APPEAL NO. 992956

This appeal is brought 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 December 9, 1999, with Will McCann presiding a hearing officer. The issues before him were what is the date of maximum medical improvement (MMI) and what is the respondent's (claimant) impairment rating (IR). The hearing officer determined that the claimant reached MMI on the date of statutory MMI and that the claimant's IR will be determined by the designated doctor based upon the outcome of the claimant's spinal surgery. The appellant (carrier) requested review; summarized the evidence; cited Appeals Panel decisions; contended that the claimant did not dispute the report of the designated doctor in a reasonable time; and requested that the Appeals Panel reverse the decision of the hearing officer and render a decision that the claimant reached MMI on July 18, 1997, with a five percent IR. The claimant responded, urged that he disputed the designated doctor's report in a reasonable time, and requested that the decision of the hearing officer be affirmed.

DECISION

We reform the decision of the hearing officer and affirm it as reformed.

The Decision and Order of the hearing officer contains a thorough statement of the evidence. Only a brief summary of the evidence will be included in this decision. The claimant injured his low back on _____. He was seen by several doctors, was treated conservatively, had a number of tests performed that did not reveal a cause for the severe pain of which he complained, and did not return to work. Dr. O examined the claimant at the request of the carrier. In a report dated May 5, 1997, Dr. O stated that there was considerable functional overlay; that there was nothing present to indicate that the claimant could not perform full duty; that range of motion (ROM) tests were invalidated; and that the claimant's IR was five percent for a specific disorder of the lumbar spine under 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). The claimant testified that he attempted to obtain the films from a 1996 MRI, but that the facility had closed and the films were not available to present to the designated doctor. In a report dated July 18, 1997, Dr. TP, the Texas Workers' Compensation Commission (Commission)-selected designated doctor, stated that the claimant had evidence of functional overlay and needed to learn to deal with the pain he had; reported that the claimant reached MMI on that day; invalidated ROM testing; and assigned a five percent IR for a specific disorder of the lumbar spine under Table 49 of the AMA Guides. In a Report of Medical Evaluation (TWCC-69) dated July 31, 1997, Dr. RP, the claimant's treating doctor at the time, stated that the claimant reached MMI on July 24, 1997, with a five percent IR. The claimant continued to have severe low back pain radiating into his legs and difficulty walking; he said that his condition became worse; and he did not return to work. In a report dated August 5, 1998, Dr. D reported that the claimant had classic radicular pain and classical findings of disc abnormality, probably at L5-S1; and that since

the 1996 MRI was not available, he recommended an MRI and an EMG. Those tests and a discogram were performed. In a report dated October 22, 1998, Dr. D stated that the discogram showed a disc herniation with pain provocation at L5-S1 and recommended a laminectomy, discectomy, and fusion at that level. Surgery was performed on February 13, 1999. The claimant testified that the surgery did amazing things for him and that he began working for another employer in October 1999. In a TWCC-69 dated October 13, 1999, Dr. D assigned a 15% IR consisting of 10% for a specific disorder of the lumbar spine, four percent for loss of ROM, and one percent for neurological deficit.

The 1989 Act and Commission rules do not specifically address amendment of a report by a designated doctor. Texas Workers' Compensation Commission Appeal No. 972233, decided December 12, 1997. All the specific facts and circumstances surrounding a case involving an amended report by a designated doctor must be evaluated. Texas Workers' Compensation Commission Appeal No. 970344, decided April 9, 1997. In Texas Workers' Compensation Commission Appeal No. 970885, decided June 26, 1997, the Appeals Panel cited several Appeals Panel decisions and stated that reasonable time considerations may vary according to the facts of a particular case. In Texas Workers' Compensation Commission Appeal No. 992849, decided February 3, 2000, surgery had been approved but not performed. The designated doctor amended his report about 19½ months after a surgeon had reported that the claimant's condition had deteriorated and that it was his impression that she had lumbar and cervical herniated discs; about 13 months after the surgeon's report that she had a herniated lumbar disc; and about 8 ½ months after the surgeon reported that cervical surgery had been reported. The Appeals Panel affirmed a determination that the designated doctor amended his report for a proper reason and within a reasonable time.

