APPEAL NO. 990904

On April 15, 1999, a contested case hearing (CCH) was held. The CCH was held under the provisions of the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq*. (1989 Act). The issues at the CCH were: (1) maximum medical improvement (MMI); (2) impairment rating (IR); (3) disability; and (4) average weekly wage (AWW). The appellant (carrier) requests reversal of the hearing officer's decision that claimant has not reached MMI, as was certified in a second report of the designated doctor chosen by the Texas Workers' Compensation Commission (Commission), and that since claimant has not reached MMI, an IR cannot be assessed. The carrier requests that a decision be rendered that claimant reached MMI on August 11, 1997, with a five percent IR as was originally reported by the designated doctor. The claimant requests affirmance. There is no appeal of the hearing officer's decision that claimant's compensable injury of _____, has resulted in disability since May 28, 1997, and that his AWW is $240.00.

DECISION

Affirmed.

Claimant testified that while working on _____, he slipped and hit his lower back on the corner of a steel table. Dr. B read an MRI of claimant's lumbar spine done on August 12, 1996, to show discogenic degenerative change at L4-5 and L5-S1, a disc bulge at L4-5, and a disc protrusion versus a disc bulge at L5-S1. Dr. D wrote on August 28, 1996, that an EMG showed no evidence of a left lumbosacral radiculopathy, peripheral neuropathy, of myopathy. Dr. R, who initially treated claimant, wrote in December 1996 that claimant is not a surgical candidate, that no further neurosurgical intervention was necessary, and that he discharged claimant from his care. Claimant was discharged from a work hardening program in December 1996 for non-compliance. Dr. LE reported in April 1997 that claimant has a possible lumbar HNP (herniated nucleus pulposus) with left lower extremity radiculopathy. The Commission approved claimant's request to change treating doctors to Dr. GH in June 1997. Dr. M reported that an EMG done in July 1997 showed evidence of left L5 radiculopathy.

Dr. F examined claimant and reviewed the MRI at carrier's request and reported in August 1997 that claimant's examination was completely normal and that he could not find anything wrong with claimant's back. In a Report of Medical Evaluation (TWCC-69) Dr. F certified that claimant reached MMI on August 11, 1997, with a zero percent IR.

Dr. GH wrote in August 1997 that claimant complained of back, hip, and leg pain, that his EMG showed left L5 radiculopathy, and that in all likelihood claimant has an HNP at L4-5. Dr. GH referred claimant to Dr. L for a lumbar myelogram and CT scan, which were done on October 8, 1997, and Dr. L reported that the myelogram and the CT scan demonstrated a disc bulge at L3-4, a herniated disc at L4-5, a herniated disc at L5-S1, indentation of the thecal sac at L3-4, impingement of the L5 nerve roots, and indentation of the S1 nerve roots. The myelogram and CT scan reports of Dr. L indicate that they were

dictated on October 13, 1997, and date stamps indicate that they were received by the carrier on October 16, 1997. On October 14, 1998, Dr. GH noted the myelogram findings and diagnosed claimant as having HNP at L3-4, L4-5, and L5-S1; and wrote that if claimant is not able to live with his pain, then a discogram would be done to determine pain generators and he would ultimately have a global fusion.

The Commission chose Dr. G as the designated doctor to determine MMI and IR. Dr. G examined claimant on October 23, 1997, and reviewed medical reports and reported in a TWCC-69 dated October 30, 1997, that claimant reached MMI on August 11, 1997, with a five percent IR. Dr. G listed medical records he reviewed, including, among others, Dr. D's EMG report, Dr. M's EMG report, and Dr. B's MRI report. Not included in the list of records reviewed by Dr. G are Dr. L's myelogram and CT scan reports and the myelogram and CT scan are not mentioned by Dr. G. Claimant testified that Dr. G did not have the results of his myelogram and CT scan at the October 23rd examination. Dr. GH noted at the bottom of Dr. G's TWCC-69 that he disagreed with the certification of MMI.

