APPEAL NO. 001506
FILED AUGUST 14, 2000

On February 11, 2000, a contested case hearing (CCH) was held in_____, Texas, with _____ presiding as the hearing officer. The CCH was held under the provisions of the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq*. The disputed issues at the CCH were maximum medical improvement (MMI) and impairment rating (IR). The parties stipulated that respondent (claimant) reached statutory MMI (the expiration of 104 weeks from the date on which income benefits began to accrue (Section 401.011(30)(B)) on June 12, 1997. With regard to the IR issue, the hearing officer decided that claimant's IR is 18% as certified in an amended report by the designated doctor chosen by the Texas Workers' Compensation (Commission). Appellant (carrier) appealed the hearing officer's decision on the IR issue. In Texas Workers' Compensation Commission Appeal No. 000462, decided April 17, 2000, the Appeals Panel (Judge Kilgore dissenting) reversed the hearing officer's decision on claimant's IR and remanded the case to the hearing officer for the hearing officer to make further findings of fact. A CCH on remand was held on June 12, 2000, and the hearing officer again decided that claimant's IR is 18%. Carrier again appeals the hearing officer's decision on the IR issue, contending, among other things, that claimant's surgery was not under consideration at the time claimant reached statutory MMI. No response was received from claimant.

DECISION

Reversed and rendered.

Claimant testified that on _____, she injured her back when she put a 70-pound box on a conveyor belt. Claimant said that she initially treated with (Dr. S) and that Dr. S did not recommend surgery. Claimant said that on some unspecified date she saw (Dr. AR) at carrier's request and that Dr. AR assigned her a five percent IR. Claimant said that on some unspecified date the Commission appointed (Dr. SI) as the designated doctor and that Dr. SI assigned her a five percent IR. Claimant said that on some unspecified date Dr. S wrote to the Commission disagreeing with the IR assigned by Dr. SI but that the Commission was unable to find Dr. SI, and so the Commission chose (Dr. C) as the second designated doctor. Claimant said that she began treating with (Dr. A), on June 11, 1997. The parties stipulated that claimant reached MMI on June 12, 1997, which was stipulated to be the statutory date of MMI. Claimant said that she knew on June 12, 1997, that she was going to have back surgery because she was not getting any better. Claimant also said that after June 12, 1997, her condition substantially changed because her condition was a lot worse.

The earliest medical report in evidence is the March 16, 1998, Report of Medical Evaluation (TWCC-69) from Dr. C, who certified in that report that claimant reached MMI on February 18, 1998, with a ten percent IR for nonsurgical disc herniations at L4-5

and L5-S1 and for right lower extremity sensory loss and weakness. Dr. C noted that he was the designated doctor and that he examined claimant on March 9, 1998. There is no mention in Dr. C's report about surgery having been a consideration in claimant's past treatment, that surgery was a consideration at the time of his examination of claimant, or that surgery is being considered as part of claimant's future treatment. Claimant said that she knew when she was examined by Dr. C on March 9, 1998, that she was going to have to have back surgery because she was getting worse.

The earliest medical record in evidence from Dr. A is his notes of November 20, 1998, wherein he noted claimant's complaints of low back pain and bilateral leg pain and diagnosed claimant as having lumbalgia and lumbosacral neuritis or radiculitis.

Claimant said that Dr. A referred her to (Dr. CH) in December 1998. In his report of December 14, 1998, Dr. CH noted that claimant had an MRI in 1995, an MRI in August 1997, a CT scan and myelogram in June 1998, and a nerve conduction study in August 1998. Dr. CH noted the abnormalities found on those studies. Dr. CH wrote that a discogram followed by another CT scan would indicate whether claimant is a surgical candidate. Claimant had a discogram on February 10, 1999, and Dr. CH wrote on February 23, 1999, that he was recommending that claimant have surgery at L4-5 and that claimant may need further surgery after that surgery is done. Claimant said that Dr. CH was the first doctor to tell her that she needed surgery. In a Recommendation for Spinal Treatment dated March 16, 1999, Dr. CH advised the Commission that he was recommending that claimant have surgery at L4-5. Dr. CH noted on April 27, 1999, that a second opinion doctor concurred with the need for surgery. On May 5, 1999, Dr. CH performed surgery on the L4-5 level for a herniated disc and bilateral radiculopathy of the L5 nerve root.

On June 16, 1999, Dr. A wrote that claimant's IR should be updated because claimant had had surgery. In other reports, Dr. A noted that claimant had had some improvement after surgery but that she also had had flare-ups of back and leg pain. In a TWCC-69 dated August 4, 1999, Dr. A certified that claimant reached MMI on June 29, 1999, with a 21% IR for loss of lumbar range of motion and for her "surgical scores." On September 29, 1999, Dr. A reported that claimant could begin work hardening.

