APPEAL NO. 000656

This appeal arises pursuant to the Texas Workers= Compensation Act, TEX. LAB. CODE ANN. ' 401.001 *et seq.* (1989 Act). A contested case hearing was held on January 26, 2000. The hearing officer determined that the respondent (claimant) had spinal surgery approximately one year after a designated doctor=s examination; that claimant did not waive the right to contest the designated doctor=s report; that the designated doctor indicated that surgery would change his opinion of maximum medical improvement (MMI) and impairment rating (IR); that MMI and IR are not ripe for adjudication; and that a new designated doctor should be appointed. The appellant (carrier) appealed, asserting that additional spinal surgery was not under "active consideration" at the time of "statutory MMI," and requesting that we reverse the hearing officer's decision and render a decision that claimant was at MMI on October 8, 1998, with a 10% IR, as assessed by the designated doctor and that claimant had waived the right to dispute the designated doctor's assessment. The claimant responded, setting forth his version of events and urging affirmance.

DECISION

Affirmed.

Claimant had been employed as a driver and laborer when he was struck in the back unloading some doors on _____. The parties stipulated that claimant sustained a compensable injury on that date; that Dr. M was the original designated doctor; that Dr. M assessed MMI on October 8, 1998, with a 10% IR; that statutory MMI (Section 401.011(30)) would have occurred on July 5, 1999; that claimant had spinal surgery, which included a fusion at L4-5, on September 9, 1999; and that the Texas Workers' Compensation Commission (Commission) contacted the designated doctor Dr. M on November 3, 1999, regarding any change in his opinion due to the surgery. At issue is whether spinal surgery was under "active consideration" at the time claimant was first certified at MMI and when he reached statutory MMI.

Claimant testified that he initially saw a chiropractor after his injury, was referred to another doctor, and eventually saw Dr. DA in July 1998. In a report dated July 16, 1998, Dr. DA recommended "a series of diagnostic injections." According to claimant, carrier denied authorization for this procedure. Dr. DA repeated his recommendation in a report dated August 19, 1998. Claimant was sent to Dr. M, the designated doctor, who, in a report dated August 14, 1998, stated claimant was not at MMI and recommended "a repeat MRI and possible repeat electrodiagnostic testing." Dr. DA, in a report dated September 15, 1998, agreed with Dr. M's assessment for "a well defined diagnostic workup." Apparently, a repeat MRI and electrodiagnostic studies were performed and Dr. M certified MMI on October 8th with a 10% IR on that date. Claimant continued treatment with continued documented complaints through November and December 1998 and January 1999. Claimant testified that his treating doctor, Dr. D, was recommending a discogram and additional testing, which was denied by the carrier during this time. In a progress note dated January 4, 1999, Dr. D referred claimant to Dr. S "for evaluation and consideration for lumbar laminectomy." A

progress note dated January 12, 1999, by Dr. DA, confirms that "a diagnostic L5 selective nerve root injection . . . has been denied by the insurance carrier" and that Dr. D has referred claimant to Dr. S. Claimant was seen by Dr. S on February 26, 1999, and, after reviewing claimant's history and diagnostic studies, Dr. S commented:

> It has been a year and a half and my recommendation would be that the patient undergo a diagnostic diskogram at L4-5 and L5-S1. I think L4-5 is likely the source [of] his symptoms. I think he would benefit from an interbody fusion. It has been 18 months and he has failed all conservative care. He is in a difficult situation. I think the best way to get him back on track would be with the interbody fusion.

Dr. DA, in a progress note dated March 2, 1999, agreed with Dr. S's "plan for surgical intervention." Another note dated May 3, 1999, from Dr. DA notes claimant "is still awaiting second opinion for surgical intervention by [Dr. S]." A lumbar discogram was performed on June 2, 1999. Dr. DA, in a note dated June 29, 1999, is of the opinion claimant "might well need a diskectomy and fusion at the L4-L5 level," but defers to Dr. S. Claimant reached "statutory MMI" on July 5, 1999. In a note dated July 9, 1999, Dr. S commented:

> **HISTORY**: He returns after his provocative diskograms. The L4-5 disk had an obviously very large annular tear. It did not produce the kind of pain that we would expect, but clearly the disk is morphologically damaged and has a large annular tear. He has had pain for 2 years. My feeling is that this is the source of his symptoms.
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> **PLAN**: My recommendation would be that he undergo an L4-5 interbody fusion. We will, of course, need to get him setup [sic] for a second opinion. We will proceed in that manner.

