APPEAL NO. 992541

This appeal arises under the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq*. (1989 Act). On October 6, 1999, a contested case hearing (CCH) was held . The issues were:

1. Did Claimant [appellant] commute her Impairment Income Benefits [IIBS] pursuant to Section 408.128?

2. Who is the correct designated doctor?

3. Has Claimant reached maximum medical improvement [MMI], and if so, on what date?

4. What is Claimant's impairment rating [IR]?

With regard to those issues, the hearing officer determined that claimant had commuted her IIBS; that the correct designated doctor was Dr. T; and that claimant reached MMI on November 6, 1997, with an 11% IR as assessed by Dr. T, whose report was not contrary to the great weight of other medical evidence.

Claimant appealed, contending that she had not made a "knowing and voluntary" commutation of IIBS; that the Employee's Election for Commuted (Lump Sum) Impairment Income Benefits (TWCC-51) form that she signed contained "ambiguities and omissions"; that the correct designated doctor was Dr. MT; that she was not at MMI on November 6, 1997; and that another post-surgery examination "by the designated doctor is necessary to determine an appropriate date of MMI and [IR]." Claimant requests that we reverse the hearing officer's decision and render a decision in her favor. Respondent (carrier) responds to the points raised in claimant's appeal and urges affirmance.

DECISION

Affirmed.

The parties stipulated that claimant sustained a compensable (low back) injury (sweeping and mopping) on _____. An MRI performed on December 2, 1996, indicated a "2-3mm" disc bulge at L4-5 and a "3mm" disc bulge at L5-S1 with degenerative changes noted at both levels. Claimant was apparently being treated by Dr. G, who referred claimant to Dr. S. Dr. S, in a note dated July 7, 1997, commented that he "did not feel [claimant] . . . required surgery and that she should 'live with it.'" Claimant was subsequently examined by Dr. M, who, in a Report of Medical Evaluation (TWCC-69) and narrative, both dated September 8, 1997, certified claimant at MMI on that date with a seven percent IR. Dr. G checked on the TWCC-69 form that he disagreed with Dr. M's MMI certification and IR. The hearing officer notes that claimant disputed that rating as

reflected in a Dispute Resolution Information System (DRIS) note on September 22, 1997. This apparently lead to the appointment of Dr. T as the designated doctor.

Dr. T, on a TWCC-69 and narrative dated November 13, 1997, certified MMI on November 6, 1997 (the date she examined claimant), with an 11% IR "due to loss of range of motion and according to Table 49 [of the Guides to the Evaluation of Permanent Impairment, third edition, second printing, dated February 1989, published by the American Medical Association (AMA Guides)]. Dr. T noted various medical reports, including Dr. S's note, and commented that claimant's "condition is static and stable at the time of the final examination." Dr. G again disagreed with the rating, commenting that he believed claimant would require disc surgery and that, in his opinion, MMI had not been reached.

The DRIS notes reflect that claimant called the Texas Workers' Compensation Commission acknowledging receipt of Dr. T's report, and requested a series of advanced payments on her IIBS by filing Employee's Request for Acceleration of Impairment Income Benefits Interim (TWCC-46) and Request for Payment of Advanced Compensation (TWCC-47) forms. The DRIS notes indicate claimant received $1,963.00 on November 24, 1997; $900.00 on December 12, 1997; and another $750.00 on March 3, 1998. In evidence is a benefit review conference agreement dated January 2, 1998, where the parties agreed that claimant had disability from August 26 to November 6, 1997. The DRIS notes indicated that claimant called the Commission on April 27, 1998, disputing Dr. T's IR and was mailed a Request for Benefit Review Conference (TWCC-45) form.

Nonetheless, claimant completed and signed a (TWCC-51 on April 29, 1998, requesting a lump sum commutation of her IIBS based on Dr. T's 11% IR. The TWCC-51, in bold print, contained the warning that by taking a lump sum payment of IIBS, she would not be able to collect supplemental income benefits or "any additional income benefits." In the box in block 8, claimant checked "No" as to whether the IR had been disputed by claimant or carrier, but, in handwriting, wrote "Did not agree." Claimant stated on the form that she had returned to work on January 20, 1998, and had returned to work for at least three months at $230.00 per week. (Claimant's stipulated preinjury average weekly wage (AWW) was $227.92.) Claimant signed the form and, upon receipt of the TWCC-51 on April 29, 1998, carrier paid claimant an additional $534.00 for IIBS from May 1 through June 25, 1998. Claimant, at the CCH, testified that she was expecting about $2,000.00 in a lump sum but received only $534.00. (Claimant had apparently not considered all her prior advance payments.) A Payment of Compensation or Notice of Refused/Disputed Claim (TWCC-21) mailed to claimant on April 30, 1998, indicated that claimant had received a total of $5,264.82 in income benefits. Claimant subsequently filed a TWCC-45 disputing Dr. T's IR, which the DRIS notes indicate was received by the Commission on May 11, 1998.

