APPEAL NO. 990838

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 10, 1999. He determined that the respondent (claimant) reached maximum medical improvement (MMI) by operation of Section 401.011(30)(B) on July 14, 1998; that there was no valid impairment rating (IR); and that the claimant had a period of disability. The appellant (carrier) appeals the MMI and IR determinations on the basis of newly discovered evidence and that they are otherwise contrary to the great weight and preponderance of the evidence. The claimant replies that the decision is correct and should be affirmed. The disability finding has not been appealed and has become final. Section 410.169.

DECISION

Affirmed in part and reversed and rendered in part.

The claimant sustained a compensable low back injury on _____. An MRI on July 15, 1996, disclosed mild bulging at L5-S1. The claimant continued to experience low back pain. In a letter of June 16, 1997, to the carrier, Dr. G, the treating doctor, requested a discogram. Dr. G continued to urge a discogram and indicated in a letter of August 15, 1997, that the claimant "is a surgical candidate if his discogram were to be found to be positive." The claimant testified that Dr. G told him he would need a discogram before he could undertake surgery. In a letter of September 22, 1997, Dr. G wrote that the carrier requested an IR. Despite Dr. G's outstanding request for a discogram as a basis for proceeding to surgery, Dr. G acceded to the carrier's request for an IR. On October 13, 1997, Dr. G completed a Report of Medical Evaluation (TWCC-69) in which he certified MMI on this date and assigned a 19% IR.

Apparently, the carrier timely disputed this certification and Dr. W was selected as the designated doctor by the Texas Workers' Compensation Commission (Commission). On November 25, 1997, Dr. W completed a TWCC-69 in which he certified October 13, 1997, as the date of MMI and assigned a nine percent IR. The discogram that Dr. G had been requesting over a six-month period was approved by the carrier on March 23, 1998. The discogram was taken on April 2, 1998. It disclosed herniation at L5-S1. The second opinion concurring in the recommendation for spinal surgery was completed on May 28, 1998. The surgery took place on June 15, 1998. The claimant testified that this surgery helped him "very much."

On July 21, 1998, the Commission asked Dr. W to review this additional medical information and determine if he should reevaluate the claimant. Dr. W agreed and reexamined the claimant on August 31, 1998. On this date he completed a new TWCC-69 in which he certified that the claimant was not at MMI pending further recovery from the surgery and that "it is impossible to give a percent of impairment." There was no dispute that the date of statutory MMI in this case would be July 14, 1998.

The hearing officer determined that Dr. W amended his original TWCC-69 for a proper reason in a reasonable amount of time. The proper reasons found by the hearing officer were that the surgery was "under active consideration" at the time of Dr. W's initial report; that the claimant experienced material recovery after the surgery; and that the surgery was in a reasonable amount of time after the initial report of Dr. W. In support of these findings, the hearing officer relied on our decisions in Texas Workers' Compensation Commission Appeal No. 962654, decided February 6, 1997. *See also* Texas Workers' Compensation Commission Appeal No. 971385, decided August 25, 1997. We find no error of law and sufficient evidence to support these determinations.

In its appeal of the determination that Dr. W properly amended his original TWCC-69, the carrier submits what it describes as newly discovered evidence, that is, yet another TWCC-69 completed by Dr. W on March 30, 1999, some three weeks after the CCH. In this TWCC-69, Dr. W certifies the original date of MMI (October 13, 1997), but nonetheless assigns a 29% IR. The claimant responds with yet more evidence, not introduced at the CCH, to flesh out the circumstances leading to this third TWCC-69. This included a March 17, 1999, letter, one week after the CCH, in which the Commission asked Dr. W to examine the claimant and assign an IR only because MMI was reached on October 13, 1997.

The Appeals Panel issues a decision based on the record of proceedings below. As a matter of course, this does not include a review of new evidence. *See* Section 410.203(a)(1). New evidence may, however, support a reversal and remand when it comes to the parties knowledge after the CCH, it was not due to lack of diligence that it did not come sooner, it was not cumulative, and it is material enough to probably change the outcome of the CCH. *See* Texas Workers' Compensation Commission Appeal No. 93943, decided December 2, 1993. In the case we now consider, the evidence submitted by the carrier met the definition of new evidence. However, because of the way the issues of MMI and IR were litigated in this case, that is, whether the claimant was at MMI and whether an IR was ripe for adjudication <u>at the time</u> of the CCH, we cannot agree that this information could have changed the outcome. While there may be some administrative economy in doing so, a reversal and remand would have doubtless opened up the requirement for a new CCH with substantial additional evidence to be taken. For these reasons, we decline to reverse and remand solely on the basis of newly discovered evidence.

What does concern us about the hearing officer's decision is that in his discussion of the evidence, he stated that Dr. W's amended report was not contrary to the great weight of the other medical evidence. Under these circumstances, the Commission was required to adopt it. Sections 408.122(c) and 408.125(e). And the hearing officer did adopt that amended report in finding that no valid IR had been determined. However, he failed to adopt this report in regards to the date of MMI. Rather, he found the claimant's date of MMI to be the statutory date. We find that it was error as a matter of law to find MMI as of the statutory date in the face of a finding that the amended report of Dr. W, which found no date of MMI, was not contrary to the great weight of the other medical evidence. For this reason, we affirm the finding that there is no valid IR in this case. We reverse the finding of a date of MMI and render a decision that there has been no valid determination of MMI as

of the date of the decision and order. The parties are free to reinitiate the dispute resolution process to resolve these issues.[1]

We affirm the determination that there is as yet no valid IR in this case. We reverse the determination that the date of MMI is July 14, 1998, and render a decision that there is as yet no valid date of MMI. The finding of disability has become final.

Alan C. Ernst
Appeals Judge

CONCUR:

Joe Sebesta
Appeals Judge

Judy L. Stephens
Appeals Judge

[1] In fairness, it should be noted that the carrier on appeal also appears to be bifurcating Dr. W's third report, insisting on accepting its date of MMI, but seemingly rejecting the 29% IR. This raises the question of how the date of MMI could remain the same as originally certified while the IR increased significantly.