APPEAL NO. 990757

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 March 29, 1999. The issues at the CCH were whether the appellant/cross-respondent (claimant) had sustained disability since January 2, 1996, whether and when he reached maximum medical improvement (MMI), what is the correct impairment rating (IR), and what is the average weekly wage (AWW). The hearing officer determined that the claimant reached MMI on January 2, 1996, with a 10% IR as certified by a designated doctor, that the claimant sustained disability since January 2, 1996, and that his AWW was $560.00. The claimant appeals the MMI and IR, arguing that he was advised by two doctors to have spinal surgery prior to his MMI date, that he did subsequently have spinal surgery, that he could not have been at MMI before the surgery and that the IR did not take into account the effects of the surgery. The respondent/cross-appellant (carrier) appeals the determination of AWW, arguing that under the evidence submitted, the AWW should be determined on the average wage for the preceding 13 weeks. The carrier also urges that there is sufficient evidence to support the hearing officer's determinations on MMI/IR. The disability issue is not on appeal.

DECISION

Affirmed in part, reversed and remanded in part.

The claimant testified that he became a regular employee of employer (had been part time in previous years) in February 1995 performing duties as a cement finisher. He stated he worked until August 1995 when he was laid off. It was stipulated that he sustained a back injury on _____. Medical records indicate that he was treated for his injury by a chiropractor, Dr. D, and subsequently referred to Dr. B. In an October 5, 1995, report, Dr. B listed an impression of lumbar radiculopathy and indicated the claimant had good improvement with conservative treatment. He stated that if the claimant did not respond to conservative treatment, he may be a candidate to have a discogram and laser discectomy. In a December 21, 1995, note Dr. B stated that the results of a discogram were normal and that he felt the claimant reached MMI and could return to work. Dr. B subsequently certified MMI as January 2, 1996, and rendered a four percent IR. Dr. D stated in a January 18, 1996, letter that he agreed with the MMI but did not agree with the four percent IR. Because of a dispute, a designated doctor, Dr. L, was appointed and, in a report of February 9, 1996, stated that the MRI and discogram studies, although indicating a disc protrusion, did not indicate that surgery would be beneficial. Dr. L certified that the claimant reached MMI on January 2, 1996, and assessed a 10% IR. The claimant subsequently saw Dr. LA in April 1996 with complaints of pain in his lower back and leg and a myelogram CT scan was suggested. This diagnostic test resulted in a finding of a significant bulge at L4-5 and adequate nerve root filling. In September, Dr. LA stated he felt the claimant was a candidate for lumbar decompression and fusion. In April 1997, Dr. B saw the claimant and agreed that he had an abnormality at L4-5 and that it "probably has some significance that the discogram was negative in 1995 and now it is positive in

1997." He wanted to analyze the other reports and tests before agreeing with surgery. Subsequently, in June 1997, Dr. B agreed with surgery. The second opinion spinal surgery process was initiated and, on May 4, 1998, the claimant had surgery.

The hearing officer determined that the presumptive weight accorded Dr. L's report certifying MMI as of January 2, 1996, with a 10% IR, in his position as the designated doctor (Section 408.123 and 408.125), was not overcome by the great weight of contrary medical evidence. Although the claimant did undergo back surgery (more than two years after the MMI date certified), this fact does not militate against the validity of a finding of the earlier MMI and assessment of an IR or establish a great weight of contrary medical evidence. *See* Texas Workers' Compensation Commission Appeal No. 94421, decided May 25, 1994; Texas Workers' Compensation Commission Appeal No. 982218, decided November 2, 1998. However, where spinal surgery is under active consideration at the time of a certification of MMI/IR and the surgery is performed within a reasonable period of time, under the circumstances of the particular case, a presurgery MMI/IR may be invalidated. Texas Workers' Compensation Commission Appeal No. 990659, decided May 12, 1999. Those circumstances are not present here, and our review of the evidence does not lead us to conclude that the determination of the hearing officer in according presumptive weight to the certification of MMI/IR by the designated doctor, Dr. L, is so against the great weight and preponderance of the evidence as to be clearly wrong or unjust. Cain v. Bain, 709 S.W.2d 175, 176 (Tex. 1986); Pool v. Ford Motor Company, 715 S.W.2d 629, 635 (Tex. 1986).

