APPEAL NO. 991081

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 11, 1999. The record closed on April 9, 1999. With respect to the issues before him, the hearing officer determined that: (1) appellant/cross-respondent (claimant) reached maximum medical improvement (MMI) on October 21, 1996, with an impairment rating (IR) of 18%, in accordance with the first report of the designated doctor; (2) claimant waived the right to dispute the 18% IR certified by the designated doctor because she waited too long to dispute; and (3) claimant did not have good cause for failing to dispute the IR earlier. The hearing officer noted that the designated doctor amended the IR in March 1999, about one year after statutory MMI, and certified a 24% IR after claimant had surgery in April 1998. The hearing officer stated in the discussion portion of the decision and order that the designated doctor amended the IR within a reasonable time, and also apparently found that the amendment was for a proper purpose. However, because of claimant's delay in disputing the 18% IR, the hearing officer determined that claimant waived the right to dispute the 18% IR. Claimant appeals the waiver determination and asks the Appeals Panel to determine that her IR is 24%, in accordance with the amended report of the designated doctor. Respondent/cross-appellant (carrier) responds that the hearing officer's determinations are correct and that claimant did waive the right to dispute the IR. Carrier appealed the determination in the discussion portion of the decision and order that the designated doctor amended his IR report within a reasonable time and for a proper purpose. Claimant responds that the Appeals Panel should affirm the determination that the designated doctor properly amended his report.

DECISION

We reverse and render.

Claimant contends the hearing officer erred in determining that she waived the right to dispute the 18% IR certified by the designated doctor, Dr. F, in his first report dated May 6, 1997. Claimant also challenges the determination that she did not have good cause for failing to raise the IR/MMI issue until August 25, 1998. Claimant contends that the hearing officer properly determined that the designated doctor amended his report for a proper reason and within a reasonable time and asserts that that Appeals Panel should render that her IR should be 24%, in accordance with the designated doctor's amended report. She also asserts that if the designated doctor amended his first IR report within a reasonable time and for a proper purpose, then claimant should also be held to have disputed the designated doctor's first IR report within a reasonable time and for an appropriate reason. Claimant contends that, after a February 1998 MRI showed for the first time that there was a cervical disc herniation, and then surgery was agreed upon in March 1998, claimant then disputed the 18% IR a few months later in August 1998, by sending a letter to the Texas Workers' Compensation Commission (Commission) field office. Claimant asserts that she disputed the first IR within a reasonable time after discovering that she had a basis to do so.

Claimant complains that the hearing officer raised the issue of waiver on his own motion. A party may waive an issue by failing to raise it at the benefit review conference (BRC). Texas Workers' Compensation Commission Appeal No. 91016, decided September 6, 1991. Claimant's attorney recognized that waiver was an issue at the CCH. In his opening statement, claimant's attorney said:

> Now, as the carrier I'm sure will point out and as they pointed out in the [BRC] report, there is a question as to whether once the Commission has made a determination concerning supplemental income benefits [SIBS] whether you can still contest the [IR] . . . .

Claimant's attorney gave the hearing officer some Appeals Panel cases and then said:

> And these are cases that talk about whether or not after the Commission has determined whether . . . the claimant is entitled to [SIBS] whether the issue of [IR] can still be raised.

Similarly, in closing argument, counsel for claimant asserted that it is not "too late" for claimant to raise the IR issue. The BRC report states that carrier's position was that the 18% IR had already become "final" by the time the initial determination for SIBS was made. At the CCH, in its opening and closing statement, carrier said claimant's challenge to the designated doctor's 18% IR was not timely and that she waived the right to challenge it. At the CCH and on appeal, carrier cited cases that hold that, if a carrier does not challenge the IR determination until after the initial SIBS determination is made, carrier has waited too long or waived its right to do so. Texas Workers' Compensation Commission Appeal No. 980590, decided May 8, 1998; Texas Workers' Compensation Commission Appeal No. 960321, decided April 2, 1996. Carrier's assertion at the CCH and on appeal was that, like carriers, claimants may also waive the right to challenge the designated doctor's IR if they wait too long to do so. We construe carrier's assertions at the BRC, CCH, and on appeal as an argument that claimant did not timely raise a dispute regarding the designated doctor's IR or that claimant "waived" the right to dispute the designated doctor's IR. The majority concludes that the hearing officer did not raise the issue of waiver on his own motion. Although waiver was not stated as a separate issue, it was raised at the BRC and addressed by the parties at the CCH. The issue of waiver was recognized by the hearing officer, discussed and acknowledged by the parties, and tried by consent. *See* Texas Workers' Compensation Commission Appeal No. 980683, decided May 21, 1998; Texas Workers' Compensation Commission Appeal No. 990925, decided June 11, 1999. Therefore, we will address waiver as it concerns the facts of this case.