On September 24, 1999, a benefit review officer wrote to Dr. C advising Dr. C that claimant had had spinal surgery and sending medical reports to Dr. C for his review. Claimant indicated that Dr. C reexamined her. In a TWCC-69 dated November 23, 1999, Dr. C certified that claimant reached MMI on June 29, 1999, with an 18% IR. The 18% IR was for disc surgery at L4-5, a disc herniation at L5-S1, loss of lumbar range of motion, and right lower extremity sensory loss and weakness.

Section 408.123(a) provides in part that after an employee has been certified by a doctor as having reached MMI, the certifying doctor shall evaluate the condition of the employee and assign an IR. Section 408.125(e) provides in part that, if the designated doctor is chosen by the Commission, the report of the designated doctor shall have

presumptive weight, and the Commission shall base the IR on that report unless the great weight of the other medical evidence is to the contrary, and that, if the great weight of the other medical evidence contradicts the IR contained in the report of the designated doctor chosen by the Commission, the Commission shall adopt the IR of one of the other doctors. In Texas Workers' Compensation Commission v. Garcia, 893 S.W.2d 504, 525 (Tex. 1995), the court noted that the IR is determined at MMI. The Appeals Panel has held that a designated doctor can amend a certification of MMI and IR for proper reason and within a reasonable period of time. Texas Workers' Compensation Commission Appeal No. 960960, decided July 3, 1996. In Texas Workers' Compensation Commission Appeal No. 962107, decided December 2, 1996, the Appeals Panel noted that in numerous cases the Appeals Panel had drawn a distinction between a certification of MMI by a designated doctor prior to the date of statutory MMI and cases where the date of MMI is established by operation of Section 401.100(30)(B) and that in those latter situations of statutory MMI, the Appeals Panel had noted that a key, distinguishing factor is whether the surgery is "under active consideration" at the time of statutory MMI. Appeal No. 962107 quoted Texas Workers' Compensation Commission Appeal No. 941265, decided November 1, 1994, as follows:

> while there may be those rare, exceptional cases where "compelling circumstances," such as the need for future surgery, might affect the claimant's ultimate IR, "it is certainly not open-ended and even surgery undergone at some future time that was not actively considered at the time of statutory MMI and the rendering of an IR will not necessarily permit an amendment or revision of the IR."

In the instant case, the hearing officer found that Dr. C's certification that claimant reached MMI with an 18% IR was "timely"; that Dr. C's certification that claimant reached MMI with an 18% IR had not been overcome by the great weight of contrary medical evidence; that surgery was being "contemplated" on June 12, 1997, the date of statutory MMI; that surgery was being "contemplated" on May 9, 1998, the date of the first examination by Dr. C; that claimant underwent a "substantial change of condition" subsequent to the date of statutory MMI; that claimant's back surgery on May 5, 1999, was a proper reason for Dr. C to certify that claimant has an 18% IR; and that claimant may have further back surgery and that that is a proper reason for Dr. C to certify that claimant has an 18% IR. The hearing officer concluded that claimant reached MMI on June 12, 1997, with an 18% IR.

Apparently, the hearing officer based his findings that surgery was "contemplated" at the time of statutory MMI and that surgery was "contemplated" at the time of Dr. C's initial examination (which was after statutory MMI) on claimant's testimony that she "knew" that she was going to have surgery because she was getting worse. However, the first mention of surgery in the medical records in evidence is in Dr. CH's report of December 1998 and there is no mention of a recommendation for surgery in the medical records until Dr. CH's report of February 1999. Claimant reached MMI on the statutory date, June 12, 1997. The first mention of surgery in the medical records was not until December 1998, which was 18 months after statutory MMI, and nine months after Dr. C, the designated doctor, first examined claimant and certified a ten percent IR. There simply is no basis in the medical records to conclude that surgery was being "contemplated" by claimant's health care providers at the time of statutory MMI. That claimant may have thought she may eventually need surgery without any indication that surgery was under consideration by her doctors at the time of statutory MMI is simply not sufficient to allow an amendment by the designated doctor based upon surgery that was done almost two years after claimant reached statutory MMI. We reverse the hearing officer's decision that claimant's IR is 18% and render a decision that claimant's IR is ten percent as was originally certified by Dr. C, the designated doctor, in March 1998.

Robert W. Potts
Appeals Judge

CONCUR:

Alan C. Ernst
Appeals Judge

DISSENTING OPINION.:

I dissented in Texas Workers' Compensation Commission Appeal No. 000462, decided April 17, 2000, because I believed that we should have affirmed the decision of the hearing officer. Seeing no reason to reverse then, I see no reason to reverse now. I would affirm the decision and order of the hearing officer.

Gary L. Kilgore
Appeals Judge