APPEAL NO. 990833

This appeal arises pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq*. (1989 Act). On March 22, 1999, a hearing was held. The hearing officer determined that respondent (claimant) has not reached maximum medical improvement (MMI) and, as a result, has no impairment rating (IR) at this time. She also determined that claimant had disability from May 7, 1998, through the date of the hearing. Appellant (carrier) asserts that the hearing officer did not "apply the analysis outlined in [Texas Workers' Compensation Commission] Appeals Panel Decision Nos. 971385 [decided August 25, 1997] and [Texas Workers' Compensation Commission Appeal No.] 982218 [decided November 2, 1998]," and adds that surgery was not being actively considered at the time of the designated doctor's initial examination so the hearing officer should not have rejected the designated doctor's initial report of MMI and IR. Carrier adds that if there is any disability, it should not begin until August 12, 1998, the date spinal surgery was performed. The appeals file contains no reply from claimant.

DECISION

We affirm.

Claimant worked for (employer) on _____. Claimant testified that he and another employee were moving a ramp (weight and size not specified) when the other employee ceased holding his end; claimant said that with the shift in weight he felt a pop in his back with pain. Claimant said he told the foreman of the injury; he added that it was a busy period and he did not quit working but "took it easy" for a period of weeks until he took vacation time. During that period of vacation time he saw Dr. E, a chiropractor. He said he received two weeks of chiropractic care. Apparently, Dr. E referred claimant to Dr. C, who claimant said he saw for a month or two. Dr. C's records show that he first saw claimant on July 16, 1997; at that time he took claimant off work. On July 23, 1997, Dr. C noted that claimant should continue bed rest but may be improved over the next few days to a week, at which time, if significantly improved, claimant could be returned to work. On August 8, 1997, Dr. C said that claimant could return to work on August 11, 1997, to supervisory duties with no "strenuous physical activity." There are no medical records of Dr. C in evidence after August 8, 1997, except for a Report of Medical Evaluation (TWCC-69) signed on February 2, 1998, in which Dr. C said that claimant reached MMI on August 18, 1997; the Texas Workers' Compensation Commission (Commission) then queried Dr. C because the form he submitted had no IR, among other things. Dr. C replied that the date of his examination, upon which MMI and IR were determined, was July 16, 1997, and that claimant has a zero percent IR. This sequence of events indicates that claimant first missed work because of the injury in July 1997, although he may have missed work prior to that month because he took vacation time. Neither party provided any medical records from Dr. E.

The parties stipulated that claimant sustained a compensable injury on _____, and that Dr. P is the designated doctor.

KR provided a letter in which he said that claimant first had "off time" on July 14, 1997, and "was returned to work on 11 August 1997." This statement basically agrees with the records of Dr. C in regard to the period that claimant was taken off work. KR added that upon his return, claimant supervised storage of wool and ensured movement of certain wool to a blending area. There was no reference to any activity of a strenuous nature such as Dr. C had advised against.

Claimant testified that Dr. C did not order an MRI, myelogram, or CT scan. He received no physical therapy; claimant did say that Dr. C prescribed medication for him, which he was told to take "for at least six months" and then to see how he is doing. Six months after August 8, 1997, would be approximately the first week in February 1998. That is also the time, February 5, 1998, that KR said in his letter that claimant and 15 other workers were laid off.

Claimant further testified that after being laid off, his back was painful; he looked for no other job. There is no indication that claimant had seen or been sent to any doctor who returned him to work without any restriction from strenuous work as Dr. C had imposed. Claimant said that after he was laid off the carrier informed him of the IR of zero percent of Dr. C which he said he did not agree; the carrier was said to have then told him that it would get an appointment for a designated doctor. At some point (the record is silent as to when claimant made the appointment) claimant contacted Dr. L and first saw him on May 7, 1998, the same day he saw Dr. P for the first time.

Dr. P noted that Dr. C had found MMI was reached on August 18, 1997, with a zero percent IR. He performed a functional capacity evaluation (FCE) in April 1998, which found claimant to be able to lift 10 pounds constantly, 20 pounds frequently, and 45 pounds occasionally, with sitting and standing limitations also. Dr. P stated that since claimant had not seen a physician since August 1997, he would give no IR from Table 49, Guides to the Evaluation of Permanent Impairment, third edition, second printing, dated February 1989, published by the American Medical Association; he gave four percent for lumbar range of motion (ROM) limitations. Dr. P, however, did not provide a clear assignment of IR; he said the IR is "4%, if there is no instability."

