APPEAL NO. 992062

This appeal arises pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act). A contested case hearing was held on August 26, 1999. The issues involved whether the respondent, who is the claimant, had reached maximum medical improvement (MMI) from his compensable injury, his correct impairment rating (IR), whether he had disability for the period of July 25, 1996, through October 8, 1997, and whether the subsequent injury was the "sole cause" of the claimant's "current condition."

The hearing officer, noting that the parties had agreed to have claimant reexamined by the designated doctor, held that the claimant's IR was 24%, as certified by the designated doctor upon his reexamination, and that the great weight of contrary medical evidence was not against this report. She held that claimant reached MMI on October 8, 1997. The hearing officer found that the subsequent injury sustained by the claimant at home was not the sole cause of his "current condition," and that he had disability from July 25, 1996, through October 8, 1997.

The appellant (carrier) has appealed. It argues that the hearing officer's finding that the great weight of contrary medical evidence is not against the designated doctor's amended report is erroneous. The carrier appeals the finding that radiating pains from the compensable injury caused claimant to fall and sustain further back injury, and that the carrier failed to present evidence that the subsequent injury was the sole cause of the "current condition." The carrier does not appeal the finding of fact that claimant had the inability to obtain and retain employment due to his injury for the period of time in issue, but appeals the conclusion of law that he had disability for that time. The carrier appeals the conclusions that claimant reached MMI on October 8, 1997, and that his IR was 24%. The carrier has not appealed findings that it entered into a written agreement with the claimant that he be reexamined by the designated doctor after his second spinal surgery. There is no response from the claimant.

DECISION

Affirmed.

The claimant was employed by (employer), when he injured his lower back while lifting a heavy roll of material on _____. Claimant was first treated by Dr. W, and then Dr. BG.

An MRI done on October 24, 1995, reported a small disc herniation at L3-4, mild bulging at two other levels, and degenerative changes throughout the lumbar spine. By March 27, 1996, two herniations were reported on an MRI. A myelogram performed on July 3, 1996, assessed the lumbar spine as normal except for a possible bulging disc at L3-

4. On May 6, 1996, claimant was examined by Dr. A, who stated that claimant reached MMI on that date and had an 18% IR, unless he were a surgical candidate, in which case he should not be considered as having reached MMI.

A surgical consult by Dr. S on April 25, 1996, found no need for surgical intervention. An EMG was performed on May 15, 1996, and referred to in another medical record by Dr. L as having shown an abnormality in the S1 nerve root. Dr. L wrote on June 18, 1996, that claimant was completely "disabled" for work. It is fair to say that early on, in July 1996, claimant's need for spinal surgery was disputed but he did not have a concurring second opinion until before his April 25, 1997, laminectomy. This occurred pursuant to the recommendation of Dr. Z on November 21, 1996, that he have spinal surgery. The claimant had a second spinal surgery on June 17, 1998, after a concurrence by Dr. S, and a nonconcurrence by another doctor. Dr. S noted in that opinion that even with surgery, claimant was unlikely to experience much relief from his pain. The surgery was a fusion with cages. In July 1998, while home recovering from surgery, he slipped and fell due to weakness and radiating pain into his leg. A report by Dr. Z indicated that claimant was improving until this accident. Claimant testified that his surgeries left him feeling no better, and he in fact felt worse after the first surgery.

The designated doctor, appointed in apparent response to the IR of Dr. A, was Dr. B. On July 31, 1996, Dr. B certified that claimant had reached MMI on July 24, 1996, with an 11% IR. Dr. BG disagreed with this IR in August 1996; he noted that claimant was pending a second opinion for surgery, that he was not at MMI and could not work, and merited a 19% IR. Dr. B apparently was contacted in August 1996 (as referred to in a later letter he wrote) and responded that he would recommend a reexamination if claimant proceeded with surgery. This recommendation was repeated in a September 30, 1997, letter from Dr. B, which is in evidence and is directed to the Texas Workers' Compensation Commission (Commission). As the hearing officer noted, there was no explanation furnished as to why neither of Dr. B's recommendations for reexamination were not acted upon with dispatch.

