APPEAL NO. 011807
FILED SEPTEMBER 6, 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 July 13, 2001. With regard to the issues before him, the hearing officer determined that the appellant (claimant) reached maximum medical improvement (MMI) on March 30, 1999, with a 7% impairment rating (IR), as initially assigned by the designated doctor.

The claimant appeals the hearing officer's determinations, arguing that he reached MMI on June 18, 2000, with a 33% IR, as amended by the designated doctor. The respondent (carrier) urges affirmance of the hearing officer's determinations.

DECISION

Reversed and remanded.

The claimant testified that he sustained a compensable injury to his neck and low back by lifting a box at work on _____. The claimant testified that he and his treating doctor, Dr. R, discussed surgery at the beginning of his medical treatment; however, the claimant preferred to undergo other forms of treatment before attempting surgery. The claimant was referred to Dr. C and Dr. M for further medical evaluations. On June 25, July 19, and August 20, 1999, Dr. C treated the claimant with epidural steroid and/or facet injections to relieve the pain to the claimant's low back, which radiated to his legs. The claimant testified that the injections relieved his pain for a few days, then his low back would hurt again. On November 3, 1999, the claimant was referred to Dr. CR for a neurological evaluation. On February 14, 2000, Dr. CR recommended surgery ("lumbar laminectomy with discectomy at L4-5 level") and Dr. M concurred. The medical reports in evidence showed that beginning on January 12, 2000, Dr. M discussed surgery with the claimant and was awaiting medical evaluations and second medical opinions to proceed with the surgery. The claimant testified that beginning in 2000 he wanted to have the surgery as it was the only means of relieving his low back pain.

During the time that the claimant was undergoing medical treatment with Dr. R, Dr. C, Dr. M, and Dr. CR, the claimant was examined by the carrier's required medical examination doctor, Dr. S, on February 8, 1999. Dr. S. certified that the claimant reached MMI on February 8, 1999, with a 5% IR. On February 17, 1999, the treating doctor, Dr. R, disagreed with Dr. S's certification of MMI and assigned IR. On March 30, 1999, the Texas Workers' Compensation Commission (Commission)-appointed designated doctor, Dr. B, examined the claimant and certified that the claimant reached MMI on March 30, 1999, with a 7% IR. On April 9, 1999, Dr. R disagreed with Dr. B's certification of MMI and his assigned IR.

On June 13, 2000, the Commission notified the claimant of the results of the spinal surgery second-opinion process and that "the insurance carrier has failed to respond

and/or to schedule opinion appointment regarding your spinal surgery within the required time frames." In addition, the Commission's letter states that "[t]his letter is your preauthorization for spinal surgery and is valid for one year from the date the letter is issued" (June 13, 2000). The claimant underwent spinal surgery on October 19, 2000. The claimant testified that he felt better after the surgery.

The documents in evidence show that a benefit review conference (BRC) was held on January 18, 2001, where the claimant and the carrier disputed the MMI date and IR. On January 24, 2001, the Commission sent a letter to Dr. B inquiring whether he would change the MMI date and IR in view of the surgery performed on October 19, 2000. On March 3, 2001, Dr. B examined the claimant and amended his report to certify that the claimant reached MMI on June 18, 2000, with a 33% IR.

At the CCH, the carrier informed the hearing officer that the claimant reached statutory MMI on June 26, 2000, and that the claimant had not requested an extension of the date of MMI for spinal surgery. However, we note that there was no evidence offered regarding the date of statutory MMI (*see* Section 401.011(30)(B) for a definition of statutory MMI) and that extension of the date of MMI was not an issue before the hearing officer. The carrier's comment that statutory MMI was reached on June 26, 2000, does not constitute evidence.

The claimant appealed the following:

FINDINGS OF FACT

8. No proper reason existed for [Dr. B] to do a second certification of [MMI] and [IR].

9. [Dr. B]'s April 2, 1999 certification that Claimant reached [MMI] on March 30, 1999 with a 7% whole body [IR] has not been overcome by the great weight of contrary medical evidence.

CONCLUSION OF LAW

3. Claimant reached [MMI] on March 30, 1999 with a 7% whole body [IR].

The carrier argues that the designated doctor's amended report should not be adopted because he did not amend his report for a proper reason or purpose and within a reasonable period of time as cited in Texas Workers' Compensation Commission Appeal No. 950861, decided July 12, 1995.