The second opinion spinal surgery process was begun and, in a report dated August 4, 1999, Dr. Z, a second opinion doctor, commented that the L4-5 "is clearly an abnormal disc, and is very likely the cause of this man's ongoing symptomatology. I would concur with [Dr. S's] recommendation for an anterior lumbar interbody fusion at the L4-5 level." Claimant had spinal surgery on September 9, 1999. Claimant said that he contacted the Commission "soon after" his surgery about his benefits. The Commission, by letter dated November 3, 1999, wrote Dr. M, who had apparently retired in the meantime, asking if the surgery would change his opinion on MMI and the IR. Dr. M replied by an undated handwritten note at the bottom of the Commission's November 3rd letter: "I must assume that changes occurred altering both the MMI & the rating."

The hearing officer made the following appealed findings:

FINDINGS OF FACT

3. Claimant was seeking testing relating to a possible spinal surgery at the time [MMI] was assigned.

4. Claimant was unable to obtain medical testing requested by his treating doctor for some months.

5. Subsequent to a positive discogram, Claimant went through the second opinion on spinal surgery process and received a concurrence on the need for spinal surgery in June 1999 and scheduled the surgery as soon as possible.

6. Claimant acted as a reasonably prudent person in pursuing spinal surgery through the spinal surgery process.

7. The delay in obtaining a spinal surgery recommendation was due to refusal of diagnostic testing by Carrier.

* * * *

9. The designated doctor's response to the Commission's letter is not contrary to the great weight of the other medical evidence.

10. The issues of date of [MMI] and whole body [IR] are not ripe without a current designated doctor's report.

11. Claimant has worked through the system continuously and the delay in obtaining spinal surgery was not due to Claimant's lack of effort or Claimant's fault.

Carrier appeals those findings, citing Appeals Panel decisions for propositions that "[s]urgery after statutory MMI may be considered only when the surgery was being actively considered at the time of MMI" and that "[n]ot only must surgery have been under 'active consideration' at the time of statutory MMI, the second opinion process must have been requested within a reasonable time." We do not disagree with any of the propositions. The hearing officer found that claimant's doctors were seeking testing relative to possible spinal surgery at the time MMI was assigned. That finding is certainly supported by not only claimant's testimony, but the progress notes and reports that are cited in this opinion. The discogram was finally approved and was performed on June 2, 1999; Dr. DA recommended a discectomy and fusion on June 29, 1999; and Dr. S began the second opinion process on July 9, 1999, four days after statutory MMI. Under the circumstances, the hearing officer's finding that surgery was scheduled as soon as possible and that claimant acted as "a reasonably prudent person" is supported by the evidence. The fact that Dr. S apparently did not begin the second opinion process until four days after statutory MMI does not require us to disturb the hearing officer's decision as, fairly clearly, spinal surgery was being actively considered after the results of the

June 2nd discogram became known. As we stated in Texas Workers' Compensation Commission Appeal No. 990910, decided June 11, 1999, one of the Appeals Panel decisions cited by carrier, the question of "reasonable time" must be approached in the context of the facts and whether or not there was a proper reason for seeking a revision. The fact that the second opinion process began four days after statutory MMI is not controlling.

Carrier also argues that "claimant's case is based on innuendo that the carrier did not allow certain medical treatment for the purpose of precluding the claimant to dispute the designated doctor." We disagree that there was any "innuendo" because claimant testified to that and claimant's testimony is supported in more than one medical report or note. In any event, the hearing officer found that the "delay in obtaining a spinal surgery recommendation was due to the refusal of diagnostic testing by Carrier." That finding is supported by claimant's testimony and some of the medical records. Section 410.165(a) provides that the hearing officer, as finder of fact, is the sole judge of the relevance and materiality of the evidence as well as the weight and credibility that is to be given the evidence. It was for the hearing officer, as trier of fact, to resolve the inconsistencies and conflicts in the evidence. Garza v. Commercial Insurance Company of Newark, New Jersey, 508 S.W.2d 701 (Tex. Civ. App.-Amarillo 1974, no writ). This is equally true regarding medical evidence. Texas Employers Insurance Association v. Campos, 666 S.W.2d 286 (Tex. App.-Houston [14th Dist.] 1984, no writ). The trier of fact may believe all, part, or none of the testimony of any witness. Aetna Insurance Company v. English, 204 S.W.2d 850 (Tex. Civ. App.-Fort Worth 1947, no writ).

Upon review of the record submitted, we find no reversible error and we will not disturb the hearing officer's determinations unless they are so against the great weight and preponderance of the evidence as to be clearly wrong or unjust. In re King's Estate, 150 Tex. 662, 244 S.W.2d 660 (1951). We do not so find and, consequently, the decision and order of the hearing officer are affirmed.

Thomas A. Knapp
Appeals Judge

CONCUR:

Robert W. Potts
Appeals Judge

Elaine M. Chaney
Appeals Judge