Regarding the AWW issue, the hearing officer rejected the use of the general method of determining AWW based on the prior 13-week earnings and used a just, fair, and reasonable basis. Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 128.3(g) (Rule 128.3(g)). The evidence on the AWW issue offered was minimal, although the claimant carried the burden of proof on the issue. Texas Workers' Compensation Commission Appeal No. 951628, decided November 16, 1995; Texas Workers' Compensation Commission Appeal No. 94244, decided April 15, 1994. The carrier offered an employer's wage statement on the claimant for the 13 weeks immediately preceding the date of injury and a statement from the employer that there was no "like employee" during that period. The wage statement shows an erratic work record, with the hours per week ranging from seven hours to 50 hours, with four weeks showing no hours. Of the 13 weeks, only three weeks show hours worked of at least 40 or more. During his testimony, the claimant answered "yes" (no further specifics) to the question "had there been some weeks when you didn't work because of weather?" He also stated that there were some cement finishers who worked and were paid steadily during this same time. The carrier did not ask any questions on cross-examination. Based on this evidence, the hearing officer, although acknowledging the carrier's argument that individuals employed in the construction industry would expect to encounter occasional work stoppage due to inclement weather, observed that Rule 128.3(g) generally provides that when an injured worker loses time from work, without remuneration, due to weather or other causes beyond the control of the employee, the Texas Workers' Compensation Commission (Commission) may resort to any just, fair, and reasonable manner in order to determine the AWW. *See generally,* Texas Workers'

Compensation Commission Appeal No. 971239, decided August 15, 1997. While we do not find reversible error in the hearing officer's application of a just, fair, and reasonable method over the general provisions applying the 13-week preinjury wage method in arriving at AWW, we reverse and remand her AWW determination as not supported by anything more than a scintilla of evidence. The hearing officer, in determining the AWW as $560.00, states that she applied the wage rate of $14.00 per hour time to "a usual forty-hour work week" Although a $14.00 per hour figure is supportable from using figures on the wage statement, we find no evidence or support for a determination that claimant ever worked, even on average, "a usual forty-hour work week." To the contrary, out of the 13-week period in evidence, only three weeks were at or above 40 hours, with four weeks of no working at all, and some four of the others well below even 20 hours for the week. We simply cannot affirm this determination and thus reverse and remand for further consideration and development of evidence on the issue.

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.

_____
Stark O. Sanders, Jr.
Chief Appeals Judge

CONCUR:

_____
Alan C. Ernst
Appeals Judge

CONCUR IN PART AND DISSENT IN PART:

I concur with the majority's affirming the hearing officer's resolution of the maximum medical improvement (MMI) and impairment rating (IR) issues under the particular circumstances of this case, although I certainly find it problematic that the claimant's MMI and IR did not reflect the effects of a surgery that was undisputedly required as a result of the compensable injury and which would clearly have resulted in a higher IR applying the Guides to the Evaluation of Permanent Impairment, third edition, second printing, dated February 1989, published by the American Medical Association. I note that the claimant's appeal was specifically hinged on arguing that the great weight of the evidence was

contrary to the designated doctor's certification of MMI and IR and did not raise the point as to whether or not surgery was under consideration prior to statutory MMI. As we recently stated in Texas Workers' Compensation Commission Appeal No. 990659, decided May 12, 1999, the test of whether the surgery was under active consideration is typically reserved to cases involving statutory MMI. I, in no way, retreat from this.

I dissent from the majority's remanding the issue of average weekly wage (AWW). The majority recognizes that, in the present case, it was appropriate for the hearing officer to determine the AWW using the just, fair and reasonable method. Inherently, the use of this method involves an exercise of discretion and, in some circumstances, considerable discretion on the part of the hearing officer. I believe that the proper standard of review of such a determination is abuse of discretion so as to provide a hearing officer sufficient latitude to make a determination. Applying that standard, I would find no abuse of discretion and I would affirm the AWW determination of the hearing officer. To my thinking, remanding this case on this issue is merely an invitation to the parties to relitigate the issue to no useful purpose.

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Gary L. Kilgore
Appeals Judge