

APPEAL NO. 000462

This appeal arises pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act). On February 11, 2000, a hearing was held. The hearing officer determined that respondent's (claimant) impairment rating (IR) is 18% as set forth by the designated doctor, Dr. C. (An issue of maximum medical improvement (MMI) was determined by stipulation which said that statutory MMI was reached on June 12, 1997.) Appellant (carrier) asserts that no proper reason was shown for amending the designated doctor's first opinion, adding that it did not argue that there is a timetable or deadline for amending and that claimant did not show there is a compelling reason to change her IR. The appeals file contains no reply from claimant.

DECISION

We reverse and remand.

Claimant testified that on _____, she was packing orders when she moved a box, which she estimated to be 70 pounds, and felt a stabbing sensation in her low back. Claimant said that she saw a company doctor, Dr. H, but did not say for how long or describe her treatment. Claimant then said that since June 11, 1997, she has been treated by Dr. A. She described having received treatment consisting of three steroid shots, physical therapy, and work hardening. When any of these treatments occurred or by whom was not stated. (Claimant also referred to seven steroid shots after surgery, but surgery is a very recent development which will be touched upon later.) She said she was referred by Dr. A to Dr. Ch in December 1998; she did not refer to any consideration of surgery prior to that time. Dr. Ch performed a laminectomy on claimant in May 1999.

The earliest medical record in evidence is the first report of the designated doctor, Dr. C. Carrier provided that report; it reflects an examination on March 9, 1998, with an IR provided of 10%. Otherwise, the earliest medical report in the record is dated November 20, 1998.

As stated, the parties stipulated that statutory MMI was reached on June 12, 1997. Claimant had begun treatment with Dr. A one day before statutory MMI. Dr. C first examined claimant nine months later on March 9, 1998; his report contains no reference to surgery, the process for approving surgery, or even that surgery had ever been mentioned. Of course, Dr. C's report says very little, mentioning nothing of medical treatment provided or medical records he reviewed.

The first record in evidence from Dr. A, dated November 20, 1998, says that claimant "remains about the same as last reported"; as stated, no records precede this so what was "last reported" is unknown. Dr. A also said that claimant's "low back hurts on the right side," with radiation into the right leg, with numbness, and difficulty standing for long periods; but he said she can sit for extended periods. On November 24, 1998, Dr. A said that claimant "remains about the same." On December 4, 1998, Dr. A said that claimant's "overall condition is stable," after saying that her low back pain is "slightly improved." There

is no referral or mention of referral from Dr. A to Dr. Ch in the record of hearing, but on December 14, 1998, Dr. Ch wrote to Dr. A saying he had examined claimant on that day. He refers to claimant having had an MRI in June 1995 (two years before statutory MMI), and that she worked until March 1996. At the end of his letter, Dr. Ch again referred to the 1995 MRI, as showing "degeneration," and said that a discogram should be done. Dr. Ch had commented that claimant's radiculopathy "occurs occasionally" and that claimant "would like more complete relief" than provided by manipulation and electrical stimulation. Dr. Ch says that claimant reported that her pain has become "much worse" since "that first episode" (Dr. Ch's descriptions of events would appear to indicate that the "episode" relates to the injury in _____). There is no comment about claimant's condition relative to events on or since June 12, 1997.

On February 23, 1999, Dr. Ch wrote that the discogram showed "disease from L3 to S1," but also referred to pain at the L4-5 level. He said surgery should be performed at the L4-5 level but added, "[s]he may need further surgery in the future from the other disk abnormalities. . . ." Surgery at L4-5 was done on May 5, 1999. Dr. C examined claimant on November 18, 1999, and said that her IR was 18%; his report contained approximately the same amount of detail as his earlier report.

The hearing officer appears to state in his opinion that the standard concerning when an IR should be assigned is not set by statute and should be discretionary; he says that no rule has imposed any deadline on amending the designated doctor's opinion.

