APPEAL NOS. 000874
AND 001228

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 March 29, 2000. The hearing officer determined that the compensable injury of _____, does not extend to the back and that the appellant (claimant) reached maximum medical improvement (MMI) on October 30, 1996, with a zero percent impairment rating (IR), as indicated in the first certification of MMI and IR that was not disputed within 90 days. The claimant appealed, disagreed with language the hearing officer used in his Decision and Order, but did not disagree with those determinations. Concerning the injury sustained on _____, the hearing officer determined that the claimant reached MMI on February 16, 1998, with a 12% IR as certified in the first report of Dr. DH, the designated doctor. The claimant appealed those determinations, contended that the hearing officer erred in not giving presumptive weight to the amended report of Dr. DH, and requested that the Appeals Panel reverse those determinations of the hearing officer and render a decision that he reached MMI by operation of law on March 2, 1998, with a 17% IR as certified by Dr. DH in his March 7, 2000, report. The respondent (carrier) replied, urged that the evidence is sufficient to support those appealed determinations of the hearing officer, and requested that they be affirmed.

DECISION

We strike a finding of fact and conclusion of law that were clearly made in error and affirm the decision and order of the hearing officer.

The claimant sustained compensable injuries while working for the same employer on _____, _____, and _____. Dr. MH examined the claimant at the request of the carrier and certified that he reached MMI on February 16, 1998, with a seven percent IR for the _____ injury. In a Report of Medical Evaluation (TWCC-69) dated March 24, 1998, and an attached narrative report, Dr. DH stated that he understood an MMI date of February 16, 1998, had been certified for the _____, injury and that the claimant's IR was 12%. In a progress report dated April 29, 1998, Dr. B said that the claimant still had back and right leg pain; that another MRI will be performed; and that if the disc is larger, he will send the claimant for surgical assessment. A CT scan and discogram were performed on September 3, 1998. In a progress note dated October 14, 1998, Dr. B recommended a laminectomy and possible fusion at L4-5 on the right. The surgery was performed on August 6, 1999. In a letter to Dr. DH dated December 15, 1999, a Texas Workers' Compensation Commission benefit review officer advised that a dispute had arisen pertaining to the claimant's IR assessed in light of surgery performed on August 6, 1999; asked Dr. DH to review attached medical records to determine if he changed his position; and requested that he complete another TWCC-69 if he changed his position. In answers to written interrogatories dated January 25, 2000, the claimant stated his

disagreement with the March 1998 report of Dr. DH. In a TWCC-69 dated March 7, 2000, Dr. DH certified that the claimant reached MMI on February 16, 1998, with a 16% IR.

In Texas Workers' Compensation Commission Appeal No. 990833, decided June 7, 1999, the Appeals Panel cited earlier decisions and stated that when surgery has been performed after a certification of MMI and IR the key distinguishing factor in determining whether the amended report of a designated doctor should be given presumptive weight is whether the surgery was under active consideration at the time of statutory MMI. In the case before us, the hearing officer made a finding of fact that surgery was not contemplated on March 24, 1998. That is the date Dr. DH signed his first TWCC-69 and is after the date the claimant reached MMI by operation of law. The evidence is sufficient to support that finding of fact. The hearing officer also made a finding of fact that the certification of MMI and IR assigned by Dr. DH on March 24, 1998, was not timely disputed by the claimant and conclusion of law that the first certification of MMI and IR assigned by Dr. DH on March 24, 1998, became final under Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 130.5(e) (Rule 130.5(e)). That finding of fact and that conclusion of law were clearly made in error, and we strike them. The hearing officer should have made a determination that the March 24, 1998, certification of Dr. DH that the claimant reached MMI on February 16, 1998, with a 12% IR is entitled to presumptive weight. After that, he should have made a determination of whether the great weight of the other medical evidence is contrary to that report. Neither at the CCH nor in his appeal does the claimant contend that the great weight of the other medical evidence is contrary to the first report of Dr. DH. We have reviewed the medical evidence, and the determination of the date the claimant reached MMI and his IR is dependent on which report of Dr. DH is entitled to presumptive weight. Under the circumstances of this case, we do not reverse and remand for the hearing officer to make a determination of whether the great weight of the other medical evidence is contrary to the March 24, 1998, report of Dr. DH.

We affirm the decision of the hearing officer that as a result of the injury of _____, the claimant reached MMI on February 16, 1998, with a 12% IR and the order to pay benefits in accordance with that decision.

Tommy W. Lueders
Appeals Judge

CONCUR:

Gary L. Kilgore
Appeals Judge

Elaine M. Chaney
Appeals Judge