APPEAL NO. 000203

This appeal arises pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act). In Texas Workers' Compensation Commission Appeal No. 992133, decided November 17, 1999, we reversed the decision of the hearing officer which afforded statutory presumptive weight to the first report of the designated doctor on the issues of maximum medical improvement (MMI) and impairment rating (IR) and remanded for further consideration of whether the designated doctor's amended report was done in a reasonable period of time. The hearing officer, convened a hearing on remand and issued a decision and order in which he found that the claimant reached MMI on August 14, 1996, with a 10% IR as certified in the first report of the designated doctor. The claimant appeals, expressing his disagreement with these determinations. The respondent (carrier) replies that the decision is correct, supported by sufficient evidence, and should be affirmed.

DECISION

Reversed and a new decision rendered that no decision has been made in this case.

The pertinent background facts and applicable law are contained in Appeal No. 992133, in which it stated as follows in relevant part:

> [T]he claimant sustained a compensable low back injury on _____. He was treated conservatively by Dr. S, who certified MMI as of August 14, 1996, and assigned a 10% IR. This certification was timely disputed and Dr. F [Dr. F] was selected and appointed by the Texas Workers' Compensation Commission (Commission) as designated doctor. On October 7, 1996, Dr. F completed a TWCC-69 [Report of Medical Evaluation] in which he also certified MMI as of August 14, 1996, and assigned a 10% IR consisting of eight percent for a specific disorder of the lumbar spine and two percent for loss of range of motion (ROM). In a discussion section of his report, Dr. F commented that Dr. S had not recommended surgery but that, in Dr. F's opinion, the claimant "meets certain criteria regarding consideration for disc replacement surgery and a fusion, i.e., spondylosis." He also noted "significant pain behavior." Dr. F concluded his report by saying he "spent an amount of time with the patient discussing various treatment options." He concluded that surgery was not an option at that point, presumably because of the pain behavior and the claimant's "return to job focus which shows expectations which may not be met, even should he undergo surgery."
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> Dispute Resolution Information System (DRIS) contact data reflect that on November 8, 1996, the effect of Dr. F's certification was explained to the claimant, and on March 25, 1997, after impairment income benefits based on a 10% IR had expired, the claimant inquired about supplemental income

benefits (SIBS). He was told he would have difficulty changing his IR to the minimum 15% to be eligible for SIBS. At this point, he apparently began the process to change treating doctors to Dr. V. The spinal surgery approval process was begun around September 1997 and, according to the claimant, on November 18, 1997, Dr. V performed a fusion at L4-5 and L5-S1.[1]

The parties stipulated that statutory MMI pursuant to Section 401.011(30)(B) was reached on February 17, 1998.

On January 5, 1999, Dr. V completed a TWCC-69 in which he certified MMI as of December 21, 1998, and assigned a 15% IR, consisting of 12% for a specific disorder of the spine and surgery; two percent for loss of ROM, and one percent for neurological deficit. A DRIS entry discloses that on January 11, 1999, the claimant called the Commission to ask if Dr. V had sent his TWCC-69 to the Commission for review by Dr. F. An entry of January 29, 1999, reflects that the claimant came to the Commission because his union told him it was up to the Commission to obtain medical evidence to dispute Dr. F's report. He was advised that it was his responsibility to obtain his evidence and request a dispute. On February 2, 1999, he requested a dispute of Dr. F's certification. Apparently at the end of March 1999, the Commission sent Dr. F a copy of Dr. V's TWCC-69 and asked Dr. F to review this information. On April 12, 1999, Dr. F completed a new TWCC-69 in which he certified MMI as of that date and assigned a 15% IR. In this report, Dr. F "rescinded" his first report. The 15% IR consisted of 10% for a specific disorder and five percent for loss of ROM. It was the claimant's position that this second report should be given statutory presumptive weight with, presumably, a statutory date of MMI. *See* Section 408.125(e).

Much effort was spent at the CCH [contested case hearing] discussing what the claimant did in the two and one-half years between Dr. F's two reports to speed the process along. The claimant testified essentially that he was told by a Commission official that he could not dispute Dr. F's 10% IR, but only Dr. S's first certification.

The fundamental legal concept to be applied in this case is that a designated doctor may submit an amended report for a proper reason in a reasonable amount of time. A report amended in compliance with this principle is entitled to presumptive weight and the Commission is to base its determination of MMI and IR on the amended report unless the great weight of the other medical evidence is to the contrary. Sections 408.122(c) and 408.125(e).

[1]The first record of Dr. V in evidence is dated March 20, 1998.

