APPEAL NO. 000138

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 was held on January 4, 2000. Dr. C, the Texas Workers' Compensation Commission (Commission)-selected designated doctor, rendered three reports. The disputed issues of the date the appellant (claimant) reached maximum medical improvement (MMI) and her impairment rating (IR) centered on which of the reports of the designated doctor is entitled to presumptive weight. The hearing officer determined that a June 1997 report from Dr. C stating that the claimant reached MMI on October 18, 1996, with a nine percent IR is entitled to presumptive weight; that a report from Dr. C dated June 29, 1999, stating that the claimant reached MMI on June 17, 1999, or the date of statutory MMI, with a 22% IR is not entitled to presumptive weight; that the great weight of the other medical evidence is not contrary to the June 1997 report; and that the claimant reached MMI on October 18, 1996, with a nine percent IR. The claimant appealed; stated that the statement of the evidence in the Decision and Order of the hearing officer contains inaccuracies; alleged that the hearing officer did not adequately consider all of the evidence; indicated why she disagreed with seven findings of fact and two conclusions of law; and requested that the Appeals Panel reverse the decision of the hearing officer and render a decision that she reached MMI on December 27, 1997, the date of statutory MMI, with a 22% IR as certified by the designated doctor in his last report. The respondent (carrier) replied, urged that the evidence is sufficient to support the decision of the hearing officer, and requested that it be affirmed.

DECISION

We reverse and remand.

The hearing officer made the following findings of fact and conclusions of law:

FINDINGS OF FACT

2. [Dr. C] issued a TWCC-69 [Report of Medical Evaluation] in October, 1996, assigning a date of [MMI] of October 18, 1996, and an [IR] of 15%.

3. In June, 1997, [Dr. C] corrected his assigned [IR] to 9%.

4. The date of statutory [MMI] is December 21, 1997.

5. Claimant's back surgeries were necessitated by degenerative disc disease.

6. There was not a substantial change in Claimant's condition between October, 1996 and January 21, 1999, when Claimant first requested review of the designated doctor's assignment of [IR] and [MMI].

7. There was not a mis-diagnosis of Claimant's condition which would allow an amendment of the originally-assigned [IR] and date of [MMI].

8. Claimant did not file her dispute of the Designated Doctor's [IR] and date of [MMI] within a reasonable time.

9. [Dr. C's] TWCC-69 of June 29, 1999 is not entitled to presumptive weight.

10. [Dr. C's] amended TWCC-69, dated October 24, 1996, but filed with the Commission on June 20, 1997, is entitled to presumptive weight.

11. The 9% [IR] and the October 18, 1996 date of [MMI] found by the Designated Doctor, [Dr. C], are not contrary to the great weight of the other medical evidence.

CONCLUSIONS OF LAW

3. The date of [MMI] is October 18, 1996.

4. Claimant's [IR] is 9%.

The claimant appealed Findings of Fact Nos. 5 through 11 and Conclusions of Law Nos. 3 and 4.

The statement of the evidence in the Decision and Order of the hearing officer contains a brief statement of the evidence; a discussion of law; and a statement that even though all of the evidence presented was not discussed, it was considered. The claimant contended that the hearing officer did not consider all of the evidence. In Texas Workers' Compensation Commission Appeal No. 94121, decided March 11, 1994, the Appeals Panel stated that the 1989 Act does not require that the Decision and Order of the hearing officer include a statement of the evidence and that omitting some of the evidence from a statement of the evidence did not result in error. A statement of the evidence in the Decision and Order should fairly and accurately summarize the evidence. A brief statement of the evidence presented by both parties often precludes appeals stating that the evidence was not fairly summarized. The Appeals Panel has previously commented on both parties offering and having admitted into evidence some of the same medical reports. That practice should be avoided. The facts that the record contains numerous medical records and that the hearing officer rendered a decision the day after the hearing alone do not indicate that the hearing officer did not consider all of the evidence as he stated in his Decision and Order. While the summary of the evidence in the Decision and Order is brief, it does not indicate error.