Claimant saw Dr. L later in the same day, May 7, 1998, that he saw Dr. P. Dr. L noted a history of radiating pain down claimant's right leg off and on since March 1997. He noted that claimant had returned to work but had not worked recently. He suspected radiculopathy and ordered a CT scan, stating that claimant is "too large for an MRI scan." On May 18, 1998, a CT scan showing a herniated disc at L4-5 was noted (also shown by myelogram) and physical therapy was ordered. On July 9, 1998, Dr. L noted that conservative measures had been tried and noted that claimant was scheduled for a second opinion as to spinal surgery. Surgery at L4-5 was performed on August 12, 1998.

We observe that with claimant first having disability in July 1997, statutory MMI would not be reached until July 1999, a date not reached at the time this review is being written.

On September 14, 1998, the Commission wrote to Dr. P saying that claimant had had surgery and asked if Dr. P thought there was a need to revise the MMI date or IR. Dr. P replied in September 1998 that he recommended a reevaluation about 12 weeks after the surgery for another IR. He added that he thought it difficult to "rescind" the MMI date, referring to the year between claimant's last visit to Dr. C and his first to Dr. L, saying there is "some responsibility" for a claimant to seek medical care when a problem continues. Dr. P saw claimant on November 10, 1998, and noted that physical therapy after surgery had been denied. While Dr. P recorded that ROM was reduced as compared to his first examination, but stated that it appeared to be a problem with flexibility and advised that claimant would benefit from rehabilitation, calling for a four to six-week period of rehabilitation to "greatly increase his flexibility." Dr. P signed the TWCC-69 saying claimant was not at MMI but that it may be reached in four to six weeks. There is no indication that claimant has been returned to Dr. P since that time.

Claimant did testify that the surgery helped his leg pain, but that his back still hurt. He said he "can move around a whole lot better now" after "Dr. P got me to therapy." On cross-examination claimant said that he had not returned to Dr. C after going back to work in August 1997, but indicated that he refilled his prescriptions several times and took the medication Dr. C had told him to take for six months. Claimant agreed with carrier's characterization that when he saw Dr. L in November 1998 he was "worse off."

The hearing officer is the sole judge of the weight and credibility of the evidence. *See* Section 410.165. She provided an excellent analysis of Appeals Panel decisions on point. She correctly noted that an amended designated doctor's report should be considered under criteria of whether there was a proper reason for another report and whether that occurred within a reasonable time. She could consider, among other evidence, that no studies other than x-rays had been performed at the time of the initial designated doctor's report; she could also consider that the initial designated doctor's report provided an IR that was said by the doctor, at that time, to be questionable.

Approximately one year after temporary income benefits would have been first paid (July 1997), claimant was in the spinal surgery process (second opinion scheduled as of July 9, 1998); at the earliest, statutory MMI will not be reached until July 1999. The hearing officer correctly observed that the Appeals Panel sets the bar higher for amendment of a designated doctor's report after statutory MMI has been reached. She correctly stated that whether or not active consideration of surgery was underway relates to surgery undertaken after statutory MMI. She concluded that active consideration of surgery was not necessary at the time of Dr. P's first examination in May 1998, less than one year after disability began. Of course if it had been under consideration at the time, that would be strong evidence of "a proper reason"; in this instance the hearing officer states that the surgery was a proper reason to amend the IR; we cannot find fault with that reasoning when surgery was performed barely one year after disability began; in addition, we find the "proper reason" standard was also met by the absence of any studies other than x-rays at the time the designated doctor first saw claimant and the absence of any indication of another injury. The question of a reasonable time and proper reason is best left to the hearing officer to determine when statutory MMI is not a factor. *See* dissent in Appeal No.

982218, *supra.* With surgery performed three months after claimant first saw the designated doctor, we will not question the hearing officer's conclusion that the amendment itself by Dr. P was provided in six months, which is said to be a reasonable time.

Carrier cites Appeal No. 971385, *supra*, and Appeal No. 982218, *supra*, both of which cited Texas Workers' Compensation Commission Appeal No. 962107, decided December 2, 1996, and Texas Workers' Compensation Commission Appeal No. 962654, decided February 6, 1997, for requirements set forth in the 1997 and 1998 opinions that called for the hearing officer to analyze whether an amended designated doctor's report was sufficient in terms of whether surgery was being considered at the time of the initial designated doctor's opinion, whether there was material recovery from surgery, and whether surgery occurred in a reasonable time after the initial designated doctor's opinion.

