APPEAL NO. 002973

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 September 5, 2000. The hearing officer reopened the record on September 11, 2000, in order to obtain additional clarification from the designated doctor and the record was again closed on December 15, 2000. With regard to the issues, the hearing officer determined that the respondent's (claimant) compensable injury of _____, was a producing cause of the claimant's current C3 through C7 cervical injury and the claimant's depression and adjustment disorder and that the claimant reached maximum medical improvement (MMI) on February 28, 1998 (by operation of law pursuant to Section 401.011(30)(B)) with a 28% impairment rating (IR).

The appellant (carrier) appealed both issues, contending that other factors were the cause of the worsening of the claimant's cervical condition and psychological problems and that the designated doctor's IR cannot be amended after statutory MMI. The appeal file does not contain response from the claimant.

DECISION

Affirmed in part and reversed and rendered in part.

The claimant was employed as a packaging machine operator and, sustained a right shoulder and neck injury lifting or pulling on a heavy box on _____. The claimant has had four cervical spine surgeries.

The claimant was seen by a numbers of doctors and given conservative care for a disc herniation at C6-7. The medical records indicate that the claimant's first spinal surgery was a cervical discectomy at C6-7 on October 21, 1996. The claimant continued to have pain and, eventually, a second cervical spinal surgery was recommended. It appears undisputed that the claimant reached statutory MMI on February 28, 1998. An anterior cervical discectomy at C3-4 and C5-6 and anterior cervical fusion at C3-4 and at C5-6 with anterior cervical plating at C5-6 was performed on March 16, 1998, by Dr. S, who became the treating doctor. In a Report of Medical Evaluation (TWCC-69) and brief narrative, Dr. S certified the claimant at MMI on March 31, 1998, with an 18% IR; although Dr. S did note that a prior 14% IR "was not based on this new surgery [presumably March 16, 1998, surgery]." The rating was disputed, and Dr. B was appointed as the designated doctor. Dr. B, in a TWCC-69 and narrative both dated May 13, 1998, certified MMI (on February 26, 1998) and assessed a 14% IR based on 9% impairment from Table 49 Section (Category)(II)(E) of the Guides to the Evaluation of Permanent Impairment, third edition, second printing, dated February 1989, published by the American Medical Association for the first surgery; an additional 2% impairment from Table 49, Category (II)(G)(1) for the second three-level surgery; plus 2% from Table 49, Category (II)(F); plus 1% for motor sensory deficit. Range of motion (ROM) deficit was invalidated based on "observational invalidity." Dr. B considered the psychological component of the injury and rated it as 0%

impairment, stating this "would be amended should there be further psychological reports." Dr. S disagreed with Dr. B's assessment. Dr. B's IR differed from Dr. S principally on ROM.

A report dated April 30, 1998, from Dr. S indicates that the claimant "whacked his head real hard" on a church bus and “chipped off the front part of the C3-4 bone fusion plug.”

Clarification based on Dr. S's disagreement was sought from Dr. B, who responded by letter dated August 27, 1998. In that report, Dr. B recognized that statutory MMI occurred on February 28, 1998, and, therefore, "this issue is not in front of me as the Designated Doctor." Dr. B then discussed the various components of his assessment in detail and confirmed his 14% IR. Other medical reports indicate that the claimant was having severe mental and emotional problems in the summer of 1998.

A report dated March 23, 1999, from Dr. S. indicates that the claimant wanted the hardware in his neck taken out and that the claimant had been assaulted by a thief but "was okay." Testimony and evidence was that the claimant was released to return to full duty with no restrictions on May 10, 1999, and, in fact, returned to work for the employer. The claimant was involved in a motor vehicle accident (MVA) on September 1, 1999. (The vehicle was hit in an intersection) and the claimant was taken to the hospital. Subsequently, the claimant was involved in another MVA on October 31, 1999 (he lost control of his vehicle in the rain), and he was again taken to the hospital. The claimant had a third cervical spinal surgery on December 12, 1999, which was a discectomy at C4-5 with a bone graft. This was apparently unsuccessful and the claimant had a fourth cervical spinal surgery on March 1, 2000, which was "a redo of the fusion at C4/C5 utilizing iliac bone graft and a plate." Dr. S in a report dated February 17, 2000, was of the opnion that all the claimant's “neck problems are related to the workers' compensation injury and not the car wreck[s]. The car wreck just caused a mild whiplash." Reports dated February 28 and March 7, 2000, from Dr. MB indicate that he believes that the claimant's December 1999 and March 2000 surgeries were due to the MVAs rather than the _____ injury.