Claimant sustained a compensable neck, shoulder, back, and right leg injury on _____, after a slip and fall at work. In October 1996 claimant's treating doctor, Dr. C, noted that claimant was doing "reasonably well" and certified that claimant reached MMI on October 21, 1996, with an IR of 30%. On May 6, 1997, the designated doctor certified that claimant reached MMI on October 21, 1996, with an 18% IR. Claimant testified that her condition began to worsen and medical records indicate that she was receiving continuous medical care after May 1997. In October 1997 claimant's treating doctor noted "very

marked palpable spasm" in claimant's neck and stated that claimant complained that her shoulder and neck area was "getting significantly worse." Claimant was thereafter treated conservatively with Prednisone, Soma, and physical therapy. By February 1998, claimant's doctor sent her to Dr. B because of pain in claimant's hands. On February 5, 1998, Dr. B recommended that claimant undergo MRI testing so that a surgical evaluation could be done. On February 13, 1998, claimant underwent what was apparently her first cervical MRI test and Dr. J stated in the resulting report that claimant had a disc protrusion/herniation at C4-5 and C5-6. On March 16, 1998, claimant and Dr. B discussed surgery and Dr. B said that claimant agreed to have cervical spinal surgery. Claimant reached statutory MMI the next day, on March 17, 1998. On April 22, 1998, claimant underwent cervical discectomy and fusion surgery.

After surgery, in May 1998, Dr. G, claimant's surgeon, noted that claimant was no longer complaining of neck pain. Although there are some post-surgical reports that claimant had continuing neck problems, she stated in an August 1998 letter to the filed office that her neck and arm pain has improved. In answers to a deposition on written questions, Dr. C stated that claimant had a substantial change in her condition after she received her IR in 1996 in that "she underwent cervical disc surgery as well as developed an adhesive capsulitis secondary to the cervical pain." When he received the deposition on written questions in February 1999, the designated doctor stated that he would need to reexamine claimant. In his amended report of March 6, 1999, the designated doctor certified that the MMI date was the date of statutory MMI, March 17, 1998, and that claimant had a 24% IR. The 24% IR consisted of impairment for specific disorders of the cervical and lumbar spine and loss of range of motion (ROM) in the cervical and lumbar spine and shoulder. The ROM values in the designated doctor's first and second reports were slightly different, but the majority of the increase in the IR from 18% to 24% was due to the increase in the specific disorders impairment due to surgery.

Claimant testified that she told the designated doctor in 1996 that she did not believe that she was at MMI and that she also discussed this with her treating doctor. Claimant first disputed the designated doctor's 18% IR on August 25, 1998, by writing a letter to the field office. A BRC on the issue was requested on October 30, 1998. Dispute Resolution Information System (DRIS) notes indicate that on November 30, 1998, and December 3, 1998, claimant called the Commission to inquire about the dispute of the designated doctor's IR.

The hearing officer determined that: (1) claimant first disputed the designated doctor's 18% IR on August 25, 1998; (2) on November 6, 1997, the Commission denied claimant's entitlement to first quarter SIBS; (3) claimant did not have good cause for failing to raise the IR/MMI dispute until August 25, 1998; (4) claimant waived her right to dispute the 18% IR; (5) the great weight of the other medical evidence is not contrary to the designated doctor's 18% IR; and (6) claimant reached MMI on October 21, 1996, with an IR of 18%. The hearing officer noted that claimant had been complaining of severe pain all along, that she was aware that her condition had worsened, and that she knew her own doctor had given her a 30% IR, yet she still did not dispute the designated doctor's 18% IR

until August 1998.[1] The hearing officer found that claimant did not give a sufficient reason for waiting to dispute the IR.