It can be inferred that a dispute was made as to whether there should be a reexamination, because the record includes a document entitled "pre-benefit dispute agreement." The disputed issue is:

> Should the claimant be re-examined by designated doctor following second spinal surgery?
>
> The resolution is:
>
> All parties agree that claimant should return to designated doctor for reexamination following second surgery.

This was signed on January 8 and 12, 1999, by the parties, by claimant's attorney, and by a benefit review officer (BRO). Dr. B accordingly reexamined the claimant on

January 27, 1999. He found MMI as of the date of his examination, with a 24% IR. He noted that claimant had two failed surgeries. Much of the greater IR related in increased IR from specific conditions and range of motion deficits. A great portion of the cross-examination was concerned with the severity of the undisputed injury and the need for the approved surgery.

Claimant said he was hospitalized after his fall at home, and that he felt he had gotten worse. The Emergency Medical Services report dated July 23, 1997, noted that claimant had simply collapsed at home due to pain in his lower back. The lone hospital summary sheet shows that claimant was treated for back pain.

THE DESIGNATED DOCTOR'S AMENDED REPORT

The carrier asserts numerous points of error relating to whether the designated doctor's amended report was appropriate. As the hearing officer especially noted, however, the designated doctor issued his report as a result of his reexamination. This reexamination was expressly agreed to by the parties in the pre-benefit dispute agreement. The carrier has not appealed the finding of fact that this occurred, although the existence of the agreement was the legal basis upon which much of the hearing officer's decision rested.

While we believe the carrier maintained the right to dispute whether any resulting IR was against the great weight of the contrary medical evidence, or in compliance with the Guides to the Evaluation of Permanent Impairment, third edition, second printing, dated February 1989, published by the American Medical Association, we believe that matters relating to the designated doctor's authority to reexamine and issue an updated or amended report as a result of that reexamination were resolved by the agreement. The carrier's concurrence or approval to have the claimant reexamined was not required in order for it to occur; the Commission could have, on its own motion, scheduled the reexamination. The agreement has meaning only in the context of the carrier's dispute over the need or authority for the reexamination; as the BRO noted in her report, the purpose for the reexamination was well-known to the parties at the time of the agreement. The carrier cannot resurrect arguments as to the propriety of the designated doctor's reexamination because it does not agree with the outcome. As the hearing officer noted, the arguments made here as to whether a reexamination should be done were available to the carrier at the time it was represented by another person and entered into the agreement. The carrier did not offer any evidence as to good cause for setting this agreement aside. Section 410.029(b); Section 410.030. Consequently, the hearing officer was limited to determining whether the 24% IR certified by Dr. B was contrary to the great weight of other medical evidence.

We have reviewed the record and cannot agree that the hearing officer's determination that the designated doctor's report of 24% was entitled to presumptive weight was against the great weight and preponderance of the evidence. Given that claimant had

two surgeries, the first before statutory MMI was reached, assertion of an 11% IR that did not consider these surgeries would be against the great weight of contrary medical evidence.

MMI is defined in Section 401.011(30), as pertinent to this case, as the earlier of:

(A) 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;

(B) the expiration of 104 weeks from the date on which income benefits begin to accrue.

The latter is referred to as "statutory" MMI. Where a designated doctor certifies a date later than statutory MMI, the hearing officer must implement the definition of MMI and opt for the "statutory" date in a finding as to when MMI is reached.

DISABILITY

A claimant's testimony alone may establish that an injury has occurred, and disability has resulted from it. Houston Independent School District v. Harrison, 744 S.W.2d 298, 299 (Tex. App.- Houston [1st Dist.] 1987, no writ). The hearing officer's decision is supported by the evidence.

CURRENT CONDITION/SOLE CAUSE

Carrier's task on proving that the fall at work was the sole cause of claimant’s current condition is hampered somewhat by a failure of proof on what the "current condition" is, and why it was different from the claimant's post-surgical back injury status. No argument is offered at all as to why the carrier believes the findings were against the great weight and preponderance of the evidence on this issue. Given considerable effects of back injury, surgery, and residual effects prior to the fall at home, we cannot agree that the hearing officer's determination was in error.

We affirm the hearing officer's decision and order on all points appealed.

_____
Susan M. Kelley
Appeals Judge

CONCUR:

_____
Gary L. Kilgore
Appeals Judge

_____
Tommy W. Lueders
Appeals Judge