The carrier cited Texas Workers' Compensation Commission Appeal No. 981988, decided October 8, 1998. In that case, the only appealed issue was the date the claimant reached MMI. The Appeals Panel wrote:

> The process is not open ended and the parties have the right to expect and should work toward some finality at least as regards such basic concepts as MMI and IR on which so many significant downstream benefits depend. The claimant provided no explanation at the CCH as to why he disputed a date of MMI, first given by his treating doctor in a report of February 13, 1997, on January 30, 1998, after the Commission wrote him in March 1997 saying that only IR was in issue. He also did not question the Commission's second letter in March 1998 about a re-examination for IR only. In his appeal, he simply said that "his time and energies were better spent in recovering from that surgery." Since he did not testify at the CCH or otherwise produce evidence on his post-surgery course of recovery, there is no basis in the record from which we can judge this assertion. For this reason, even if we were to conclude that Dr. G did in fact amend his date of MMI in the second TWCC-69, we conclude that any such purported amendment was not done in a timely fashion.

The carrier also cited Texas Workers' Compensation Commission Appeal No. 980355, decided April 6, 1998. In that case, the Appeals Panel stated that in the absence of a Commission rule establishing a time in which a designated doctor may amend a certification of IR, it looked to the circumstances of individual cases; that in a case involving a substantial change of condition, the fact finder may look to when a discovery was made and the diligence used after discovery was made; that the case involved whether all of the claimant's impairment was included in the IR; that the designated doctor amended his report about three years after rendering his first report; and that the time that lapsed before the IR was amended was not reasonable.

In the case before us, the hearing officer wrote:

> In any event, given the specific facts of this case, it is determined that the Claimant disputed the findings of the designated doctor within a reasonable time. The objective findings of the examinations were against him, the doctors' opinions were against him, there was no valid diagnosis of his real problem, and there was no appropriate treatment. There was no way that the Claimant could have disputed the findings of the designated doctor until he found out what was wrong. As the Claimant's attorney pointed out, if the Claimant had disputed the findings of the designated doctor early on, the Claimant would inevitably have lost his case because there was then no evidence to support him. As soon as the Claimant completed successful surgery, he sought to dispute the findings of the designated doctor, and that equates to a "reasonable period."

The hearing officer is the trier of fact and is the sole judge of the relevance and materiality of the evidence and of the weight and credibility to be given to the evidence. Section 410.165(a). The trier of fact may believe all, part, or none of any witness's testimony because the finder of fact judges the credibility of each and every witness, the weight to assign to each witness's testimony, and resolves conflicts and inconsistencies in the testimony. Taylor v. Lewis, 553 S.W.2d 153 (Tex. Civ. App.-Amarillo 1977, writ ref'd n.r.e.); Texas Workers' Compensation Commission Appeal No. 93426, decided July 5, 1993. This is equally true regarding medical evidence. Texas Employers Insurance Association v. Campos, 666 S.W.2d 286 (Tex. App.-Houston [14th Dist.] 1984, no writ). The facts in the Appeals Panel decisions cited by the carrier are distinguishable from those in the case before us. We do not conclude that the hearing officer improperly applied the law to the facts. His factual determinations are not 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); Pool v. Ford Motor Co., 715 S.W.2d 629, 635 (Tex. 1986).

In a finding of fact, a conclusion of law, and the decision, the hearing officer stated that the IR will be determined by the designated doctor based on the outcome of surgery. We reform the finding of fact, conclusion of law, and decision to state that the designated doctor shall render an amended report and that the amended report of the designated doctor shall be used in determining the claimant's IR.

We reform the decision of the hearing officer and affirm it as reformed.

Tommy W. Lueders
Appeals Judge

CONCUR:

Thomas A. Knapp
Appeals Judge

Gary L. Kilgore
Appeals Judge