The 1989 Act provides that the hearing officer is the sole judge of the weight and credibility of the evidence. Section 410.165(a). Where there are conflicts in the evidence, the hearing officer resolves the conflicts and determines what facts the evidence has established. As an appeals body, we will not substitute our judgment for that of the hearing officer when the determination is not so against the great weight and preponderance of the evidence as to be clearly wrong or manifestly unjust. Cain v. Bain, 709 S.W.2d 175, 176 (Tex. 1986); Texas Workers' Compensation Commission Appeal No. 950456, decided May 9, 1995.

For the purposes of this appeal, we will assume, without deciding, that it is possible for a claimant to "waive" the right to contest a designated doctor's IR by waiting "too long to do so."[2] *See* Appeal No. 990925; Texas Workers' Compensation Commission Appeal No. 980355, decided April 6, 1998; *but see* Appeal No. 990925 (dissenting opinion). Claimant's August 25, 1998, dispute of the designated doctor's first report took place about 15 months after the designated doctor's May 1997 report. Although claimant said she was having severe pain as of May 13, 1997, and that it greatly worsened over time, it was not until the spring of 1998 that claimant's doctors performed MRI testing, diagnosed a herniation for the first time, and then discussed the need for surgery. The designated doctor's IR changed from 18% to 24% because of added impairment for the surgery. There was evidence that claimant's condition changed after the designated doctor's first report and that doctors then attempted to treat and diagnose claimant's condition. Claimant did not dispute the IR until about five months after discovering the disc herniation and four months after her surgery. However, it is possible that claimant was cognizant of the difficulty of challenging a designated doctor's IR and that she concluded that the most reasonable challenge to the IR would be based on the fact that she had surgery, and that that surgery had been contemplated at the time of statutory MMI. A challenge made to the IR before claimant's surgery most likely would have been baseless, in any case. For these reasons, we cannot say that claimant acted unreasonably in waiting until August 1998 to dispute the 18% IR. We conclude that claimant did not "waive" the right to dispute the IR through delay in challenging the designated doctor's report. *See* Texas Workers' Compensation Commission Appeal No. 981144, decided July 13, 1998; Texas Workers' Compensation Commission Appeal No. 981291, decided July 30, 1998. We further conclude that claimant's dispute can be considered to be based on newly discovered evidence: the February 1998 MRI report and the March 1998 surgery recommendation. *See generally* Appeal No. 980355. Therefore, we reverse the hearing officer's determinations that: (1) claimant waived the right to dispute the 18% IR; and (2) she did not have good cause for her delay in disputing the IR. These determinations are so against the great weight and

[1]It appears that the hearing officer may have been applying a 90-day rule concept here. *See* Texas Workers' Compensation Commission Appeal No. 951578, decided November 1, 1995.

[2]We also have serious reservations that the first report of the designated doctor is the point from which any waiver analysis should begin.

preponderance of the evidence as to be clearly wrong or manifestly unjust and we reverse them. We render a determination that claimant did not waive the right to dispute the 18% IR. We also render a determination that claimant had good cause for the delay in disputing the 18% IR.

In its cross appeal, carrier contends that the hearing officer erred in determining that the designated doctor amended his IR report within a reasonable time and for a proper reason.[3] Carrier asserts that the amendment was improper because surgery was not being actively considered at the time the designated doctor made his first report in May 1997.

The Appeals Panel has addressed cases where a designated doctor amends his or her IR report after statutory MMI and after the claimant has surgery. We have held that a designated doctor may, with proper reason, and in a reasonable amount of time, amend his original report of MMI and IR, for various reasons which can include, but are not limited to, the need for surgery. *See* Texas Workers' Compensation Commission Appeal No. 941168, decided October 14, 1994. The report may be amended where there were incomplete or erroneous facts when the first report was rendered that are subsequently taken into account in amending the report. *See* Texas Workers' Compensation Commission Appeal No. 941600, decided January 12, 1995. Whether a doctor has amended his report for a proper reason and within a reasonable amount of time is essentially a question of fact. Texas Workers' Compensation Commission Appeal No. 960888, decided June 18, 1996. In cases where a claimant has surgery after the designated doctor certifies an IR, the Appeals Panel considers whether the designated doctor's MMI and IR certification took place before or after the date of statutory MMI. Where a claimant is determined to have been at MMI by statute, a distinguishing factor is whether the surgery was "under active consideration" at the time of statutory MMI. Texas Workers' Compensation Commission Appeal No. 950861, decided July 12, 1995; Texas Workers' Compensation Commission Appeal No. 950496, decided May 15, 1995; Texas Workers' Compensation Commission Appeal No. 941243, decided October 26, 1994.