Dr. GH wrote in February 1998 that claimant continued to have pain in his back and left leg and that he was waiting for approval of a discogram. Dr. GH wrote in March 1998 that claimant continued to be symptomatic and that the discogram had been denied. Dr. GH wrote in April 1998 that the myelogram showed L4-5 disc herniations with nerve root compression and explained why a discogram is necessary. In May 1998 Dr. GH noted that claimant had HNP at L4-5 and L5-S1. On July 8, 1998, claimant underwent a lumbar discogram performed by Dr. L and Dr. L reported that the discogram was abnormal at L3-4, L4-5, and L5-S1 with severe concordant pain at those levels and left-sided radiculopathy. Dr. GH wrote on July 16, 1998, that the spinal surgery approval process was underway.

Dr. A, the carrier's second opinion doctor on spinal surgery, examined claimant and reported on July 20, 1998, that he does not concur with the need for surgery. Dr. A noted that the MRI report showed no HNP, that the myelogram showed no HNP, and that the discogram report stated that there was a positive discogram. Dr. A noted that films were not provided for his review. Dr. GH wrote on July 21, 1998, that he disagrees with the report of the designated doctor; that the myelogram and post-myelogram CT scan had shown herniated discs impinging on nerve roots, that Dr. G did not make reference to those studies, that subsequent to Dr. G's examination claimant underwent a discogram that showed abnormal lumbar discs, and that claimant was going through the spinal surgery approval process. Apparently Dr. LA was claimant's second opinion doctor on spinal surgery and Dr. LA reported on July 29, 1998, that the myelogram demonstrated degenerative disc changes with bulging at L4-5 and L5-S1, that he does not feel that the surgery recommended for claimant is indicated, and that claimant should be managed conservatively. In a letter dated August 5, 1998, the Commission noted that neither of the second opinion doctors concurred with Dr. GH's recommendation for spinal surgery and thus the carrier is not liable for the costs of spinal surgery and that claimant could appeal that decision within 10 days.

Apparently at claimant's request, a benefit review officer wrote to Dr. G, the designated doctor, on August 24, 1998, stating that medical documentation was attached for his review and asking if that documentation alters his findings. In response to the letter of August 24th, Dr. G wrote on October 2, 1998, that the IR done on October 23, 1997, was based on information available to him at the time of examination, that the new information submitted to him clearly demonstrates significant pathology of claimant's lumbar spine, that his original report should be rescinded regarding impairment and MMI date, and that claimant should be reevaluated for MMI and IR.

The Commission scheduled claimant for another examination by Dr. G. In a TWCC-69 dated November 26, 1998, Dr. G noted a date of visit of November 21, 1998, and reported that claimant had not reached MMI and estimated that claimant would reach MMI on January 20, 1999. Dr. G noted in an attached narrative report that claimant's chief complaint was back pain radiating into the left buttock, that claimant is scheduled for a series of injections to relieve his pain, that that may appreciably change his condition, that claimant is not at MMI, and that the estimated date of MMI is January 20, 1999. In the records reviewed section of his report, Dr. G noted, among other records, the myelogram and CT scan by Dr. L, Dr. LA's report, Dr. A's report, and the discogram by Dr. L.

Dr. GH wrote in January 1999 that claimant underwent one epidural steroid injection but was denied more injections because he had relief for only two or three days. Claimant testified that Dr. GH wants to try more injections before submitting a second request for spinal surgery.

Since disability began on May 28, 1997, claimant would not have reached statutory MMI (the expiration of 104 weeks from the date on which income benefits begin to accrue–Section 401.011(30)(B)) at the time of the CCH. Thus, for purposes of the MMI issue at the CCH, MMI would be the earliest date after which, based on reasonable medical probability, further material recovery from or lasting improvement to an injury can no longer reasonably be anticipated. Section 401.011(30)(A). Section 408.122(c) provides in part that the report of the designated doctor has presumptive weight, and the Commission shall base its determination of whether the employee has reached MMI on the report unless the great weight of the other medical evidence is to the contrary. Section 408.125(e) provides in part that if the designated doctor is chosen by the Commission, the report of the designated doctor shall have presumptive weight, and the Commission shall base the IR on that report unless the great weight of the other medical evidence is to the contrary.

