APPEAL NO. 002938

This appeal arises pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq*. (1989 Act). On October 9, 2000, a contested case hearing (CCH) was held. The record was closed on November 24, 2000. The following issues were certified at the benefit review conference (BRC): (1) whether the respondent (claimant) has reached maximum medical improvement (MMI) and, if so, on what date; and (2) the claimant's impairment rating (IR). At the CCH, the hearing officer, over the appellant's (carrier) objection, added the issue of whether the claimant was entitled to a second Texas Workers' Compensation Commission (Commission)-appointed designated doctor; however, this issue is not reflected in the hearing officer's decision and order. The hearing officer determined that the claimant had not reached MMI, in view of the fact that he had been approved for spinal surgery, and the claimant would need to be reevaluated by a designated doctor. The carrier appealed on several grounds and makes reference to numerous procedural and administrative errors. The claimant urges that the hearing officer's decision be affirmed.

DECISION

Reversed and rendered.

On _____, the claimant sustained a compensable injury to his lumbar spine, while employed by (employer). The claimant was treated for his injury by Dr. R, and underwent a laminectomy and discectomy at L3 and L4 bilaterally with exploration of the L3-4 disc space on November 4, 1998. Although the claimant continued to experience pain and weakness following the surgery, Dr. R determined that the claimant had reached MMI on May 6, 1999, and referred the claimant to Dr. C for evaluation. Dr. C certified that the claimant had reached MMI on May 6, 1999, with a 15% IR, based on an 11% impairment for a specific disorder, a 4% impairment for loss of range of motion (ROM) and a 0% impairment for neurological deficits under the Guides to the Evaluation of Permanent Impairment, third edition, second printing, dated February 1989, published by the American Medical Association (AMA Guides). Although not clear, the carrier apparently disputed the MMI/IR certification and Dr. B was appointed by the Commission as the designated doctor. Dr. B certified that the claimant reached MMI on May 6, 1999, with an 11% IR, based on an 11% impairment under Table 49 (II) (E) and (F) of the AMA Guides, 0% for loss of ROM, and 0% for neurological deficits. Following Dr. B's certification of MMI/IR, the claimant continued to experience pain in his lower back and right lower extremities.

Statutory MMI was reached, pursuant to Section 401.011(30)(B), on June 3, 2000, according to the carrier; June 5, 2000, according to the claimant; or June 7, 2000, according to the BRC report. On July 27, 2000, the claimant was recommended, by two treating doctors, for a second spinal surgery to include discectomies at L2-3 and L4-5 with fusion.

Sections 408.122(c) and 408.125(e) of the 1989 Act provide that the report of a Commission-appointed designated doctor determining the date of MMI and the claimant's IR shall have presumptive weight and the Commission shall base its determination on such report, unless the great weight of other medical evidence is to the contrary. We have held that a "great weight" determination requires more than a mere balancing or preponderance of the evidence; that no other doctor's report, including the treating doctor's report, is accorded the special presumptive status; and that the designated doctor's report should not be rejected absent a substantial basis for doing so. Texas Workers' Compensation Commission Appeal No. 960897, decided June 28, 1996. We have also held that it is inappropriate for a designated doctor to amend a certification if surgery was not under active consideration at the time of statutory MMI. Texas Workers' Compensation Commission Appeal No. 002929-S, decided January 23, 2001.

The hearing officer's decision and order does not contain findings supporting his determination that the great weight of other medical evidence is contrary to the designated doctor's report, other than the finding that spinal surgery was recommended prior to statutory MMI. Although there is no agreement with regard to the date of statutory MMI, the benefit review officer stated that statutory MMI is June 7, 2000; the carrier asserted that the date of statutory MMI is June 3, 1999; and the claimant asserted that statutory MMI is June 5, 1999, the date of statutory MMI would appear to be no later than June 7, 2000. Our review of the evidence reveals that a second spinal surgery was first proposed on July 27, 2000. Using any of the dates put forth, it is clear that the second surgery was not contemplated until approximately six weeks after statutory MMI. In addition, we note that the second spinal surgery was not approved by the Commission until October 5, 2000, and may then have been approved as the result of an administrative error, insofar as the carrier's request for a second opinion doctor may have been overlooked by the Commission.

With regard to the MMI/IR certifications, Dr. B's report differs from the treating doctor's report only with regard to an IR for loss of ROM. We view the decision to exclude a rating for loss of ROM, based on inconsistent effort, as a mere difference in medical opinion, which does not rise to the level of the great weight of medical evidence contrary to the designated doctor's report. We conclude, therefore, that the hearing officer's determinations that spinal surgery was recommended prior to statutory MMI as not being supported by the evidence. We further hold that the hearing officer's finding that the great weight of the other medical evidence is contrary to the designated doctor's report as to the date of MMI is so against the great weight and preponderance of the evidence as to be clearly wrong or manifestly unjust. Cain v. Bain, 709 S.W.2d 175 (Tex. 1986). This decision does not limit the claimant's right to additional medical benefits, pursuant to Section 408.021 of the 1989 Act.

With regard to the remaining issue, we find no evidence in the record to support the hearing officer's determination that the designated doctor asked not to see the claimant again. If correspondence with the designated doctor would support such a finding, it was not made available to the parties and, therefore, was improper. *See* Section 410.167.

As stated above, the carrier, in its appeal, complains of numerous errors in the record of this proceeding. We recognize such errors exist, including the failure to take testimony at the CCH, the failure to include in the hearing officer's decision the added issue and stipulations made by the parties at the CCH, and errors in the decision and order with regard to the list of evidence presented. In view of our decision, however, we need not further address these matters.

We reverse the decision of the hearing officer that the claimant was not at statutory MMI and that the claimant needs to be reevaluated by a designated doctor, and we render a new decision that the claimant reached MMI on May 6, 1999, with an 11% IR, as certified by the Commission-appointed designated doctor, who's opinion is not contrary to the great weight of other medical evidence.

Thomas A. Knapp
Appeals Judge

CONCUR:

Susan M. Kelley
Appeals Judge

Robert W. Potts
Appeals Judge