APPEAL NO. 000179

This appeal arises 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 21, 1999. The issues involved whether the appellant, _____, who is the claimant, reached maximum medical improvement (MMI), and, if so, what date; and the proper impairment rating (IR) to be assigned for his compensable injury of _____.

The hearing officer held that the claimant's IR was 10%, in accordance with the report of the designated doctor, which had not been overcome by the great weight of the contrary medical evidence, and that he reached MMI on May 22, 1996. Because the essence of the hearing had to do with whether these matters could be reviewed and revised over two years after statutory MMI would have been reached (in the absence of the earlier certification), the hearing officer also made findings as to whether revising the IR would be proper, and determined it would not.

The claimant appeals, arguing that while statutory MMI is a "useful guide" as to whether to reevaluate an IR, it should not be applied as an absolute time limitation. The claimant argues (but does not cite statutory or case law authority) that he should be entitled to have his IR reviewed after surgeries that took place after MMI. The respondent (carrier) responds that the IR and MMI cannot be revisited nearly two years after statutory MMI was reached, and numerous cases are cited in support.

DECISION

Affirmed.

The claimant was operating heavy equipment on _____, when it fell off a mountain, overturning several times in the process. Among other injuries, he had a low back injury. It was stipulated that the date statutory MMI would have occurred (in the absence of an earlier certified date) was March 11, 1997.

Dr. D was claimant's treating doctor. Claimant was treated by Dr. D with physical therapy, and Dr. D also diagnosed a closed head injury. Dr. D's assigned IR was 52%, with an MMI date of May 22, 1996. Forty-five percent of this was due to "impairment secondary to memory loss from closed head injury." Dr. D commented that an April 1995 lumbar MRI showed degenerative disc disease with an associated protrusion at L4-5 that did not impinge. Dr. D understood that claimant had a loss of consciousness when his accident happened. This was disputed by a consultant for the carrier, who reviewed records on June 4, 1996, and noted that the initial medical reports showed that claimant had not lost consciousness but was alert and oriented. Hospitalization after the accident showed no documentation of disorientation or confusion. The consultant questioned whether documented cognitive problems by Dr. D and an earlier doctor stemmed from the compensable injury, when the degree of diagnosed problems would certainly have been observed when claimant was hospitalized after the injury.

The claimant was examined by Dr. S, the designated doctor, on July 29, 1996, and his past medical treatment was recited. It was noted that MRIs of the cervical and lumbar area showed degenerative disc disease with no herniation. He had bilateral carpal tunnel syndrome per EMG testing. His CT scan of the head was normal. Claimant's belief that he could "never" work again was noted; he was 51 on the date of this examination. Pain behavior was noted. Dr. S also observed that while claimant used a walker to walk, his body mechanics were such that the walker offered no true support and he actually had to use more strength to ambulate effectively and safely. Muscle testing was normal. Sensory testing reported bilateral lower extremity numbness which appeared nonphysiological. Examination of the spine showed only some diffuse tenderness, with many areas not tender. Seated and supine straight leg raising were not consistent. She documented childhood trauma due to his family. Dr. S assigned a five percent IR but noted that she did not have complete records on neuropsychological testing or evaluations.

On August 30, 1996, after receipt of such documents, Dr. S revised her IR to 10%. The doctor opined that decreased concentration and attention were due to depression and anxiety. The carrier accepted the 10% IR and paid impairment income benefits (IIBS) based on this; there is no indication in the record that any dispute over this IR versus that of Dr. D was activated.

The records in the file show that claimant eventually was treated by Dr. SM, who in April 1998 ordered MRIs. A May 2, 1998, lumbar MRI showed no significant marrow replacing lesion. The only level where anything reportable was found was at L4-5, where a left-sided protrusion was noted with some encroachment, characterized as "mild narrowing" of the left neural foramen.

A cervical MRI of the same date found a broad-based protrusion with some encroachment at C6-7. Claimant had lumbar surgery at L4-5 on July 28, 1998. On October 21, 1998, Dr. SM documented that claimant had only occasional pain and had had an excellent result. On January 13, 1999, Dr. S noted only occasional pain radiating into the left leg. His back was noted to be "doing great." A month later, the pain was noted to be "quite a bit" and Dr. SM described the reported radiation upward into the neck as an unusual presentation. A repeat MRI was done, and Dr. SM noted in March 1999 that there was foramina stenosis at L4-5, possibly due to recurrent herniation. A second surgery was performed on August 17, 1999. Ten days later, Dr. SM noted that the pain after surgery was the same as before. On November 17, 1999, Dr. SM said that an MRI of the neck showed a very large herniation at C6-7 and surgery was suggested.

Generally, the decisions of the Appeals Panel have allowed greater ability of an injured worker's IR to be reevaluated up to the point of the maximum allowable date that MMI can be found. This limit of 104 weeks after the date of injury is part of the definition of MMI set out in Section 401.011(30)(B). Although the claimant portrays MMI as a "useful guideline," it is plainly a bit more than that. It marks the demarcation point, by the express terms of the 1989 Act, at which temporary income benefits (TIBS) entitlement ceases (even

though an injured worker may still have disability) and at which IIBS accrue. Sections 408.102(a) and 408.121(b).

The fact that the legislature intended this to be so is demonstrated by a subsequent amendment to the 1989 Act, Section 408.104, which expressly provided for limited circumstances under which the date of MMI could be extended by order of the Texas Workers' Compensation Commission (Commission) beyond the 104 week "statutory" maximum due to spinal surgery. This amendment, applicable in certain limited circumstances, would not have been necessary had the already-existing MMI maximum date been intended as a mere "guideline" rather than an absolute cutoff. The only benefits held open potentially throughout the course of a lifetime are medical. While the Appeals Panel is not unsympathetic to those situations where the sequelae of an injury extend several years beyond the expiration of the TIBS period, the means by which this situation may be addressed is more properly legislative, rather than adjudicative.

From the records presented, it does not appear that claimant was considered a surgical candidate until three years after his injury and nearly three years after he was certified as having reached MMI, which certification does not appear to have been disputed. In addition, as the hearing officer noted, statutory MMI was over a year in the past at the time of the first surgery. Resolution of an IR cannot be indefinitely deferred to await all the effects of an injury and resultant surgery. Texas Workers' Compensation Commission Appeal No. 980999, decided June 29, 1998. It is clear from claimant's position that he wishes the records of both lumbar surgeries sent to Dr. S for incorporation into his IR, with perhaps any future cervical surgery evaluated as well. We do not find that the 1989 Act supports such a course of action at the level of the Commission, and whether such a request would be supported in judicial review would be subject to Section 410.307, which may or may not cover a situation, as here, where the designated doctor's IR upon which IIBS were based was not shown to result from a CCH adjudication of any dispute over the designated doctor's opinion.

We cannot agree that the designated doctor's opinion, apparently undisputed at the time, is now overcome by a great weight of contrary medical evidence pertinent to the time that MMI was certified.

We affirm the hearing officer's decision and order.

Susan M. Kelley
Appeals Judge

CONCUR:

Philip F. O'Neill
Appeals Judge

Dorian E. Ramirez
Appeals Judge