APPEAL NO. 992014

This appeal arises pursuant to the Texas Workers' Compensation Act of 1989, TEX. LAB. CODE ANN. § 401.001 *et seq*. (1989 Act). On August 13, 1999, a hearing was held. She (the hearing officer) determined that respondent/ cross-appellant (claimant) reached maximum medical improvement (MMI) on October 6, 1998 (statutorily), that his impairment rating (IR) is 18% as found by the designated doctor in his second report, and that claimant had disability from September 13, 1997, through October 6, 1998. Appellant/cross-respondent (carrier) asserts that the decision is against the great weight and preponderance of the evidence, that the initial report of the designated doctor should have presumptive weight, that surgery did not materially improve claimant's condition, and that claimant was not actively considering surgery at the time of the initial examination by the designated doctor; carrier cited Texas Workers' Compensation Commission Appeal No. 982218, decided November 2, 1998, in support of the above argument at the hearing; it also states that no temporary income benefits can be paid after MMI, which it says occurred on September 12, 1997. Claimant appealed, stating that the finding of fact as to disability incorrectly stated September 13, 1998, when it should read September 13, 1997. Claimant also responded to carrier's appeal.

DECISION

We affirm, as modified.

The issues in this case involved MMI, IR, and disability. The real issue was whether the designated doctor's initial report or his amended report should be given presumptive weight.

Various dates significantly affect the outcome of this case.

Date of Back Injury	-	_____
Spinal Surgery Requested	-	December 1996
Commission Notice of Non-concurrence	-	March 13, 1997
Designated Doctor's Initial Examination	-	September 30, 1997
Second Request Spinal Surgery	-	November 25, 1997
Commission Notice of Concurrence	-	September 11, 1998
STATUTORY MAXIMUM MEDICAL IMPROVEMENT-OCTOBER 6, 1998		
Spinal Surgery	-	November 11, 1998
Designated Doctor's Second Examination	-	May 11, 1999

A nonconcurring opinion provided in January 1997 by Dr. W said that claimant should be evaluated further, noting that 80% of his pain was in the back with only 20% in his leg. Claimant testified that he underwent a work hardening program that lasted several months. Dr. F stated that claimant's pain thereafter predominated in his leg rather than his

back. Dr. W, in providing his second opinion to the second request for spinal surgery, said in May 1998 that claimant's leg pain has increased to a point where it is greater than the back pain. He thought a laminectomy may be appropriate but discounted fusion surgery. The record does not indicate why notice of concurrence from the Texas Workers' Compensation Commission (Commission) was not provided until September 1998. Whether or not there was a spinal surgery hearing after the September 1998 notice of concurrence is not shown. Surgery took place in November 1998, just after statutory MMI, and the designated doctor then evaluated claimant six months after surgery, a fair amount of time to allow some recovery from spinal surgery.

As the hearing officer stated in her Statement of Evidence, the bulk of the hearing addressed whether surgery was actively considered at the time of the initial examination by Dr. N. Carrier cited Appeal No. 982218, *supra*, in describing the issue as whether surgery was being actively considered at the time of the initial examination by a designated doctor. Carrier also cited Texas Workers' Compensation Commission Appeal No. 960960, decided July 3, 1996. The latter case showed that the initial evaluation by a designated doctor did not take place until after statutory MMI had already been reached. Prior to statutory MMI there had been three surgeries; the fourth occurred over a year after statutory MMI. There is some language in Appeal No. 960960 which says it was considering whether surgery was actively considered "at the time the first IR from the designated doctor is given," but, as stated, in Appeal No. 960960, the first IR by the designated doctor was not given until after statutory MMI. Another case cited by carrier, Texas Workers' Compensation Commission Appeal No. 941243, decided October 26, 1994 (in stressing the point of whether surgery was being contemplated), also involved a designated doctor's first examination after statutory MMI. Appeal No. 941243 affirmed a hearing officer's determination that the designated doctor's IR was correct, stating that surgery was not being actively considered "at the time of statutory MMI"; that case also compared a change to a designated doctor's report before statutory MMI and a change after statutory MMI, saying "a different question arises when statutory MMI has passed without significant development of the surgical option before the Commission."

