APPEAL NO. 990659

This appeal arises pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act). A contested case hearing was held on March 1, 1999. With respect to the issues before him, the hearing officer determined that the appellant (claimant) reached maximum medical improvement (MMI) on June 21, 1995, with an impairment rating (IR) of seven percent in accordance with the report of Dr. D, the designated doctor selected by the Texas Workers' Compensation Commission (Commission). In his appeal, the claimant argues that the hearing officer erred in giving presumptive weight to the designated doctor's report which did not take into account his subsequent spinal surgery and asks that we render a decision that the claimant reached MMI statutorily on March 3, 1996, with an IR of 21% in accordance with the certification of the claimant's treating doctor, Dr. G following surgery. In its response, the respondent (carrier) urges affirmance.

DECISION

Reversed and remanded.

It is undisputed that the claimant sustained a compensable injury to his low back on _____, in the course and scope of his employment with (employer). The parties stipulated that Dr. D was selected by the Commission as the designated doctor.

Initially, the claimant sought medical treatment for his injury with Dr. R. The claimant testified that Dr. R treated him largely with medications and he did not agree with that course of treatment. The claimant stated that he changed treating doctors to Dr. C, upon the recommendation of his former attorney. The claimant had his first appointment with Dr. C on May 5, 1995. At that appointment, Dr. C diagnosed a contusion of the low back and a lumbar sprain, noting that he had to "rule out herniated nucleus pulposus." In a report of June 2, 1995, Dr. C referred the claimant to Dr. G for a surgical consultation. In a June 29, 1995, report, Dr. G diagnosed central canal stenosis and lateral recess stenosis with L5 nerve root irritation. In addition, Dr. G stated in the June 29th report:

> We are awaiting his discogram with post-discographic CT to help firm up the fact these abnormalities are the pain generators in this case, and if so, he will be a candidate for decompression of his central canal, lateral recess and in all likelihood, a localized fusion. He is now 14 months since his injury, and has failed to improve.

There are a series of reports from Dr. C and Dr. G in the period from July 13, 1995, to December 1, 1995, which state that the claimant is a surgical candidate and is awaiting approval of the discogram and the post-discogram CT, which testing is variously described as "final preoperative investigation" and "presurgical evaluation."

In a report of December 18, 1995, Dr. C again notes that the request for the discogram was denied by the carrier. He stated that the claimant was going to be referred "for work conditioning with a view to placing him in pain management, as well, since he is no longer a candidate for surgical correction of his problem." However, in a report of January 22, 1996, Dr. C states that the claimant "is a surgical candidate, but discogram and post discographic CT has been denied." Thereafter, the reports of Dr. C and Dr. G continue to state that the claimant is a surgical candidate and reflect repeated requests for a discogram and post-discographic CT scan. In a report of April 19, 1996, Dr. G notes that the claimant has finally undergone the discogram and post-discographic CT testing, which revealed "an annular tear at L5-6 [sic] with significant concordant pain reproduction." In addition, Dr. G also noted that the claimant "had excellent relief with post Marcaine challenge at L5-6 with more than 90% improvement. " In a May 10, 1996, report, Dr. G stated that he would proceed with a "global" discectomy and fusion "as soon as it has passed through the spinal review unit." In a July 8, 1996, report, Dr. C states that Dr. X, who apparently served as the carrier's spinal surgery second opinion doctor, did not concur in the need for surgery. In a report of July 22, 1996, Dr. C notes that they are awaiting the written report of Dr. S, who seemingly served as the claimant's spinal surgery second opinion doctor, "but the verbal is that [Dr. S] concurred." In reports of July 29, 1996, August 12, 1996, and August 26, 1996, respectively, Dr. G states that Dr. S has "evidently" or "apparently" concurred in the need for surgery but that his written report is not available for review. Dr. G's September 25, 1996, report provides that the claimant has been approved for a "global fusion" at L5-S1. Dr. G's report of November 21, 1996, states that the claimant's surgery is scheduled for February but "he has had a recent exacerbation of his pain and would like to advance the date of his surgery." By December 27, 1996, Dr. G notes that the surgery is scheduled for January 14, 1997. Dr. G performed surgery on January 14, 1997, namely a discectomy and fusion with instrumentation at L5-S1. The claimant testified that his condition has deteriorated since the surgery.

In a Report of Medical Evaluation (TWCC-69) dated June 29, 1995, Dr. R, the claimant's initial treating doctor, certified that the claimant reached MMI on June 21, 1995, with an IR of seven percent. In his accompanying narrative report, Dr. R states that the claimant was noncompliant and that he was "discharged" with an IR of seven percent for a specific disorder of the lumbar spine. The claimant apparently disputed Dr. R's certification and Dr. D was selected by the Commission to serve as the designated doctor. In a TWCC-69 dated January 24, 1996, Dr. D certified that the claimant reached MMI on June 21, 1995, with an IR of seven percent for a specific disorder of the lumbar spine. In his accompanying narrative report, Dr. D stated that "[n]o impairment was given for loss of movement of the lumbar spine since accurate measurement was not possible" and opined that he did not believe the claimant would benefit from surgical treatment. In a letter of March 20, 1996, Dr. D states that he was asked by a Commission employee to perform range of motion (ROM) testing and that he does not believe such testing was necessary. He states that accurate measurements were not possible at the initial examination "since [claimant] was unable to cooperate." Dr. D concludes his letter by stating that the Commission employee asked him to write a letter indicating that he would not perform ROM testing "so that [claimant] can be referred to another designated physician." In a March 29, 1996, TWCC-69, Dr. G certified that the claimant reached "statutory MMI" on March 3,

1996, with an IR of nine percent, which was comprised of seven percent 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 for a specific disorder of the lumbar spine and two percent for loss of lumbar right and left lateral flexion ROM.

