APPEAL NO. 990988

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 30, 1999, with the record being reopened by the hearing officer for supplementation of exhibits, and finally closed on April 15, 1999, following the opportunity of both parties to respond to the supplemented exhibits. The issues at the CCH were whether the Texas Workers' Compensation Commission (Commission) abused its discretion in appointing a second designated doctor to determine the impairment rating (IR), whether and when the respondent (claimant) reached maximum medical improvement (MMI), and what is the IR. The hearing officer determined that the Commission did not abuse its discretion in appointing a second designated doctor, that the claimant has not reached MMI as determined by the second designated doctor, and that claimant's IR cannot be assessed. The appellant (carrier) urges error in several findings of fact and conclusions of law and urges that the IR of the first designated doctor is the proper one and should be adopted, that the claimant reached MMI at the time stated by the first designated doctor and with the rating assigned, and that the Commission abused its discretion in appointing the second designated doctor. The claimant responds that the findings and conclusions of the hearing officer are correct and that the decision should be affirmed.

DECISION

Affirmed.

The evidence showed that the claimant sustained serious injury to his foot and ankle on _____, when he fell into a ditch. He initially treated with a medical doctor, was seen by a podiatrist who diagnosed a left navicular fracture, and was subsequently seen and treated conservatively by a chiropractor, Dr. P. He was seen in referral by Dr. L, who indicated the treatment options given to the claimant were "live with the condition, try injections and cast treatment or have surgery." Apparently the claimant wanted a second opinion regarding surgery and desired at the time to continue to try conservative treatment. He was seen by a carrier doctor who ultimately, on April 3, 1998, found the claimant to be at MMI on November 25, 1997, with a zero percent IR. Dr. P, claimant's then treating doctor, disagreed with the MMI and IR determinations. The claimant was examined by the first designated chiropractic doctor, Dr. D, on May 14, 1998, which resulted in a certification of MMI on May 14, 1998, with a seven percent IR. Dr. D indicated that his opinion was based on lack of improvement on the current treatment plan and that "it seems that he is decided against that [following one or more of Dr. L's suggestions] at this time." (In a later letter, Dr. D indicated that the claimant "refused surgery.") The claimant disagreed with Dr. D's assessment. The claimant was still, according to medical records, having considerable problems with his ankle/foot, and apparently wanted a second opinion concerning surgery. And a letter from Dr. P shows a referral to Dr. C, an orthopedic surgeon, who in a June 23, 1998, letter states that he believed the claimant will require surgical debridement and reconstruction of the posterior tibial tendon along with excision of the accessory navicular. The claimant subsequently underwent excision of his accessory

navicular and reinsertion of the posterior tibial to the navicular. He was placed in therapy, continued to experience pain and discomfort in his ankle/foot, and, in a January 14, 1999, letter, Dr. C indicates some improvement and that he will continue his final two weeks of therapy.

After the surgery was performed, and apparently at the behest of the claimant, the Commission attempted to reschedule a reexamination with Dr. D to determine if his opinion remained the same as in his earlier report. The carrier objected at the time; however, the records were sent to Dr. D. Unfortunately, Dr. D had moved to a location some 200 miles away and advised the Commission he could not be the designated doctor for this evaluation. In his letter, Dr. D did state he reviewed the information provided and that, in his opinion, a new impairment evaluation of the claimant should be made. (Subsequently, records show that Dr. D was removed from the Commission's designated doctor list.) As a result of Dr. D's letter, the Commission appointed a second chiropractic designated doctor, Dr. DI, who examined the claimant on January 22, 1999, and stated the claimant had not reached MMI and that the estimated date for reaching MMI was March 1, 1999.

Unfortunately, there was no testimony at the CCH and the course of events has to be determined by picking through the records and other exhibits offered. The claimant is also non- English speaking, which may have hampered the course of events. In any event, the evidence suggests that the claimant sustained a more serious injury and one requiring different treatment than initially thought. Given the circumstances of the claimant's treatment and unsatisfactory response to conservative treatment, leading to surgery in July 1998, the Commission determined to have a reevaluation performed of claimant's IR. This was the recommended course of action by claimant's treating doctor and the first designated doctor. Carrier urges that the first report should be adopted because the claimant rejected surgery at that time; however, the medical records and logs from the Dispute Resolution Information System support the hearing officer's finding "the claimant to be credible concerning his desire to have a second opinion regarding the need for the surgery that had been recommended . . . ." Although the hearing officer alluded in her discussion to "his testimony," which is inaccurate since there was no testimony, there is support for her belief that the claimant was actively pursuing the potential surgery and not merely attempting to delay the surgery. In any event, we do not conclude from the evidence that the hearing officer erred in her evaluation concerning the course of events leading to the surgery and her concluding that it was not merely a delaying tactic by the claimant to extend benefits. Texas Workers' Compensation Commission Appeal No. 941227, decided October 26, 1994.

Carrier also urges error in the appointment of a second designated doctor, arguing that the Appeals Panel has held such appointment to be a rare occurrence and generally based on a first appointed designated doctor's refusal or inability to comply with the IR aspect of the 1989 Act. Texas Workers' Compensation Commission Appeal No. 951266, decided September 18, 1995; Texas Workers' Compensation Commission Appeal No. 94970, decided September 7, 1994. *See also* Texas Workers' Compensation Commission Appeal No. 982370, decided November 19, 1998. We agree that that has been the firm

position of the Appeals Panel. However, not only did Dr. D respond that he was not available to do the reevaluation, he was subsequently taken off the Commission's designated doctor list. Under these circumstances, we cannot conclude the Commission or the hearing officer (in her decision) committed error in appointing and accepting the report of the second designated doctor. Texas Workers' Compensation Commission Appeal No. 961436, decided September 5, 1996. At the time of the second designated doctor's evaluation, Dr. DI determined that the claimant was not at MMI at that time. The hearing officer found, and our review of the evidence shows support for the determination, that the great weight of the other medical evidence does not overcome the presumptive weight accorded Dr. DI's report.

For the reasons stated, the decision and order of the hearing officer are affirmed.

_____
Stark O. Sanders, Jr.
Chief Appeals Judge

CONCUR:

_____
Philip F. O'Neill
Appeals Judge

_____
Gary L. Kilgore
Appeals Judge