because claimant's extensive treatment has not provided significant improvement.

Dr. M wrote on May 7, 1998, that an MRI of January 14, 1998, was read by the radiologist as a "C5-C6 3mm disc with upper limits of stenosis"; that he personally reviewed the MRI and felt it was a ruptured disc at C5-6 with some canal stenosis and that it was almost touching the spine; that he found severe neck muscle spasm; that claimant is not at MMI; and that claimant needs a myelogram and a neurosurgical consultation as soon as possible and that "anything short of that would border on negligence."

On May 15, 1998, Dr. C signed a TWCC-69 stating that claimant reached MMI on "05-14-1998" with an IR of 15%. In his accompanying narrative report, Dr. C stated that claimant had been previously afraid of surgical intervention but now realizes that surgery is his last option and is ready to pursue it if a neurosurgeon believes it necessary.

Dr. M wrote on June 2, 1998, that he read Dr. C's report and could not believe he had placed claimant at MMI; that Dr. C made no mention of claimant's having a myelopathic process and failed to even recognize the spinal disorder and include a rating for it, at least six percent, in the IR; that claimant is not at MMI; and that claimant needs a cervical myelogram, CT scan, and neurosurgical consultation.

Dr. W reported on July 6, 1998, that he recommended claimant have an anterior cervical discectomy and fusion with an A-line plate at C3-4, a discectomy at C5-6, and foraminotomies and fusion at C5-6.

Dr. M reported on July 14, 1998, that claimant was sent to Dr. W who feels he needs an anterior cervical fusion from C3-6, and that Dr. W "has the paperwork in" for consideration of surgery. Incidentally, Dr. M signed a TWCC-69 on January 7, 1999, stating that claimant reached MMI on that date with an IR of 26%.

Dr. C wrote on September 2, 1998, that in his IR report on claimant he had mentioned that claimant was a probable surgical candidate and needed to be evaluated by neurosurgeons; that claimant has been scheduled for surgery which has been cleared through the Commission's second opinion process; that if claimant needs this surgery now, he needed it in May when he was evaluated; that he, Dr. C, is now stating that claimant is not at MMI and should proceed with surgery and rehabilitation; and that he will gladly execute a new TWCC-69 if desired by the Commission.

Dr. W's operative report of October 15, 1998, reflects that he performed an anterior cervical fusion of C3-4 and C5-6, discectomy and insertion of an anterior cervical plate.

Concerning disputes over whether an employee has reached MMI and the amount of the IR, if any, Sections 408.122(c) and 408.125(e) provide, respectively, that the report of the designated doctor has presumptive weight and that the Commission shall base its determination of whether the employee has reached MMI and the IR on the designated

doctor's report unless the great weight of the other medical evidence is to the contrary. Section 408.125(d) provides that if the designated doctor is chosen by the parties, the Commission shall adopt the IR made by the designated doctor.

In Texas Workers' Compensation Commission Appeal No. 960960, decided July 3, 1996, the Appeals Panel stated that "[a] designated doctor may, with proper reason, and in a reasonable amount of time, amend his original report of MMI and IR . . . same should take place after surgery when compelling circumstances will affect the ultimate IR resulting from an injury." In Texas Workers' Compensation Commission Appeal No. 971385, decided August 25, 1997, the Appeals Panel stated the following:

> 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 evaluation and if the surgery was not under active consideration, it is in appropriate 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.

The carrier urged below that claimant's overall condition was stable shortly after the accident and did not change, that the surgery was performed to essentially correct claimant's preexisting cervical spine degeneration rather than an injury occurring at work, and that the surgery was not under active consideration in May 1998 when Dr. C determined that claimant had reached MMI and assigned the 15% IR.

Among the appealed findings is the finding that Dr. C is the designated doctor and that his opinion is entitled to presumptive weight. Curiously, the hearing officer failed to obtain a stipulation or even inquire as to whether Dr. C was selected by agreement of the parties or by the Commission. However, since the hearing officer found that Dr. C's opinion is entitled to presumptive weight, we will infer that Dr. C was selected by the Commission.

Among the other appealed factual findings, many of which merely recite evidence, are the following findings:

FINDINGS OF FACT

> 11. In the present case, surgery was under active consideration at the time of the initial designated doctor examination, Claimant experienced material recovery as a result of the surgery being performed, and

Claimant had the surgery within a reasonable amount of time following the designated doctor's report.

12. Claimant has reached statutory MMI.

13. Claimant's [IR] cannot be determined until he is evaluated by the designated doctor.

As noted, claimant has also appealed the following conclusions:

CONCLUSIONS OF LAW

3. Claimant has reached statutory MMI.

4. A new [IR] should be performed taking into consideration the proper date of MMI.

The hearing officer is the sole judge of the weight and credibility of the evidence (Section 410.165(a)) and, as the trier of fact, resolves the conflicts and inconsistencies in the evidence including the medical evidence (Texas Employers Insurance Association v. Campos, 666 S.W.2d 286 (Tex. App.-Houston [14th Dist.] 1984, no writ)). As an appellate reviewing tribunal, the Appeals Panel will not disturb the challenged factual findings of a hearing officer unless they are so against the great weight and preponderance of the evidence as to be clearly wrong or manifestly unjust and we do not find them so in this case.

The decision and order of the hearing officer are affirmed.

_____
Philip F. O'Neill
Appeals Judge

CONCUR:

_____
Thomas A. Knapp
Appeals Judge

_____
Alan C. Ernst
Appeals Judge