In his discussion, the hearing officer cites Texas Workers' Compensation Commission Appeal No. 982218, decided November 2, 1998, and states that the claimant's spinal surgery "should not effect the finality" of the designated doctor's initial assessment because "neither the Claimant's testimony nor the medical documentation is sufficient to show that surgery was being 'actively considered' at the time of [Dr. D's] certification of IR and MMI; the medical notes indicate that at the time the Claimant was not being treated as a surgical candidate. Secondly, the surgery did not cause any improvement in Claimant's condition, as both his testimony and the medical records indicate." We note that the test of whether the surgery was under active consideration is typically reserved to cases involving statutory MMI. *See* Texas Workers' Compensation Commission Appeal No. 971339, decided August 28, 1997; Texas Workers' Compensation Commission Appeal No. 972423, decided January 2, 1998; Texas Workers' Compensation Commission Appeal No. 981622, decided August 26, 1998; and Texas Workers' Compensation Commission Appeal No. 982451, decided December 2, 1998. However, even if we were to apply that test in this instance, we are puzzled by the hearing officer's determination that the surgery was not being actively considered at the time of the designated doctor's evaluation in January 1996. As early as June 29, 1995, Dr. G stated that the claimant was a candidate for decompression and fusion surgery but that he was awaiting a discogram and post-discographic CT to firm up the fact that the abnormalities noted were the pain generators. Dr. G and Dr. C continued to maintain that the claimant was a surgical candidate and to request the discogram and the CT scan for final preoperative investigation and evaluation, with the exception of a single report. By April 1996, the discogram and CT scan results were available and thereafter Dr. G initiated the spinal surgery second opinion process. That process was completed and surgery was approved by September 1996. The claimant had his surgery on January 14, 1997. Our review of the medical evidence demonstrates that the claimant was continuously considered a surgical candidate from June 29, 1995, to April 1996, when the requested discogram and CT scan, which Dr. G required as a final preoperative step to verify the claimant's pain generators, were finally performed. The hearing officer's determination that the surgery was not under active consideration is so contrary to the great weight and preponderance of the evidence as to be clearly wrong or manifestly unjust. Pool v. Ford Motor Co., 715 S.W.2d 629 (Tex. 1986); Cain v. Bain, 709 S.W.2d 175 (Tex. 1986). Therefore, we reverse that finding and render a new determination that the surgery was under active consideration both at the time of the designated doctor's examination and at the time the claimant would have reached statutory MMI under Section 401.011(30).

The hearing officer also makes a factual finding that the effect of the subsequent surgery on the claimant's MMI date and IR should not be considered because the surgery "did not improve his condition." Appeal No. 982218, *supra*, states that the claimant has to demonstrate "material recovery" or "lasting improvement" in order to establish that the effect of the surgery on the MMI date and the IR should be considered. We have not

previously required such a showing. While the existence of recovery or improvement may be of help in establishing a later date of MMI, it does not follow that there must be improvement or recovery in order to have the effects of surgery considered in the calculation of the claimant's IR. In this instance, we rendered a determination that the surgery was under active consideration at the time of the designated doctor's examination and at the time the claimant would have reached statutory MMI. In addition, the facts in this case demonstrate that the delay in obtaining the surgery is largely tied to the frustration of the claimant's treating doctors in obtaining requested diagnostic testing in order to confirm the surgical recommendation and to the pursuit of approval of that surgery in the spinal surgery second opinion process once the diagnostic testing was undertaken. As such, we believe that the surgery in this case was performed within a reasonable period of time that is attributable to the claimant. In fact, this case seems to present a situation where the designated doctor's evaluation was simply premature. Thus, it would be appropriate in this instance to have the designated doctor reexamine the claimant in order to determine the effects of the January 14, 1997, spinal surgery on the claimant's MMI date and his IR.

We reverse the hearing officer's determinations that the claimant reached MMI on June 21, 1995, with a seven percent IR in accordance with Dr. D's certification and remand the case for further proceedings consistent with this opinion. Pending resolution of the remand, a final decision has not been made in this case. However, since reversal and remand necessitate the issuance of a new decision and order by the hearing officer, a party who wishes to appeal from such new decision must file a request for review not later than 15 days after the date on which such new decision is received from the Commission's Division of Hearings, pursuant to Section 410.202. *See* Texas Workers' Compensation Commission Appeal No. 92642, decided January 20, 1993.

Elaine M. Chaney
Appeals Judge

CONCUR:

Stark O. Sanders, Jr.
Chief Appeals Judge

Robert W. Potts
Appeals Judge