The hearing officer did not discuss Section 408.123 which says that "[a]fter an employee has been certified by a doctor as having reached [MMI], the certifying doctor shall evaluate the condition of the employee and assign an [IR]. . . ." It is true that the above quote does not say that the IR will be assigned that day, but the language does not appear to contemplate an extended period of time between the two. That language certainly does not say that after MMI has been reached, an IR will be assigned "in the future as necessary to reflect medical treatment or changes in the IR." While IR affects income benefits, the above language may be compared to the language chosen in the statute to define medical benefits. Section 408.021 shows that the legislature can describe an open-ended benefit when it wishes to; health care is provided for an injury "as and when needed."

The Appeals Panel has interpreted Section 408.123 to allow some latitude in assigning an IR after MMI is reached. See Texas Workers' Compensation Commission Appeal No. 94492, decided June 8, 1994; Texas Workers' Compensation Commission Appeal No. 950861, decided July 12, 1995; and Texas Workers' Compensation Commission Appeal No. 960960, decided July 3, 1996. These, and many more opinions, allow the amending of a designated doctor's opinion for a proper reason and in a reasonable period of time, with Appeal No. 960960 adding that consideration of an amendment "after surgery" should be "when compelling circumstances" are present. These provisions do not and have not established a "timetable." See Texas Workers' Compensation Commission Appeal No. 990910, decided June 11, 1999, which, citing Texas Workers' Compensation Commission Appeal No. 971770, decided October 23,

1997, said that there was no time limit in the statute or rules for disputing a designated doctor's report. Appeal No. 990910, *supra*, remanded for factual determinations concerning the medical evidence relative to the first report and second report of the designated doctor; that opinion also said that statutory MMI was not a factor in that case, and it touched on the development of the "proper reason-reasonable time" question which is applied to amendments of an earlier determination.

While we agree that there are no time limits in the 1989 Act and the rules for amending a designated doctor's report, that does not equate to no guidance having been provided. As stated, Section 408.123 provides for a sequence of events in MMI and IR which the Appeals Panel has said does not amount to a "snapshot" of the IR at the time of MMI; however, in providing for compelling circumstances to be present in determining whether there is a proper reason in a reasonable time to amend, the Appeals Panel has not said that Section 408.123 provides an open-ended opportunity to change the IR at any time in the future; compare to medical benefits which are open-ended so long as necessary and tied to the injury. In addressing IR, Section 408.123 cannot be ignored just because an opinion of a designated doctor is also involved.

The hearing officer made no findings of fact concerning whether there was a proper reason or compelling circumstances for changing the IR. No finding was made as to whether surgery was being contemplated at the time statutory MMI was reached or even at the time of the first examination by the designated doctor which occurred subsequent to statutory MMI. No finding was made as to whether claimant underwent a change of condition subsequent to statutory MMI and if so, whether that change was substantial. Upon remand, findings of fact should address these points. The hearing officer may develop the evidence further if necessary to make the findings of fact addressed.

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 Texas Workers' Compensation Commission's Division of Hearings, pursuant to Section 410.202. See Texas Workers' Compensation Commission Appeal No. 92642, decided January 20, 1993.

Joe Sebesta
Appeals Judge

CONCUR:

Robert W. Potts
Appeals Judge

DISSENTING OPINION:

The Appeals Panel has stated that a designated doctor's report may be amended for a proper reason and in a reasonable amount of time. The hearing officer, in his decision, clearly considered the reason for the designated doctor's amendment of his report, as well as the timing of the amendment. We have held in a number of cases that surgery can be a proper reason for a designated doctor amending his report. As far as a reasonable amount of time is considered, I believe the hearing officer addressed this matter as follows in the portion of his decision labeled "Discussion":

If it should be determined on appeal that the hearing officer should decide whether to impose a deadline in this particular case, rather than as a rule of general applicability, the hearing officer would find that the policy interest in favor of the finality of the original impairment rating [IR] from [Dr. C] is outweighed by the policy interest in favor of assigning Claimant an [IR] that accurately reflects Claimant's impairment from her _____ injury. The hearing officer would find and conclude that the certification by [Dr. C] that Claimant reached maximum medical improvement with an 18% whole body [IR] was timely.

In light of the hearing officer's discussion, I believe that a remand for further findings is unnecessary. With no basis to overturn the decision of the hearing officer as a matter of law, I would affirm the decision and order of the hearing officer.

Gary L. Kilgore
Appeals Judge