APPEAL NO. 000799

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 March 23, 2000. The hearing officer determined that the respondent/cross-appellant (claimant) reached statutory maximum medical improvement (MMI) on May 11, 1998, with an impairment rating (IR) of 19% and that the claimant is not entitled to first, second, and third quarter supplemental income benefits (SIBs). The appellant/cross-respondent appeals (carrier), urging that the claimant's IR is 14%. The appeals file does not contain a response to the carrier's appeal from the claimant. The claimant appeals, urging he is entitled to SIBs for the first, second, and third quarters. The carrier replies that the hearing officer's decision regarding SIBs is supported by sufficient evidence and should be affirmed.

DECISION

Affirmed in part, reversed and rendered in part.

The decision and order of the hearing officer contains a thorough statement of the evidence. Only a brief summary will be repeated here. The parties stipulated that the claimant sustained compensable lumbar spine injury on _____, and reached statutory MMI on May 11, 1998. The claimant received medical treatment from Dr. EC, who referred him to Dr. M. Dr. M performed a lumbar fusion at L4-S1 with cages on July 22, 1997. Dr. M's records reflect that in February 1998, he requested a lumbar CT myelogram and this was denied by the carrier until September 11, 1998. In March 1998, Dr. M stated that the claimant appeared to have pseudoarthrosis at L5-S1; that electrostimulation was appropriate; and that, if the electrostimulation failed, he would recommend surgery. On March 25, 1998, the carrier had the claimant examined by Dr. D. Dr. D certified that the claimant had not reached MMI and stated that the claimant may need further spinal surgery to augment the spinal fusion.

On April 9, 1998, the carrier authorized an external bone growth stimulator. Dr. M's records indicate that in May and July 1998, the claimant still had a non-union of the fusion. The Texas Workers' Compensation Commission (Commission) appointed Dr. C as the designated doctor. Dr. C examined the claimant on July 10, 1998, and certified that the claimant had a 14% IR. Dr. C stated that the claimant was at MMI statutorily and "the clinical condition is not stabilized and is likely to improve with surgical intervention or active medical treatment. The degree of impairment is likely to change substantially within the next year. The patient may suffer sudden or subtle incapacitation."

The claimant had a CT myelogram performed on September 15, 1998, which revealed motion at L5-S1 and spondylitic changes consistent with a non-union. On November 16, 1998, Dr. M completed a Recommendation for Spinal Surgery (TWCC-63). On April 26, 1999, the Commission approved spinal surgery and on June 18, 1999, the

claimant had a fusion with instrumentation at L4-S1. On November 9, 1999, Dr. C reexamined the claimant and reviewed additional medical records. Dr. C diagnosed the claimant with lumbar disc displacement and postoperative spinal fusion and assessed a 19% IR. Dr. C stated that the claimant has continuous pains down both legs; that the claimant is going to need ongoing treatment for a long time; and that he agrees with Dr. M's delay in rehabilitation.

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.

The carrier argues that the 1989 Act and Commission rules do not provide for an amendment to a designated doctor's report, citing Rodriguez v. Service Lloyds Insurance Company, 997 S.W.2d 248 (Tex. 1999). Rodriguez held that Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 130.5(e) (Rule 130.5 (e)) does not contain any exceptions. The circumstances of the case before us do not involve exceptions to a Commission rule and are clearly different from those in Rodriguez.

The hearing officer determined that additional spinal surgery was under active consideration at the time the claimant reached statutory MMI and that the amendment was made for a proper reason and purpose. Although a recommendation for spinal surgery did not occur until November 16, 1998, six months after statutory MMI, Drs. C, D, and M indicated around the time of statutory MMI that the claimant had a non-union and that the claimant may need spinal surgery. The carrier's delay in not approving the CT myelogram

when it was initially requested, prior to reaching statutory MMI, delayed Dr. M's request for spinal surgery. Regarding whether the claimant improved after his surgery, this is a factor that may be considered regarding whether the MMI date changed. However, the 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 spinal surgery was under active consideration at the time the claimant reached statutory MMI and that the designated doctor's amendment was made for a proper purpose and within a reasonable time.