Carrier also cited Texas Workers' Compensation Commission Appeal No. 981773, decided September 17, 1998, but that case merely affirmed a finding of no proper reason and not within a reasonable time when surgery was performed five months after statutory MMI. Texas Workers' Compensation Commission Appeal No. 960274, decided March 28, 1996 (also cited by carrier), reversed a decision which had given presumptive weight to a second opinion from a designated doctor. This case presented an initial designated doctor's opinion approximately one and one-half years after the injury with two surgeries then occurring (one before statutory MMI and one appearing to be after statutory MMI). The Appeals Panel stated therein, "[t]he facts of this case appear to demonstrate an attempt solely to obtain a higher rating using surgery as the impetus." (Emphasis added.)

The hearing officer in her Statement of Evidence also cited Texas Workers' Compensation Commission Appeal No. 990659, decided May 12, 1999, as stating that

"active consideration" of surgery is a question in regard to consideration of what was transpiring at the time of statutory MMI. The hearing officer then found that surgery was under active consideration before statutory MMI and that finding of fact is sufficiently supported by the evidence. The hearing officer did not err in providing no finding of fact that addressed whether surgery was being considered at the time of the initial examination by the designated doctor, which occurred a year prior to statutory MMI. *See* Texas Workers' Compensation Commission Appeal No. 962654, decided February 6, 1997, which affirmed presumptive weight given to a designated doctor's second opinion since "surgery was under active consideration . . . at the time of statutory MMI"; in that case the initial evaluation by the designated doctor had been over a year prior to statutory MMI. *See also* Texas Workers' Compensation Commission Appeal No. 962107, decided December 2, 1996, which also dealt with a designated doctor's initial examination occurring after statutory MMI; that opinion cited numerous cases in which "surgery is under active consideration at the time of statutory MMI"; the Appeals Panel then held that surgery was only a "speculative possibility" at the "time of statutory MMI." (Emphasis added.) These two 1996 cases were cited by Appeal No. 982218, *supra* (cited by carrier) in setting forth the criteria that surgery must be actively considered at the time of the first evaluation by the designated doctor and that the subsequent surgery must improve the claimant. *Also see* Texas Workers' Compensation Commission Appeal No. 990833, decided June 7, 1999, which pointed out the lack of authority cited by Appeal No. 982218, *supra*, for the position it espoused and did not follow Appeal No. 982218.

We do acknowledge that another criterion, whether the designated doctor's opinion was amended for a proper reason in a reasonable time, is not restricted to consideration only after statutory MMI. Most cases, however, that address this standard do involve a change occurring after statutory MMI. *See* Texas Workers' Compensation Commission Appeal No. 970954, decided July 7, 1997. The question of "proper reason in a reasonable time," is one of fact for the hearing officer to make. In the case under review, the hearing officer did not address in a finding of fact whether a change occurred within a reasonable time, and this point was one argued by carrier. The hearing officer did, however, acknowledge the question of reasonable time in her Statement of Evidence; the hearing officer did make findings of fact indicating that claimant had attempted to have surgery before the first designated doctor's evaluation but the request had been denied; she also found that claimant then underwent a period of conservative care before surgery was again requested. From these findings and the hearing officer's Statement of Evidence we may imply a finding that the second designated doctor's report was provided in a reasonable time. *See* Texas Workers' Compensation Commission Appeal No. 93119, decided March 29, 1993, which discussed the efficacy of a designated doctor's amended report receiving presumptive weight when surgery was undertaken after a period of conservative care had been attempted and noted that "surgery . . . was not frivolously delayed for reasons other than good medical practice."

While the hearing officer found that claimant improved after the surgery, that finding of fact was not necessary to the decision to give presumptive weight to the designated

doctor's second opinion. *See* Appeal No. 990659, *supra*. The determination that the designated doctor's second report should be given presumptive weight was sufficiently supported by the evidence.

The carrier only attacked disability on the basis of what date of MMI should be chosen. With an affirmed date of MMI as the statutory date of MMI of October 6, 1998, the period of disability found is also sufficiently supported by the evidence; the period of disability is clearly shown in the Statement of Evidence to be from September 13, 1997, through October 6, 1998, which also follows the dates set forth in the issue presented as to disability. The hearing officer's finding of fact, conclusion of law, and decision provided at the end of her opinion incorrectly state the beginning date of disability to be September 13, 1998.

Finding that the decision and order are sufficiently supported by the evidence, we affirm, except that all references to disability are hereby changed to read September 13, 1997, as the beginning date. *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

_____
Gary L. Kilgore
Appeals Judge