First, Appeal No. 971385, *supra*, concerned a designated doctor's first examination of that claimant in April 1996, when statutory MMI would be reached in October 1996. That opinion stated that surgery was discussed in June 1996 and was not merely under active consideration at the time of statutory MMI (not clearly defined but the opinion states that claimant was taken off work on October 28, 1994, for an August 29, 1994, injury) but was performed on October 16, 1996 (clearly before statutory MMI according to the reported facts–*see* Section 401.011(30) which ties statutory MMI to the passage of 104 weeks after income benefits began). Appeal No. 971385 does stand for the proposition that surgery, even when performed prior to statutory MMI, had to have been under consideration at the time the designated doctor first examined a claimant. As stated, Appeal No. 971385 and Appeal 982218, *supra*, both cited Appeal No. 962107, *supra*, and Appeal No. 962654, *supra*, as authority for their holdings.

Appeal No. 962107, *supra*, involved an injury in May 1993 with statutory MMI occurring on May 14, 1995. The designated doctor did not first see that claimant until June 1995 and the MRI that prompted an amendment was not performed until October 1995, five months after statutory MMI; in addition, there had been an earlier MRI. The Appeals Panel in Appeal No. 962107 cited cases dealing with designated doctor's amendments before, and after, statutory MMI. It then said:

> In these latter situations of statutory MMI we have noted that a key distinguishing factor is whether the surgery is under active consideration at the time of statutory MMI. [Emphasis added.]

Appeal No. 962107 did not find active consideration of surgery at the time of statutory MMI and did not allow the designated doctor's amended report to control.

Appeal No. 962654, *supra*, dealt with an injury in November 1993. In that case, statutory MMI was reached in March 1996 (note that 104 weeks to statutory MMI does not begin until income benefits began). This case reports that the surgery in question was scheduled over a month before statutory MMI. The hearing officer's determination, which used an amended report of the designated doctor after surgery was performed, was affirmed as based on sufficient evidence.

The latter case cited by carrier, Appeal No. 982218, *supra*, dealt with an injury occurring in July 1995. The designated doctor evaluated that claimant in December 1996 (clearly before statutory MMI). Surgery was then performed in November 1997. Statutory MMI was not identified. The opinion stated that the designated doctor's report of December 1996 did not refer to future surgery and reversed a determination that a later, amended report could be used to determine IR. The dissent, *infra*, stated that surgery must have been considered by the time of statutory MMI and would not reverse, saying that a reasonable time is a matter for the hearing officer to determine. As stated, the majority opinion in this case, as in Appeal No. 971385, *supra*, cited Appeal No. 962107, *supra*, and Appeal No. 962654, *supra,* as authority for imposing a requirement of "active consideration" of surgery at the time of an initial designated doctor's report even though that occurred prior to the time of statutory MMI. Both Appeal No. 962107, *supra*, and Appeal No. 962654, *supra*, made the time line of statutory MMI essential to the determinations each reached, and both provided no basis to hold that surgery must have been actively considered at the time the designated doctor first examined a claimant regardless of when statutory MMI was reached. In addition, neither imposed a requirement that the surgery had to be shown to have improved a claimant's condition at any particular time post spinal surgery.

Neither Appeal No. 962107, *supra*, nor Appeal No. 962654, *supra*, warrant the conclusion reached in Appeal No. 971385, *supra*, and Appeal No. 982218, *supra*; insofar as Appeal No. 971385, *supra*, and Appeal No. 982218, *supra*, say that a designated doctor cannot amend an IR unless there was active consideration of surgery at the time of the first opinion of that doctor, regardless of when statutory MMI is reached, therefore, neither will be followed.

While carrier would have disability begin only when surgery was performed on August 12, 1998, the FCE performed in April 1998 as part of the designated doctor's evaluation, shows that weight limitations were imposed, and claimant testified that he did not work during this period. *See* Texas Workers' Compensation Commission Appeal No. 91045, decided November 21, 1991. Disability that began on May 7, 1998, and continued to the date of hearing, is sufficiently supported by the evidence.

The determinations of the hearing officer are sufficiently supported by the evidence and are affirmed. *See* In re King's Estate, 150 Tex. 662, 244 S.W.2d 660 (1951).

_____
Joe Sebesta
Appeals Judge

CONCUR:

_____
Susan M. Kelley
Appeals Judge

_____
Judy L. Stephens
Appeals Judge