The Appeals Panel has also noted that it is not reasonable to conclude that a substantial change of condition, such as occasioned by required surgery subsequent to an initial IR determination following statutory MMI, must be ignored by the Commission, thereby forcing the parties into court. *See* Appeal No. 941243, *supra*; Section 410.307. Section 410.307 provides that if a case is appealed to the courts, the evidence of the extent of impairment is not limited to that presented to the Commission if the court determines that there is a substantial change of condition.

In this case, the injury was in _____, the designated doctor's 18% IR was certified in May 1997, the statutory MMI date was stipulated to be March 17, 1998, claimant's surgery was contemplated at the time of statutory MMI, the surgery took place

[3] The hearing officer determined that, although the designated doctor's amendment was proper, the claimant's IR is 18% because claimant waived the right to dispute the designated doctor's first report. Carrier filed an appeal that was contingent on claimant's filing an appeal.

approximately one month after statutory MMI, and the designated doctor's amended IR report certifying a 24% IR was made on March 6, 1999, 11 months after the surgery. There was evidence that claimant contacted the Commission during the 11-month period inquiring about her dispute of the 18% IR. Considering these facts, and because the evidence in this case also supports the hearing officer's determination that there was a substantial change in the claimant's medical condition, we conclude that the hearing officer did not err in determining that the designated doctor's amendment was appropriate in this case. Texas Workers' Compensation Commission Appeal No. 970344, decided April 9, 1997.

Carrier contends that, because surgery was not contemplated on the date of the designated doctor's first report, the designated doctor could not properly amend his report. However, as stated in Texas Workers' Compensation Commission Appeal No. 990833, decided June 7, 1998, when deciding whether an amendment by a designated doctor is appropriate, the Appeals Panel considers whether surgery was contemplated *at the time of statutory MMI.* The Appeals Panel noted that it was not following the case (Texas Workers' Compensation Commission Appeal No. 971385, decided August 25, 1997) that held that the focus is on whether surgery was contemplated on the date of the designated doctor's first examination. The Appeals Panel further stated that Appeal No. 971385, in stating that the focus is on whether surgery was contemplated at the time of the designated doctor's first report, cited authority that did not stand for that proposition of law. The Appeals Panel in Appeal No. 990833 then stated that it would not follow Appeal No. 971385.

We conclude that the hearing officer erred in determining that claimant waived the right to dispute the 18% IR. We further conclude that the hearing officer erred in failing to give presumptive weight to the designated doctor's amended report and 24% IR. *See* Appeal No. 950861, *supra.*

We reverse the determination that claimant waived the right to dispute the 18% IR. We affirm the determination that the designated doctor amended his 18% IR within a reasonable time and for a proper reason. We reverse the hearing officer's decision and order and render a determination that claimant reached MMI on March 17, 1998, with an IR of 24%.

_____
Judy Stephens
Appeals Judge

CONCUR IN THE RESULT:

_____
Alan C. Ernst
Appeals Judge

CONCURRING OPINION:

I concur in the result. I do not view an issue of claimant's having waived the right to dispute the designated doctor's 18% impairment rating (IR) as having been properly added to the statement of disputes as required by Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 142.7 (Rule 142.7). Nor, in my opinion, was a disputed issue of waiver "tried by consent." Obviously, waiver can have harsh results for parties and, in my opinion, should not be allowed to casually creep into the statement of disputes such as was done in this case. The bare reference in the benefit review conference report to the 18% IR having become final when the first quarter supplemental income benefits (SIBS) determination was made together with the comments of counsel cited in the principal opinion do not, in my judgment, provide us with a basis to conclude that a disputed issue of waiver was added by consent of the parties. *See* Section 410.151(b)(1). The references pertain to challenging a 15% or higher IR once the entitlement to SIBS for the first quarter has been decided, and not to some general notion of waiver based on claimant's failure to dispute the 18% IR either from the time the designated doctor assigned it or promptly after her April 22, 1998, surgery.

_____
Philip F. O'Neill
Appeals Judge