After the CCH on September 5, 2000, the hearing officer, on her own motion, reopened the record and wrote Dr. B (with copies to the parties) asking Dr. B if the additional surgeries and" mental health counseling" which occurred after Dr. B last saw the claimant, "would change your opinion of [claimant's] [IR]" and asks about using the ankylosis Table 50. Dr. B responded that Table 50 was not applicable and asked to reexamine the claimant, which he did, and, in a TWCC-69 and narrative dated November 13, 2000, certified MMI and assessed a 28% IR. Dr. B again gave a 9% impairment from Table 49, Category (II)(E); 2% impairment each for Categories II(F) and II(G)(1); an additional 1% each for Categories (II)(G)(2) and (II)(G)(3), which total a 15% whole body impairment, plus 15% impairment for loss of ROM, combined to form the 28% IR. Dr. B found no motor or sensory loss.

First, addressing the hearing officer's determinations and the carrier's appeal regarding whether the compensable _____ injury is a producing cause "of his current

C3 through C7 cervical injury" and the claimant's depression and adjustment disorder. There is conflicting evidence regarding these issues. There are reports that related all of the claimant's problems back to the compensable injury, including the claimant's depression and adjustment disorder. The carrier's position is that the claimant's depression was caused by personal problems, including a divorce, and that the claimant had been released and had returned to full duty without restrictions prior to the 1999 MVAs which are the cause of the claimant's current cervical condition. With the evidence in conflict, it is the hearing officer, as the sole judge of the relevance and materiality of the evidence as well as the weight and credibility that is to be given to 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). Consequently, we affirm the hearing officer's decision on the extent-of-injury issues.

The hearing officer adopted Dr. B's November 13, 2000, IR on the basis of a change in condition and that the report "was made within a reasonable time . . . ." The hearing officer comments:

> [T]he Act does, indeed, permit the revision of an [IR] after statutory [MMI] has been reached, in that the Act permits evidence of a substantial change of condition to be introduced when the issue of an [IR] is appealed for judicial review. Since a protracted amount of time may elapse between an injured worker's date of [MMI] and the time that his case reaches a district court for judicial review proceedings regarding his [IR], and since the Act specifically allows evidence of a greater impairment to be brought forth at such proceedings, it follows that the Act does, contrary to Carrier's argument, permit the revision of an [IR] provided that the dispute regarding the hypothetical [IR] has not become final by an order of the [Texas Workers' Compensation] Commission or court of competent jurisdiction.

The evidence is very clear that neither the third or fourth spinal surgeries were being considered in any form at the time of statutory MMI. In Texas Workers' Compensation Commission Appeal No. 002929-S, decided January 23, 2001, we held that the key factor to allow a designated doctor to amend his report based on spinal surgery was whether the surgery was under active consideration at the time of statutory MMI. In this case, that was clearly not the situation and Dr. B's report of November 2000 was over two and one-half years after the claimant reached MMI by operation of law (statutory MMI).

Accordingly, we reverse the hearing officer's decision that the claimant has a 28% IR and render a new decision that the claimant's IR is 14% as assessed by the designated doctor shortly after statutory MMI, and that that report is not contrary to the great weight of other medical evidence.

Thomas A. Knapp
Appeals Judge

CONCUR:

Elaine M. Chaney
Appeals Judge

Philip F. O'Neill
Appeals Judge