Claimant seeks to avoid the commutation of IIBS because she had not made a "knowing and voluntary election." Claimant bases this on her testimony that she was in a

mentally fragile condition and had a methadone dependency problem. Claimant testified that from December 1997 through March 1999 she was pretty much "whacked out" and was "high" nearly all the time. Claimant testified that during this period she had lost custody of her minor son, as she was unable to care for him. Claimant testified that she had signed up with a temporary employment agency in January 1998 and had worked "some" when work was available. The hearing officer, in her Statement of the Evidence, commented that claimant's "testimony as to her mental state at the time she signed the document [the TWCC-51] and as to whether she knowingly and voluntarily signed the document was not persuasive."

Section 408.128(a) provides that an employee may elect to commute IIBS to which he is entitled in a lump sum payment "if the employee has returned to work for at least three months, earning at least 80 percent of the employee's [AWW]." Subsection (b) further provides that an employee who elects to commute IIBS "is not entitled to additional income benefits for the compensable injury." Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 147.10 (Rule 147.10) requires that the form to request a commutation of IIBS must state the date the employee reached MMI; the IR; and the amount of the weekly benefit. It must also "include a warning to the employee that commutation terminates the employee's entitlement to additional income benefits for the injury." The TWCC-51 was created for this purpose. In this case, although the stated date of MMI on the TWCC-51 is listed as November 5, 1997 (which is what Dr. T's narrative states), whereas November 6, 1997, was listed on the TWCC-69, we do not view that minor discrepancy, which is also in Dr. T's report, as invalidating the request for commutation. The contradiction where the claimant marked that the IR was not disputed and then wrote "did not agree" is an ambiguity for the hearing officer to resolve. That claimant did not agree with the IR does not necessarily mean that she was disputing it. Similarly, claimant, during the November 1997 through April 1998 time frame, was requesting, and accepting, advances based on Dr. T's 11% IR, while at the same time disputing or disagreeing with that same rating. It appears that claimant wants both the 11% IR in lump sum advances and then wants to dispute the same IR, which has been the basis of the lump sum advances. Claimant substantially complied with the requirement to commute by marking there was no dispute of the IR; that she had returned to work on January 20, 1998; and that she had returned to work for at least three months, earning $230.00 per week. Claimant then accepted the lump sum benefits, even though they were less than she had expected. As we discussed in Texas Workers' Compensation Commission Appeal No. 980829, decided June 10, 1998, and Texas Workers' Compensation Commission Appeal No. 951549, decided November 1, 1995, claimant was advised in bold print of the consequences of requesting a commutation, chose to proceed and accepted the benefits of that commutation. We will not require a carrier to go behind the TWCC-51 to determine whether the representations are accurate and whether claimant has any inconsistent intentions, absent fraud by the carrier. Claimant, on the TWCC-51, stated that she had not disputed the 11% IR and, even though perhaps not agreeing, claimant nonetheless initiated and accepted the benefits of the commutation. Claimant's methadone problem is not mentioned until a report dated January

11, 1999, where Dr. M mentions that claimant is taking methadone "10 mg three times a day." Carrier is not obligated to ascertain that claimant may have been "whacked out" or what drugs claimant may have been using. The hearing officer, who is the sole judge of the weight and credibility of the evidence (Section 410.165(a)), was not persuaded by claimant's testimony and we will reverse a factual determination of a hearing officer only if that determination is so against the great weight and preponderance of the evidence as to be clearly wrong and unjust. Cain v. Bain, 709 S.W.2d 175, 176 (Tex. 1986); Pool v. Ford Motor Company, 715 S.W.2d 629, 635 (Tex. 1986). Applying this standard of review to the record of this case, we decline to substitute our opinion of the credibility of the claimant for that of the hearing officer. The hearing officer's determination that claimant's IIBS were properly commuted in accordance with Section 408.128 and Rule 147.10 is supported by the evidence.