The parties agreed that the amendment in this case was for a proper reason, that is, surgery after the designated doctor's initial report and before statutory MMI. The purpose of the remand was for the hearing officer to reconsider his determination that the amendment was not done in a reasonable amount of time. We advised the hearing officer in undertaking this analysis that the proper focus was not simply the elapsed time between the first and the amended reports, but on the following significant events: (1) active consideration of surgery;[2] (2) the date of the surgery (November 18, 1997); (3) the date of statutory MMI (February 17, 1998); and (4) the date of the amended report (April 12, 1999). These milestones were to be considered in terms of "what circumstances existed that might have had a bearing on the claimant's actions to obtain an amended report." The claimant had the burden of proving that the report was amended in a reasonable amount of time. Appeal No. 992133 *supra*.

The claimant again testified about his efforts to change treating doctors and what he believed was the wrong information he received from the Commission about getting his IR changed. He also testified to some confusion on his part about whether he had to develop the evidence to raise a challenge to the first report or whether the Commission on its own would do this.[3] The hearing officer made several findings of fact which stated the dates on which various actions occurred and one finding which simply stated that the report was not amended in a reasonable period of time.[4] Finding of Fact No. 9. The hearing officer provided the following sole explanation for this conclusion in his discussion of the evidence:

> There are no evidentiary facts or circumstances, in this case, that can account for or excuse a delay of 14 months, between statutory MMI and the amendment of the designated doctor's TWCC-69. The designated doctor did not amend his original TWCC-69 in a "short period of time," "fairly soon," or in a reasonable period of time. The attempt to change an [IR], some 14 months after statutory MMI is a violation of the spirit, if not the letter, of the [1989 Act].

As noted above, the purpose of the remand was for the hearing officer to consider certain pivotal dates and the circumstances of what was or was not done by the claimant in the time surrounding these dates to determine if the delay in issuing the amended report was reasonable. This determination cannot be made simply by focusing on the elapsed time between dates. The hearing officer should have considered how much of the time elapsed is attributable to the claimant and not just the total amount of time elapsed. *See* Texas Workers' Compensation Commission Appeal No. 990659, decided May 12, 1999. Nonetheless, in the decision and order on remand, the hearing officer again just looked to

[2]We note the phrase "active consideration" appears in well over 50 decisions of the Appeals Panel.

[3]In Appeal No. 992133 we wrote that it was not solely up to the Commission "to create the opportunity for a timely amendment of a designated doctor's report, but rather believe that he had some significant responsibility to present facts in a timely fashion to the Commission that would give it cause to make further inquiries of the designated doctor."

[4]Two and one-half years elapsed between the first and second reports of the designated doctor.

elapsed time, this time between statutory MMI and the amended report. In doing so, he ignored DRIS notes which reflected a call to the Commission on January 11, 1999, from the claimant about his IR and an entry for February 2, 1999, which reflected that the Commission added an issue of a dispute of the designated doctor's IR. No accounting of these activities was made by the hearing officer in his decision and order. Nor does the hearing officer appear to consider the fact that the claimant underwent fusion surgery. Under these circumstances, we conclude that a proper and sufficient determination of MMI and IR has not been made.

Lacking statutory authority for any further remands, we reverse the decision of the hearing officer and render a decision that the issue before the hearing officer has not been resolved. Texas Workers' Compensation Commission Appeal No. 980502, decided April 15, 1998; Texas Workers' Compensation Commission Appeal No. 93992, decided December 13, 1993; Texas Workers' Compensation Commission Appeal No. 93902, decided November 19, 1993; and Texas Workers' Compensation Commission Appeal No. 93323, decided June 9, 1993. The parties are free to reinitiate dispute resolution proceedings.

Gary L. Kilgore
Appeals Judge

CONCUR:

Tommy W. Lueders
Appeals Judge

DISSENTING OPINION:

I respectfully dissent. The majority opinion is premised on the conclusion that the hearing officer merely looked to the elapsed time in this case until the amended report and considered it too long and thus, unreasonable. Unfortunately, the findings of fact and discussion in the decision do not give much confidence that the hearing officer considered anything besides the elapsed time and declined to go into what the claimant actually did to create some momentum toward an amended Report of Medical Evaluation (TWCC-69).

Nonetheless, I believe that the real basis for his decision and order was that the claimant simply failed to meet his burden of proof. I would interpret his comment that the attempt to change the impairment rating "some 14 months after statutory MMI [maximum medical improvement]" is meant to reflect only the evidence and not an impermissible standard that

delay in itself, regardless of the reasons, can be sufficient to support a finding that the amendment was not done in a reasonable amount of time. I would affirm.

_____
Alan C. Ernst
Appeals Judge