

APPEAL NO. 000601

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 16, 2000. The issues at the CCH were whether the respondent (claimant) has reached maximum medical improvement (MMI) and what is the impairment rating (IR). The hearing officer determined that the claimant reached MMI on February 10, 1999, with a 20% IR. The appellant (carrier) appeals, urging that the hearing officer erred in determining that the date of statutory MMI is February 10, 1999; erred in determining that the claimant needed surgery immediately, implying that the surgery was reasonable and necessary; and erred in determining that the claimant reached MMI by operation of law on February 10, 1999, with a 20% IR. The carrier asserts that the claimant=s surgery was not being actively considered at the time of statutory MMI, that the claimant did not experience material or lasting improvement from the surgery, that the claimant did not have the surgery within a reasonable amount of time, and that the hearing officer=s decision should be reversed. The claimant replies that the hearing officer=s decision is correct and should be affirmed.

DECISION

Affirmed.

The claimant sustained a compensable low back injury on _____, when he lifted a valve. The claimant received medical treatment from Dr. H, a chiropractor, and was referred to Dr. C, a neurosurgeon. A lumbar MRI performed on February 17, 1997, revealed a disc herniation at L5-S1 and a central disc protrusion at L4-5; a CT scan post myelogram performed on July 7, 1997, confirmed a central disc protrusion at L4-5 with obliteration of the epidural fat and compression of the thecal sac. Dr. C=s report dated July 9, 1997, states that the claimant is neurologically intact; that straight leg raising is negative; and that the claimant will probably not benefit from surgery. On July 25, 1997, the claimant was examined by Dr. E who states that there is no indication of compression or irritation of any of the claimant=s spinal nerve roots.

Dr. H certified that the claimant reached MMI on October 7, 1997, with an eight percent IR. The claimant testified that he disputed Dr. H=s certification and the Texas Workers= Compensation Commission (Commission) appointed Dr. K as the designated doctor. Dr. K diagnosed low back pain with bilateral sciatica secondary to disc herniations at L4-S1 and certified that the claimant reached MMI on November 26, 1997, with a 10% IR, based on seven percent for specific disorders and three percent for range of motion (ROM). The claimant testified that he continued to receive medical treatment from Dr. H and was unable to return to work.

In January 1999, Dr. H referred the claimant to Dr. S. The claimant testified that when he went to see Dr. S, he could hardly walk; had numbness in his legs and spasms in his back;

and was in severe pain. Dr. S examined the claimant on February 3, 1999, and diagnosed radiating pain secondary to an L5-S1 disc herniation. The claimant testified that he told Dr. S that he had sustained a workers-compensation injury and had been denied previous medical treatment and Dr. S said that he could perform the surgery and submit it for payment under the claimant's health insurance policy. According to the claimant, Dr. S told him that he needed the surgery as soon as possible. On February 4, 1999, Dr. S performed a laminectomy at L5-S1 and did not go through the second opinion spinal surgery process provided by Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE ' 133.206 (Rule 133.206). On February 12, 1999, the claimant disputed the designated doctor's report. The Commission subsequently forwarded additional medical documentation to Dr. K; he reexamined the claimant on September 16, 1999, and certified that the claimant reached a statutory MMI on January 31, 1999, with a 20% IR, based on 10% for specific disorders and 11% for ROM.

Section 401.011(30) provides, in pertinent part, that MMI means the earlier of: "(A) the earliest date after which, based on reasonable medical probability, further material recovery from or lasting improvement to an injury can no longer reasonably be anticipated; [or] (B) the expiration of 104 weeks from the date on which income benefits begin to accrue[.]" The latter provision is commonly referred to as "statutory MMI." Section 408.082(a) provides that income benefits may not be paid for an injury that does not result in disability for at least one week. Section 408.082(b) provides that if the disability continues for longer than one week, weekly income benefits begin to accrue on the eighth day after the date of the injury and that if the disability does not begin at once after the injury occurs or within eight days of the occurrence but does result subsequently, weekly income benefits accrue on the eighth day after the date on which the disability began. Rule 124.7(b) provides that an injured worker's accrual date is the worker's eighth day of disability. TWCC Advisory 93-01, dated January 11, 1993, relates to statutory MMI at 104 weeks and provides, in part, that a claimant, by definition, reaches MMI on the day after the expiration of 104 weeks from the date income benefits began to accrue and that the claimant's eligibility for temporary income benefits ends at this point and eligibility for impairment income benefits begins. TWCC Advisory 93-03, dated March 9, 1993, relates to MMI and the accrual date and provides that Section 8308-1.03(32) (now Section 401.011(30)) provides that statutory MMI determination occurs at the expiration of 104 weeks from the date income benefits begin to accrue and that, as provided by Rule 124.7(b), an injured worker's accrual date is the worker's eighth day of disability.

