

## APPEAL NO. 000554

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 February 2, 2000. The issues at the CCH were the date of maximum medical improvement (MMI) and the impairment rating (IR). The hearing officer determined that the appellant (claimant) reached MMI on January 1, 1998, with a seven percent IR, as certified by the designated doctor, Dr. A, on June 25, 1998. Claimant appeals, contending that the hearing officer erred in according presumptive weight to the designated doctor=s report because she had spinal surgery after that time. The respondent (carrier) responds, urging affirmance.

### DECISION

We reverse and remand.

Claimant contends the hearing officer erred in according presumptive weight to the designated doctor=s report. The designated doctor certified that claimant reached MMI on January 1, 1998, with a seven percent IR. Claimant asserts that another examination by the designated doctor was warranted because she subsequently had surgery that had been contemplated at the time of statutory MMI. Claimant asks that the Appeals Panel remand this case so that the designated doctor may consider the effects of claimant=s surgery on the MMI date and IR.

Claimant testified that she sustained a compensable injury at work on \_\_\_\_\_, when she slipped and fell, injuring her back. Claimant said she went to employer=s nurse, but the nurse sent her back to work. Claimant said the company doctor said nothing was wrong with her. Claimant testified that she worked for some period of time until she was no longer able to operate the sewing machines. Dr. A stated in June 1998 that claimant had worked for eight months after her injury, which would have been until approximately \_\_\_\_\_. Claimant=s Employee=s Notice of Injury or Occupational Disease and Claim for Compensation (TWCC-41) states that the first day she lost time from work was July 21, 1997. Claimant indicated that she had been taken off work and that she never returned to work after that.

Claimant said she treated with Dr. B for therapy, but he went to Aprison@and she then began treating with Dr. L in September 1998. Claimant said Dr. L also tried a course of therapy, that it did not Awork,@and that she later underwent surgery. Medical records from Dr. L indicate that claimant was initially treated with therapy and steroid injections, that her condition did not improve, and that she underwent spinal surgery in October 1999.

Section 408.125 provides that the designated doctor's report will be given presumptive weight in determinations involving IR. Amendments to the designated doctor=s report that are made long after statutory MMI are not favored. If the amendment is made as long as three years after statutory MMI, then the claimant would have to prove that there were rare and

exceptional circumstances justifying such a late amendment. When a report is amended, the latest report is not automatically the one which should be given presumptive weight. See Texas Workers' Compensation Commission Appeal No. 94155, decided March 30, 1994. The issues of reasonable time and proper purpose must be considered in this regard.

The parties should not have to wait indefinitely for the IR issue to be determined, while the claimant undergoes a course of continuing medical treatment. Texas Workers' Compensation Commission Appeal No. 992829, decided February 2, 2000. The legislature has specifically provided that MMI is reached upon, if not before, the passage of 104 weeks (except for certain cases of spinal surgery set forth in Section 408.104). However, if surgery is contemplated before, and performed close in time to, the statutory MMI date, then the designated doctor should be permitted to use medical judgment and the Guides to the Evaluation of Permanent Impairment, third edition, second printing, dated February 1989, published by the American Medical Association, to consider whether the IR should be amended. The fact that surgery was contemplated at the time of statutory MMI is strong evidence of a proper reason to permit the designated doctor's amendment of the IR, provided this is sought and accomplished within a reasonable time. Texas Workers' Compensation Commission Appeal No. 990833, decided June 7, 1999. We would note that a claimant is not required to show that the surgery improved his or her condition at any particular time after the surgery before an amendment to the IR is justified. Texas Workers' Compensation Commission Appeal No. 962107, decided December 2, 1996; Texas Workers' Compensation Commission Appeal No. 962654, decided February 6, 1997.