Claimant testified that she continued to have back pain but what, if any, treatment claimant was receiving in the latter part of 1998 is not clear. Dr. G, in a letter dated June 9, 1998, seems to request a second MRI and said that the December 2, 1996, MRI "demonstrated a 2mm herniated disc." Dr. G also asks for "a hearing on the claimant's MMI." Dr. G says MMI has not been reached "and will not be able to until spinal surgery has been performed." The parties agreed that statutory MMI (Section 401.011(30)(B)) was reached on December 1, 1998. At that time, no spinal surgery was scheduled or even contemplated other than Dr. G's comments that claimant would not reach MMI until spinal surgery was performed. Certainly, the second opinion spinal surgery process was not begun until March 1999.

Claimant was referred to Dr. M for reexamination and, in his report dated January 11, 1999, Dr. M notes "persistence of [claimant's] symptomology," suggests additional diagnostic tests "to determine the source of her symptoms" and a psychological evaluation. Dr. G referred claimant to Dr. P, who, in a report dated January 28, 1999, noted "opioid dependence with recent withdrawal from Methadone." Dr. P opined that nothing could be done until the opioid dependence has been resolved. Claimant testified that she entered into a drug rehabilitation program and, at some point, the second opinion spinal surgery process was begun. Claimant had spinal surgery on April 16, 1999. Dr. T, the designated doctor, in a letter dated June 17, 1999, sought to rescind her earlier MMI certification and IR, which she stated had been based on Dr. S's report that claimant "was not a surgical candidate." Dr. T notes the April 16, 1999, surgery, claimant's improvement following that surgery and suggests that another examination of claimant be performed. It is unclear, even to claimant, why Dr. MT was subsequently appointed as a second designated doctor to assess an IR only. Dr. MT, in a TWCC-69 and narrative dated July 19, 1999, certified MMI and assessed a 20% IR, explaining in detail how he arrived at that IR.

The hearing officer, in her Statement of the Evidence, commented:

> Surgery had not been recommended until January 1999, which is fourteen months after [Dr. T's] initial report and five months after Claimant would have reached statutory [MMI] [sic, the surgery was four and one-half months after the agreed-upon December 1, 1998, date of statutory MMI]. A recommendation for spinal surgery was not initiated until March 3, 1999, and surgery was on April 16, 1999. The report was not amended within a reasonable period of time and [Dr. T's] report of November 14, 1997, is entitled to presumptive weight. The great weight of the other medical evidence is not contrary and Claimant reached [MMI] on November 6, 1997, with an [IR] of 11%.

The hearing officer found that Dr. T was the correct designated doctor and that she had not timely amended her report. In Texas Workers' Compensation Commission Appeal No. 971770, decided October 23, 1997, the Appeals Panel set out at some length, with numerous case citations, the principles to be applied in determining whether a designated doctor's amendment of a prior report was effective, particularly in the context of what constituted a reasonable time to amend the report. Important to the analysis is the date of statutory MMI and the date when surgery came under active consideration. Texas Workers' Compensation Commission Appeal No. 990058, decided February 24, 1999. In this case, the hearing officer considered the time frames involved and made findings that the designated doctor did not amend her report within a reasonable period of time. We have held that a reasonable time may vary according to the facts of a particular case. Texas Workers' Compensation Commission Appeal No. 941168, decided October 14, 1994, and Appeal No. 971770, *supra*. Very clearly, surgery was not contemplated either when the designated doctor rendered her initial report in November 1997 or on the date of statutory MMI on December 1, 1998. In this case, the hearing officer found Dr. T was the designated doctor and accorded presumptive weight to her November 1997 report. We hold that the hearing officer's decision is sufficiently supported by the evidence.

Upon review of the record submitted, we find no reversible error and we will not disturb the hearing officer's determinations unless they are so against the great weight and preponderance of the evidence as to be clearly wrong or unjust. In re King's Estate, 150 Tex. 662, 244 S.W.2d 660 (1951). We do not so find and, consequently, the decision and order of the hearing officer are affirmed.

Thomas A. Knapp
Appeals Judge

CONCUR:

Joe Sebesta
Appeals Judge

Susan M. Kelley
Appeals Judge