The hearing officer found that subsequent to Dr. G's report of October 30, 1997, the Commission sent additional medical information to Dr. G; that Dr. G reexamined claimant; and that Dr. G revised his earlier certification of MMI and IR based on medical information that was unavailable to him at the time of his October 30, 1997, report. The hearing officer accorded presumptive weight to Dr. G's report of November 26, 1998, and found that it had not been overcome by the great weight of contrary medical evidence. The hearing officer concluded that claimant had not reached MMI and that since he had not reached MMI, an IR could not be assessed. The carrier requests that we reverse the hearing officer's

decision on MMI and IR and render a decision that claimant reached MMI on August 11, 1997, with a five percent IR as originally reported by Dr. G on October 30, 1997.

It is clear from a review of the record that at the time of Dr. G's October 23, 1997, examination of claimant, Dr. G did not have the results of the myelogram and CT scan done on October 8, 1998, and that those results, along with the results of the discogram done in July 1998 and other medical reports, were sent to him by the Commission for his review in August 1998. It is also clear that Dr. G found the additional medical evidence to be material and relevant information because he wrote that the new information clearly demonstrated significant pathology in claimant's lumbar spine, rescinded his original report of MMI and IR, and advised that claimant should be reevaluated for MMI and IR. The Commission scheduled another examination of the claimant by Dr. G, and Dr. G then reported that claimant was not at MMI and listed medical records reviewed for that examination, including reports of the myelogram, CT scan, and discogram. We have held that a designated doctor may amend a report for a proper reason and that a correction or amendment of the first report of a designated doctor, especially when the first report was based upon incomplete or erroneous facts, and which is done fairly soon after the first report, may be given presumptive weight. Texas Workers' Compensation Commission Appeal No. 93827, decided November 5, 1993.

We disagree with carrier's contention that the hearing officer used an incorrect legal standard in according presumptive weight to Dr. G's report of November 26, 1998. Carrier contends that claimant manipulated the designated doctor process by not giving Dr. G the results of the myelogram and CT scan at the first examination. Carrier does not explain why it did not send the myelogram and CT scan reports to Dr. G in accordance with Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE §130.6(h). Date stamps on those reports reflect that carrier received them prior to Dr. G's first examination of claimant.

Carrier contends that Dr. L overstated the results of diagnostic tests. There does appear to be a difference of medical opinion as to what the diagnostic tests show; however, Dr. G noted in his report of November 26, 1998, where he found claimant not to be at MMI, that in addition to reviewing Dr. L's reports of diagnostic tests, Dr. GH's reports, and other medical reports, he also reviewed the reports of Dr. F, who determined claimant was at MMI on August 11, 1997, with a zero percent IR, and the reports of Dr. A and Dr. LA, the second opinion doctors on spinal surgery who did not concur with surgery. Thus, it cannot be said that Dr. G was unaware of the divergent medical opinions.

In response to a Commission subpoena, Dr. G provided medical records to carrier, including his report of October 30, 1997, his report of November 26, 1998, and Dr. GH's report of July 21, 1998, but noted that other records had been shredded. Carrier speculates that Dr. G shredded records to cover up improper contacts. We note that it was the Commission, apparently at claimant's request, that contacted Dr. G by letter dated August 24, 1998, which would not be an improper contact. Dr. G noted in his report of November 26, 1998, that he had reviewed for the evaluation of claimant done on November

21, 1998, the medical reports of Dr. GH, which would certainly be appropriate since Dr. GH is the treating doctor.

The 1989 Act makes the hearing officer the sole judge of the relevance and materiality of the evidence offered and of the weight and credibility to be given to the evidence. Section 410.165(a). As the finder of fact, the hearing officer resolves conflicts in the evidence. We conclude that the hearing officer's decision that claimant had not reached MMI is supported by sufficient evidence and is not so contrary to the great weight and preponderance of the evidence as to be clearly wrong and unjust. Cain v. Bain, 709 S.W.2d 175 (Tex. 1986). The hearing officer did not err in deciding that an IR could not be assessed because "impairment" means "any anatomic or functional abnormality or loss existing after [MMI] that results from a compensable injury and is reasonably presumed to be permanent." Section 401.011(23).

The hearing officer's decision and order are affirmed.

_____
Robert W. Potts
Appeals Judge

CONCUR:

_____
Tommy W. Lueders
Appeals Judge

_____
Dorian E. Ramirez
Appeals Judge