A Decision and Order of another hearing officer indicates that the compensable injury sustained on _____, includes an injury to the claimant's lower back. In a TWCC-69 dated October 24, 1996, Dr. C certified that the claimant reached MMI on October 18, 1996, with a 15% IR. In attachments to the TWCC-69, Dr. C stated that the

claimant had transposition of the ulnar nerve at the right elbow; that the ulnar nerve problems were resolved; that the claimant was diagnosed with major depression; that the depression remained unresolved; that a May 30, 1996, report of an MRI was "normal"; that the back pain remained unresolved; that she was pregnant and off medication; that the claimant had reached MMI, however she can improve further with appropriate treatment; that he assigned seven percent impairment for the upper extremity and seven percent for loss of lumbar range of motion (ROM); that the combined values chart resulted in a 14% IR; and that he rounded the IR to the nearest five percent and assigned a 15% IR. At the request of the carrier, Dr. P reviewed the records of the claimant and in a letter dated November 10, 1996, stated his disagreement with the report of Dr. C. On June 13, 1997, a Commission dispute resolution officer sent Dr. P's letter to Dr. C and asked him to review it, decide if he changes his opinion, and to explain why he did or did not change his opinion. In an undated response that was received by the Commission on July 9, 1997, Dr. C said that he changed the impairment for loss of lumbar ROM to eight percent, withdrew the impairment for loss of hand ROM, assigned one percent for sensory loss for the right upper extremity, and assigned a nine percent IR.

The report of the MRI dated May 30, 1996, states that the lumbar discs were of normal height and signal intensity; that there was no evidence of lumbar herniation or any form of degenerative process of the lumbar discs; that the lumbar spinal process was widely patent; that there was no evidence of a bony destructive process; and there was a normal MRI evaluation of the lumbar spine and spinal canal. A psychiatric evaluation dated June 18, 1996, includes the diagnosis of major depression and chronic pain syndrome. A report dated June 19, 1996, indicates that trigger point injections were planned. In a letter to the carrier dated August 21, 1996, Dr. MS, a psychologist, stated that the claimant needed continued psychological treatment. A September 25, 1997, report of an MRI of the lumbar spine revealed degeneration of the L4-5 and L5-S1 discs with decreased signal, but no significant loss of disc height; marrow bulging at L2-3 and L5-S1, but no localized disc protrusion or spinal stenosis or nerve root impingement. A report of a lumbar discogram and CT scan dated April 24, 1998, indicated an annular tear at L4-5 and results suggesting degeneration of the entire posterior margin of the annulus and extravasion of contrast into the epidural space near the midline. On September 28, 1998, Dr. JS performed fusions at L4-5 and L5-S1. A pathology report dated September 30, 1998, on disc material states fibrohyalin cartilage with extensive myxoid degeneration and clumping of chondocytic nuclei and a diagnosis of intervertebral disc material with marked chondromalacia.

The claimant testified that she had low back pain after she was assaulted in December 1996, that she became pregnant and had to stop taking pain medication, that her child was born in April 1997, that she breast-fed the child and could not take medication while she was so doing, that her pain became so severe that she stopped breast-feeding her child, that in 1998 her pain became worse, that she had a positive discogram in April 1998, and that she started taking more medication during the summer of 1998. She said that she had some psychiatric treatment before the December 1995 injury, that she did not receive any psychiatric treatment for about a year before the injury, and that after the assault she had post-traumatic stress syndrome. On some unidentified date, the claimant sent an e-mail to the Research and Oversight Council on Workers' Compensation asking about disputing the nine percent IR of Dr. C. In a letter dated September 29, 1998, a