The carrier argues that the claimant's date of statutory MMI is February 2, 1999, 104 weeks from February 5, 1997, the eighth day after the date of the injury, based on its interpretation of Sections 408.082(b) and 408.083, Rule 124.7, and the preamble to Rule 124.7. The Appeals Panel considered and rejected a similar argument in Texas Workers' Compensation Commission Appeal No. 93678, decided September 15, 1993. The Appeals Panel has subsequently declined to change its interpretation, despite an amendment to Section 408.083 on September 1, 1995. See Texas Workers-Compensation Commission Appeal No. 000499, decided April 24, 2000. The parties stipulated that the claimant's lost

time started on February 5, 1997, and was continuing for eight consecutive days. The hearing officer found that statutory MMI occurred on February 10, 1999, which is 104 weeks after the claimant's income benefits began to accrue on February 12, 1997, the claimant's eighth day of disability. We find sufficient support for the hearing officer's determination on this point and we decline to reverse it as a matter of law.

The hearing officer made a finding that the claimant's surgery was needed immediately and Claimant agreed to have it paid for by his health insurance rather than wait to have it approved under the spinal surgery second opinion process. The carrier asserts that such a finding implies that the surgery was reasonable and necessary and the hearing officer was without jurisdiction to make such a determination. The hearing officer's finding is supported by the claimant's testimony that Dr. S told him that he needed the surgery as soon as possible. We do not construe the hearing officer's finding as indicating that surgery was reasonable and necessary. The hearing officer did not err in determining that the claimant's surgery was needed immediately.

Sections 408.122(c) and 408.125(e) provide, in part, that the report of the designated doctor has presumptive weight and the Commission shall base its determination of MMI and IR on the report unless the great weight of the other medical evidence is to the contrary. The Appeals Panel has addressed cases where a designated doctor amends his or her IR report after statutory MMI and after the claimant has surgery. We have held that a designated doctor may, with proper reason, and in a reasonable amount of time, amend the original report of MMI and IR for various reasons which can include, but are not limited to, the need for surgery. See Texas Workers' Compensation Commission Appeal No. 941168, decided October 14, 1994. The report may be amended where there were incomplete or erroneous facts when the first report was rendered that are subsequently taken into account in amending the report. See Texas Workers' Compensation Commission Appeal No. 941600, decided January 12, 1995. Whether a doctor has amended his report for a proper reason and within a reasonable amount of time is essentially a question of fact. Texas Workers' Compensation Commission Appeal No. 960888, decided June 18, 1996. In cases where a claimant has surgery after the designated doctor certifies an IR, the Appeals Panel considers whether the designated doctor's MMI and IR certification took place before or after the date of statutory MMI. Where a claimant is determined to have been at MMI by statute, a distinguishing factor is whether the surgery was "under active consideration" at the time of statutory MMI. Texas Workers' Compensation Commission Appeal No. 990833, decided June 7, 1999; Texas Workers' Compensation Commission Appeal No. 950861, decided July 12, 1995; Texas Workers' Compensation Commission Appeal No. 950496, decided May 15, 1995; Texas Workers' Compensation Commission Appeal No. 941243, decided October 26, 1994.

In this case, the claimant had surgery six days prior to reaching statutory MMI. The carrier asserts that there was no proper reason for Dr. K to amend his opinion because the surgery was not obtained through the Rule 133.206 process; the claimant's surgery was not

being actively considered at the time of statutory MMI; the claimant did not experience material or lasting improvement from the surgery; and the claimant did not have surgery within a reasonable amount of time. Section 401.011(24) defines IR as the percentage of permanent impairment of the whole body resulting from a compensable injury. The parties stipulated that the claimant had low back surgery on February 4, 1999, which was related to the compensable injury. Rule 133.206 addresses the carrier's liability for medical costs related to spinal surgery and has no effect on the determination of an IR.

The hearing officer found that the designated doctor amended his date of MMI and IR due to the claimant's subsequent surgery and that the designated doctor amended the date of MMI and IR for a proper purpose. The claimant disputed the designated doctor's certification of MMI and IR nine days after spinal surgery was recommended by Dr. S and eight days after spinal surgery was performed. Surgery was contemplated and performed prior to statutory MMI, although the designated doctor's amendment was accomplished seven months after statutory MMI. Regarding whether claimant improved after his surgery, this is a factor that may be considered regarding whether the MMI date changed. However, claimant was not required to show that he improved before the designated doctor could properly amend the IR. See Texas Workers' Compensation Commission Appeal No. 992014, decided November 1, 1999; Texas Workers' Compensation Commission Appeal No. 990659, decided May 12, 1999. We find the evidence sufficient to support the hearing officer's determination that the designated doctor's amendment was made for a proper purpose and we can infer from the hearing officer's findings that the amendment was done within a reasonable time.

The hearing officer considered all of the medical evidence presented and found that the designated doctor's amended report is not contrary to the great weight of the other medical evidence and that the claimant reached MMI on February 10, 1999, with a 20% IR. Although the hearing officer did not determine that the amended report of the designated doctor is entitled to presumptive weight, we can infer such a finding. The designated doctor used the incorrect statutory date of MMI and the hearing officer assigned the correct statutory date of MMI. The hearing officer's determination that the claimant reached MMI on February 10, 1999, with a 20% IR is not so against the great weight and preponderance of the evidence as to be clearly wrong and unjust. In re King's Estate, 150 Tex. 662, 244 S.W.2d 660 (1951).

The decision and order of the hearing officer are affirmed.

Dorian E. Ramirez
Appeals Judge

CONCUR:

Alan C. Ernst
Appeals Judge

Tommy W. Lueders
Appeals Judge