The hearing officer considered all of the medical evidence presented and determined that the claimant has a 19% IR. In so determining, the hearing officer gave presumptive weight to the designated doctor's amended report and found that the designated doctor's amended report is not contrary to the great weight of the other medical evidence. The hearing officer's determination that the claimant has a 19% 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).

Sections 408.142(a) and 408.143 provide that an employee is entitled to SIBs when the impairment income benefits (IIBs) period expires if the employee has: (1) an IR of at least 15%; (2) not returned to work or has earned less than 80% of the average weekly wage as a direct result of the impairment; (3) not elected to commute a portion of the IIBs; and (4) made a good faith effort to obtain employment commensurate with his or her ability to work. The qualifying period for the first quarter was from March 2, 1999, through May 31, 1999; the qualifying period for the second quarter was from June 1, 1999, through August 30, 1999; and the qualifying period for the third quarter was from August 31, 1999, through November 29, 1999. It is undisputed that the claimant made no attempt to seek employment during the qualifying periods. Rule 130.102(d)(3), the version then in effect, provides that an injured employee has made a good faith effort to obtain employment commensurate with the employee's ability to work if the employee has been unable to perform any type of work in any capacity, has provided a narrative report from a doctor which specifically explains how the injury causes a total inability to work, and no other records show that the injured employee is able to return to work.

The claimant presented a narrative report from Dr. M dated December 2, 1999, to support his position that he was totally unable to work during the qualifying periods. Dr. M's report states:

> The above mentioned patient underwent additional spinal surgery for a failed fusion on 6-18-99. He is currently undergoing pain management secondary to the injury he sustained and multiple surgeries. He is totally disabled at this time. It will be at least another 12 to 18 months before we can determine consolidation of the fusion mass.

The claimant had spinal surgery on June 18, 1999. The claimant testified that after spinal surgery, he was told by Dr. M to not engage in any other activity other than walking so as to not interfere with the fusion.

The hearing officer found that the opinions of Dr. C and Dr. M did not clearly articulate with specificity how the compensable injury caused a total inability to work. The claimant did testify that he was capable of walking, driving, and performing activities of daily living during the qualifying periods. The hearing officer concluded that the claimant had the ability to perform some work during the qualifying periods and that he did not in good faith attempt to obtain employment commensurate with his ability to work.

The 1989 Act provides that the hearing officer is the sole judge of the weight and credibility of the evidence. Section 410.165(a). The hearing officer had to judge the credibility of the evidence before him in order to determine whether the evidence presented was sufficient to meet the criteria of Rule 130.102(d)(3). As an appeals body, we will not substitute our judgment for that of the hearing officer when the determination is not so against the overwhelming weight of the evidence as to be clearly wrong and unjust. Cain v. Bain, 709 S.W.2d 175, 176 (Tex. 1986); Texas Workers' Compensation Commission Appeal No. 950456, decided May 9, 1995. Applying this standard of review to the record of this case, we find the evidence sufficient to support the hearing officer's determinations that during the first and third quarter qualifying periods the claimant had some ability to work and did not make a good faith attempt to obtain employment commensurate with his ability to work and that the claimant is not entitled to SIBs for the first and third quarters.

Dr. M's narrative report dated December 2, 1999, certainly could have been more specific; however, we cannot ignore the fact that the claimant had spinal surgery during the second quarter qualifying period. The hearing officer states that he considered that the claimant would have been hospitalized from June 18, 1999, through approximately June 23, 1999. In light of the evidence as a whole, we believe Dr. M's narrative report sufficiently explains how the injury causes a total inability to work. We, therefore, reverse the hearing officer's finding that the claimant had some ability to work as being contrary to the great weight of the evidence and we reverse his conclusion and decision that claimant is not entitled to SIBs for the second quarter. We render a decision that claimant is entitled to SIBs for the second quarter.

We affirm the hearing officer's decision that the claimant has a 19% IR and is not entitled to SIBs for the first and third quarters. We reverse the hearing officer's decision that the hearing officer is not entitled to SIBs for the second quarter and render a decision that the claimant is entitled to SIBs for the second quarter.

Dorian E. Ramirez
Appeals Judge

CONCUR:

Gary L. Kilgore
Appeals Judge

Thomas A. Knapp
Appeals Judge