director of a division at the Commission responded to that e-mail; advised the claimant that she had the right to dispute Dr. C's report assessing nine percent; and said that there was no specific time frame to comply with to dispute the report. In a letter to the Commission dated January 21, 1999, the claimant presented unidentified material and requested review of the date she reached MMI and her IR. She testified that after the surgery she had home health care for about four months, that it was several months before she was able to do much, that she obtained material, and that she sent the letter. She said that a benefit review conference was held on March 5, 1999; that it was agreed that she would see the designated doctor again; that a letter was sent to the designated doctor on March 15, 1999; and that she saw the designated doctor on June 17, 1999. In a TWCC-69 dated June 29, 1999, Dr. C certified that the claimant reached MMI on June 17, 1999, or the date of statutory MMI, with a 22% IR. Attachments to the TWCC-69 indicate that the IR included 11% for a specific disorder of the lumbar spine, seven percent for loss of lumbar ROM, and five percent for depression. In a letter dated July 29, 1999, Dr. P stated his disagreement with the amended report of Dr. C; his letter was sent to Dr. C; and Dr. C did not change his June 1999 report.

A designated doctor may amend a report for a proper reason within a reasonable time. Texas Workers' Compensation Commission Appeal No. 981773, decided September 17, 1998. The burden of proof is on the party who advocates that the amendment was made for a proper reason and within a reasonable time. Texas Workers' Compensation Commission Appeal No. 992849, decided February 3, 2000. A proper reason and reasonable time depend on the circumstances of individual cases. Texas Workers' Compensation Commission Appeal No. 970885, decided June 26, 1997. In Appeal No. 970885, the Appeals Panel stated that subsequent surgery alone may not be a sufficient basis for a designated doctor to amend a report and that consideration should be given to significant, new, previously unavailable medical evidence and lack of knowledge at the time of assessment of significant information concerning impairment. *Also see* Texas Workers' Compensation Commission Appeal No. 970954, decided July 7, 1997, and Texas Workers' Compensation Commission Appeal No. 992133, decided November 17, 1999, concerning consideration of surgery and statutory MMI.

The hearing officer made findings of fact that there was not a substantial change of the claimant's medical condition and that there was not a misdiagnosis of her medical condition. Those are factors that the Appeals Panel has considered in cases concerning whether the first certification of MMI and IR became final under the provisions of Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 130.5(e) (Rule 130.5(e)). In its response to the claimant's appeal, the carrier cited Texas Workers' Compensation Commission Appeal No. 972731, decided February 11, 1998, a case involving Rule 130.5(e). Findings of Fact Nos. 6 and 7 are not dispositive of the question of amending for a proper reason.

The hearing officer also found that the claimant did not dispute the second report of the designated doctor in a reasonable time. That finding of fact has legal consequences and is more in the nature of a conclusion of law. *See* Texas Workers' Compensation Commission Appeal No. 970876, decided June 27, 1997. He did not make a finding whether Dr. C amended his report within a reasonable time or other findings of fact concerning reasonable time. Finding of Fact No. 8 is not dispositive of the question of

whether the designated doctor amended his report in a reasonable time. In his statement of the evidence, the hearing officer stated that the 90-day rule does not apply to reports of designated doctors. But his statement that she knew in June 1997 that the nine percent IR did not include a rating 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, and did not inquire about challenging the IR until over a year later and did not challenge the IR until one and one-half years later are not sufficient to indicate that he properly considered reasonable time criteria. Necessary underlying findings of fact may not be inferred from the hearing officer's statement of the evidence.

We reverse the decision and order of the hearing officer and remand for him to make findings of fact and conclusions of law to resolve the disputed issues before him. Pending resolution of the remand, a final decision has not been made in this case. However, since reversal and remand necessitate the issuance of a new decision and order by the hearing officer, a party who wishes to appeal from such new decision must file a request for review not later than 15 days after the date on which such new decision is received from the Commission's Division of Hearings, pursuant to Section 410.202. *See* Texas Workers' Compensation Commission Appeal No. 92642, decided January 20, 1993.

Tommy W. Lueders
Appeals Judge

CONCUR:

Stark O. Sanders, Jr.
Chief Appeals Judge

Dorian E. Ramirez
Appeals Judge