APPEAL NO. 011182
FILED JULY 13, 2001

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 May 2, 2001. With respect to the sole issue before her the hearing officer determined that the respondent (claimant herein) had a 27% impairment rating (IR) based upon the amended report of the designated doctor. The appellant (carrier herein) files a request for review contending that the hearing officer erred in giving presumptive weight to the amended report of the designated doctor because the designated doctor did not amend his report for a proper reason or in reasonable amount of time. The carrier argues that the hearing officer should have found the claimant had an 11% IR based upon the original report of the designated doctor. The claimant responds that the decision of the hearing officer should be affirmed.[1]

DECISION

Finding sufficient evidence to support the decision of the hearing officer and no reversible error in the record, we affirm the decision and order of the hearing officer.

The parties stipulated that on _____, the claimant sustained a compensable injury and it is undisputed that the claimant reached statutory MMI on July 14, 1999. This injury is described in medical records in evidence as taking place when the claimant was trying to open a stuck door on a railroad car and heard his back pop. It was undisputed that the claimant initially underwent considerable conservative treatment for his injury prior to being referred to Dr. C, a neurosurgeon. Dr. C stated in a report dated April 29, 1999, that the claimant "will need a more definite approach which would be a PLIF [posterior lumbar interbody fusion] procedure." On September 13, 1999, the claimant underwent a lumbar laminectomy at L5-S1. In his operative report Dr. C stated in part as follows:

> The patient was evaluated in the office, and after evaluating the entire situation, it was felt that he did have degenerative disease at L5-S1 with decreased disk-space height and also had herniated disk. The concern at this point was because of his age, it was felt that he should undergo simple decompression first of L5-S1 in the form of a laminotomy/laminectomy to remove any posterior disk and disease. Following this, he would then undergo anterior fusion in the future if in fact he continued to have back pain.

[1]There is a question as to whether this response was timely filed. The response was initially mailed on June 12, 2001, which was within 15 days of the claimant's receipt of the carrier's request for review (which was received on June 1, 2001), but was returned for postage due. It was then remailed with additional postage on the June 18, 2001. However, we note that the 15th day after the claimant's receipt of the carrier's request for review was June 16, 2001, which was a Saturday. The time for filing the response was therefore tolled to the next business day which was Monday, June 18, 2001, the date the response was remailed.

Dr. G certified on a Report of Medical Evaluation (TWCC-69) dated November 11, 1999, that the claimant attained MMI on November 11, 1999, with a 16% IR. The parties stipulated that as a result of an MMI and IR dispute, the Texas Workers' Compensation Commission (Commission) appointed Dr. Ca as its designated doctor. Dr. Ca certified on a TWCC-69 dated March 27, 2000, that the claimant attained MMI on November 11, 1999, with an 11% IR.

In a report dated April 20, 2000, Dr. C recommended the claimant proceed with interbody fusion a L5-S1 stating as follows in relevant part:

> Following surgery in September, he did show some improvement particularly with his radiculopathy. However, he never truly seemed to improve from the low back pain. He presents to the office today for reevaluation of his back.
>
> * * * *
>
> Prior to his initial surgery he was told that if he had any additional problems he would most likely be a candidate for fusion due to disk space loss as well as degenerative disease.

The claimant underwent a lumbar fusion on July 24, 2000, followed by a another course of conservative treatment. He was reevaluated by Dr. Ca on December 5, 2000. Dr. Ca issued an amended TWCC-69 dated December 12, 2000, in which he certified that the claimant attained statutory MMI on July 14, 1999, and had a 27% IR. The carrier put into evidence a report dated April 9, 2001, from Dr. Co, its peer review doctor, who based upon his review of the medical records, stated various disagreements with Dr. Ca's IR and suggested various alternative IR's from 5% to 14%.

At the CCH the carrier argued that the hearing officer should give presumptive weight to the first report of Dr. Ca and find that the claimant has an 11% IR. The claimant argued that the hearing officer should find that the claimant had a 27% IR based upon the amended certification of the designated doctor. The hearing officer, citing our decision in Texas Workers' Compensation Commission Appeal No. 970653, decided May 28, 1997, found that the amendment of his IR certification by the designated was done for a proper reason. The hearing officer, noting the time between the designated doctor's original report and his amended report, as well as the events that transpired during this period, stated that the amendment was done in a reasonable amount of time.

Section 408.125(e) provides:

> 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 impairment rating on that report unless the great weight of the other medical evidence is to the contrary. If the great weight of the medical evidence contradicts the impairment rating

> contained in the report of the designated doctor chosen by the commission, the commission shall adopt the impairment rating of one of the other doctors.

The parties recognize that the Appeals Panel has generally held that amended IR certifications by a designated doctor done for a proper reason and in a reasonable amount of time are given presumptive weight. The carrier argues that Dr. Ca did not amend his report for a proper reason or in a reasonable amount of time. The carrier also argues that the hearing officer's decision is contrary to a line of Appeals Panel decisions holding that amendment due to surgery after statutory MMI is only proper where the surgery was under active consideration at the time of statutory MMI. The hearing officer specifically found that the designated doctor's report of December 5, 2000, was done within a reasonable time and for a proper reason. Section 410.165(a) provides that the contested case hearing officer, as finder of fact, is the sole judge of the relevance and materiality of the evidence as well as of the weight and credibility that is to be given the evidence. When reviewing such a factual determination of hearing officer we will only reverse if the determination is so contrary to the overwhelming weight of the evidence as to be clearly wrong and unjust. Cain v. Bain, 709 S.W.2d 175, 176 (Tex. 1986); Pool v. Ford Motor Co., 715 S.W.2d 629, 635 (Tex. 1986). We do not find that to be the case here as there is sufficient evidence in the record to support the finding of the hearing officer that the designated doctor amended his report for a proper reason and in a reasonable amount of time. We specifically note that there was evidence that lumbar fusion surgery was under active consideration prior to statutory MMI. Merely because Dr. C and the claimant opted to try the less intrusive laminectomy first does not mean that the fusion surgery was not under active consideration at the time of statutory MMI. The April 29, 1999, report from Dr. C quoted above explicitly shows that fusion surgery was under consideration at the time of statutory MMI. The other quoted reports show that while there was some hope the claimant might be able to avoid a fusion, consideration of his having a fusion was never abandoned, and in a sense, the fusion surgery was only the second step of the procedure begun with the laminectomy. Finally, the hearing officer did not err in finding the great weight of the medical evidence was not contrary to the amended IR certification of the designated doctor.

The decision and order of the hearing officer are affirmed.

Gary L. Kilgore
Appeals Judge

CONCUR:

Elaine M. Chaney
Appeals Judge

Susan M. Kelley
Appeals Judge