In Texas Workers' Compensation Commission Appeal No. 951273, decided September 18, 1995, the Appeals Panel affirmed where the hearing officer permitted amendment after a delay of over one year after statutory MMI, based on the difficulty in diagnosing that claimant's condition. Where surgery takes place after the designated doctor's report and after statutory MMI, essential facts for the hearing officer to consider include: (1) the date of statutory MMI; (2) whether surgery was contemplated at the time of statutory MMI; (3) whether the reason for any delay in obtaining surgery was due to circumstances beyond claimant's control, such as Texas Workers' Compensation Commission (Commission) delay or a delay in approval of, or delay in the obtaining of, treatment; (4) whether the diagnosis was evolving over time; (5) how long after statutory MMI the surgery took place; and (6) whether the claimant unduly delayed in seeking an amendment of the designated doctor's report after the need for surgery was known.

Whether the claimant's MMI date and IR changed after surgery, justifying an amendment of the designated doctor's Report of Medical Evaluation (TWCC-69), is a question for the designated doctor. Whether the amendment was within a reasonable time and for a proper purpose is a fact question for the hearing officer. Texas Workers' Compensation Commission Appeal No. 992951, decided February 14, 2000.

In this case, there were insufficient findings of fact that addressed the factors and issues of reasonable time and proper purpose. Regarding the issue of a reasonable time, Dr.

L's reports from October 1998 and May 1999 indicate that surgery was contemplated before July 1999, which apparently was the time of statutory MMI. Dr. L's May 24, 1999, report indicates that second opinions were sought at some point soon after May 1999. The surgery was performed in late October 1999, less than three months after the apparent date of statutory MMI. The hearing officer noted that surgery was performed three years after the date of injury. However, regarding any delay in obtaining surgery, there was evidence that: (1) claimant was told by the company doctor that nothing was wrong with her, she continued to work, and she apparently did not begin to lose time until July 21, 1997, when her condition worsened; (2) she obtained conservative treatment from one doctor, including acupuncture and suction cups, until September 1998, when that doctor went to prison; (3) claimant was required to change doctors at that time, and began seeing Dr. L on September 28, 1998; (4) Dr. L then began his own course of conservative treatment; (5) as of October 1998, Dr. L was discussing surgery, but trying a course of epidural steroid injections to see if claimant responded to this treatment; (6) by March 1999, Dr. L was noting that if back strengthening exercises did not help, then it was fair for claimant to be given a discogram; and (7) by May 1999, apparently about two months before statutory MMI, Dr. L noted that claimant's pain was increasingly severe and stated that surgical intervention was appropriate. In an August 1999 report, it was noted that claimant wanted surgery. Claimant said that she had been afraid of surgery but that Dr. L told her he would obtain a second opinion and that she had a good chance of positive results, so she agreed. Regarding whether claimant delayed in seeking an amendment of the designated doctor's report, the record reflects that: (1) in August 1998, about two months after the designated doctor's report, claimant's attorney had filed a dispute regarding the designated doctor's June 1998 report; (2) the Commission thereafter sent medical records to the designated doctor; and (3) in January 1999, the designated doctor replied and noted that medical records said that claimant will likely need surgery. The designated doctor then stated that it would be appropriate to reexamine claimant's MMI date after surgery. However, the designated doctor apparently was not asked to examine claimant again.

Regarding whether there was a proper reason to amend the designated doctor's report, there was evidence that: (1) surgery was contemplated at the time of statutory MMI; and (2) surgery was performed in October 1999, less than three months after statutory MMI. We do not know the designated doctor's opinion about claimant's post-surgical IR because the designated doctor did not examine claimant after surgery.

The issues of whether surgery was contemplated at the time of statutory MMI, reasonable time, and proper purpose are fact issues for the hearing officer to determine. We must remand this case for the hearing officer to consider these fact issues and to make findings of fact and conclusions of law in this regard.

We reverse the hearing officer's decision and order and remand this case to the hearing officer for further proceedings consistent with this decision. 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.

Judy L. Stephens  
Appeals Judge

CONCUR:

Susan M. Kelley  
Appeals Judge

Dorian E. Ramirez  
Appeals Judge