The hearing officer erred in determining that no proper reason existed for Dr. B to do a second certification of MMI and IR. With regard to proper reason, the Appeals Panel has held that "revision of IR may be considered after statutory MMI when a substantial

change of medical condition occurs or when certain treatment is provided, such as surgery, which was being processed at the time of statutory MMI." Appeal No. 950861 *citing* Texas Workers' Compensation Commission Appeal No. 941243, decided October 26, 1994. In this case, Dr. B's revision of the MMI date and IR was due to his re-evaluation at the request of the Commission because of the subsequent surgery.

On March 3, 2001, Dr. B submitted an amended Report of Medical Evaluation (TWCC-69) that certified that the claimant reached MMI on June 18, 2000, with a 33% whole body IR. Dr. B calculated the claimant's IR based on a 10% IR for specific disorders from Table 49 of the Guides to the Evaluation of Permanent Impairment, third edition, second printing, dated February 1989, published by the American Medical Association, 25% IR for "total lumbosacral range of motion and ankylosis impairment," for a combined 33% whole body IR. We hold that the designated doctor amended his report for proper a reason, namely, subsequent surgery.

With regard to reasonable time, the documents in evidence show that MMI and IR were in dispute since Dr. S first certified that the claimant reached MMI on February 8, 1999, with a 5% IR and the treating doctor, Dr. R, disagreed. Dr. R also disagreed with the designated doctor's first certification of MMI on March 30, 1999, with a 7% IR. The record shows that although there was a dispute regarding MMI and IR, a BRC was not held until January 18, 2001, after statutory MMI; and that on January 24, 2001, the designated doctor first became aware of the claimant's subsequent surgery by letter from the Commission. We note that surgery was under active consideration beginning in January 2000 and that spinal surgery was approved by the Commission on June 13, 2000. The Appeals Panel has held that a "designated doctor may amend a report for a proper reason within a reasonable time." Texas Workers' Compensation Commission Appeal No. 000138, decided March 8, 2000, *citing* Texas Workers' Compensation Commission Appeal No. 981773, decided September 17, 1998.

The hearing officer erred in determining that Dr. B's certification that the claimant reached MMI on March 30, 1999, with a 7% IR was not overcome by the great weight of contrary medical evidence. The carrier argues that "surgery was not under active consideration when the designated doctor *initially assigned* an MMI date and an [IR]." (Emphasis added.) The Appeals Panel, in Texas Workers' Compensation Commission Appeal No. 002929-S, decided January 23, 2001, has declined to follow the carrier's argument as cited in Texas Workers' Compensation Commission Appeal No. 971385, decided August 25, 1997. The Appeal Panels has held that "whether surgery was contemplated ('under active consideration') at the time of statutory MMI" is the determining factor. *See also* Texas Workers' Compensation Commission Appeal No. 990833, decided June 7, 1999; Texas Workers' Compensation Commission Appeal No. 010514, decided April 9, 2001. The record shows that surgery was contemplated beginning January 12, 2000, through August 17, 2000, and had been approved by the Commission on June 13, 2000, prior to statutory MMI.

The hearing officer's Decision and Order is reversed and remanded. We reverse the hearing officer's determination that the claimant reached MMI on March 30, 1999, with a 7% whole body IR. We remand the case for the hearing officer to determine the date of statutory MMI, to determine whether spinal surgery was under "active consideration" at statutory MMI, and to review Dr. B's amended report. The parties may stipulate on the date of statutory MMI or the hearing officer may take other evidence regarding the date of MMI. We also note that Dr. B's amended report has an MMI date of June 18, 2000; that the claimant clearly had spinal surgery after that date; and that the carrier stated that statutory MMI was June 26, 2000. It would appear that MMI was the date of statutory MMI, rather than some date prior to statutory MMI.

Pending resolution of the remand, a final decision has not been made in this case. However, since reversal and remand necessitate the issuance of a new decision and order by the hearing officer, a party who wishes to appeal from such new decision must file a request for review not later than 15 days after the date on which the new decision is received from the Commission's Division of Hearings pursuant to Section 410.202. *See* Texas Workers' Compensation Commission Appeal No. 92642, decided January 20, 1993.

The true corporate name of the insurance carrier is **ACE INSURANCE COMPANY OF TEXAS** and the name and address of its registered agent for service of process is

MARCUS MERRITT, ACE USA
6600 E. CAMPUS CIRCLE DRIVE, SUITE 200
IRVING, TEXAS 75063.

Thomas A. Knapp
Appeals Judge

CONCUR:

Elaine M. Chaney
Appeals Judge

Philip F. O'Neill
Appeals Judge