APPEAL NO. 012550
FILED DECEMBER 4, 2001

This appeal arises pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act). Following a contested case hearing held on September 11, 2001, the hearing officer determined that, based upon the amended report of the designated doctor, the appellant (claimant) reached maximum medical improvement (MMI) on July 30, 1998, and that his impairment rating (IR) is 14%. The claimant has appealed, expressing his disagreement with these determinations, and urging that the Texas Workers' Compensation Commission (Commission) adopt the MMI date of August 2, 2001, and the 30% IR determined by the claimant's treating doctor following his second spinal surgery. The response filed by the respondent (carrier) asserts that the evidence is sufficient to affirm the challenged determinations.

DECISION

Affirmed.

The claimant testified that on _____, he injured his low back at work and continued to work until January 7, 1998, when he underwent lumbar spine surgery by Dr. SC, a laminectomy and discectomy for herniation at L4-5; that he returned to work at light duty on or about May 11, 1998, and to-full duty work on or about June 22, 1998; and that after seeing his treating doctor, Dr. AC, on June 30, 1998, Dr. AC certified in a Report of Medical Evaluation (TWCC-69) dated "08-03-98" that the claimant had reached MMI on that date with an IR of 15%. Dr. AC's accompanying narrative report indicated that the claimant was not assigned more impairment for abnormal lumbar range of motion (ROM) because of invalidation of measurements by the straight leg raise (SLR) test. The claimant said he disputed Dr. AC's IR and feels he also disputed the MMI date though he is not aware that his dispute of the MMI date is recorded anywhere. In this regard, he maintained that he disputed Dr. AC's June 30, 1998, MMI date "from day one" and "all along," but also stated that two Commission employees involved in his several requests to the designated doctor for clarification advised him that the 90-day time period to dispute the June 30, 1998, MMI date had passed. Commission letters dated September 25, 1998, and June 10, 1999, to the claimant and the carrier reflect that the designated doctor was appointed for the determination of the IR only.

The claimant further testified that after he was examined by the designated doctor, Dr. M, on October 12, 1998, the latter adopted Dr. AC's MMI date of June 30, 1998, and assigned a 13% IR. Dr. M's TWCC-69 of October 12, 1998, states the MMI date as June 30, 1998, and the IR as 13%. However, in his accompanying narrative report the designated doctor states that only the IR is in dispute. The designated doctor also indicates that the claimant's lumbar flexion and extension ROM measurements were invalidated by the SLR test. The claimant stated that his back pain did not improve; that Dr. AC disagreed with the designated doctor's ROM rating and expressed this in writing; that he was reexamined by the designated doctor on June 28, 1999; and that after this

reexamination, the designated doctor reported that he again invalidated the lumbar ROM based on the SLR test but continued to assign ratings for lateral flexion and increased the total IR to 14%. The claimant also said that at the time of the second examination, he told the designated doctor that a fusion operation was being discussed as a future treatment option and that if the designated doctor's records do not reflect that information, they are incorrect. Dr. AC's record of November 6, 1999, states that the claimant is having a significant increase in low back pain; that he discussed the options of fusion surgery or IDET (intradiscal electrical thermal therapy) at the L4-5 and L5/S1 levels; and that he feels the IDET procedure would be appropriate since the claimant does not want to move towards fusion surgery at this time. Dr. AC's records reflect that the claimant underwent the IDET procedure on February 16, 2000.

The claimant testified that on December 6, 2000, he underwent lumbar spine fusion surgery at the L4-5 and L5-S1 levels by Dr. SC; that following this surgery, his treating doctor changed his MMI date to August 2, 2001, and increased his IR to 30% (which included 20% for abnormal ROM as reflected on Dr. AC's TWCC-69 of August 14, 2001); and that the designated doctor, after being sent additional records, refused to change his 14% IR. Dr. AC wrote on August 5, 1999, and April 6, 2000, that he had reviewed the designated doctor's second evaluation; that the designated doctor once again invalidated the claimant's lumbar flexion and extension range of motion (ROM); that he, Dr. AC, was able to obtain valid measurements; and that he, Dr. AC, feels that the claimant is being done an injustice and has a concern as to whether the designated doctor is trying to keep the claimant's IR below 15%. The designated doctor wrote on May 22, 2000, that on each occasion, he examined the claimant and rated the claimant's ROM based on the claimant's performance; that he feels that he performed his designated doctor duties in accordance with Texas Workers' Compensation law and the Guides to the Evaluation of Permanent Impairment, third edition, second printing, dated February 1989, published by the American Medical Association (AMA Guides); that Dr. AC is asking him evaluate the claimant "based on sentiment"; that he resents Dr. AC's implication that he somehow misapplied the AMA Guides; and that he stands by his separate examinations. The designated doctor, responding to a Commission employee's letter, wrote on May 1, 2001, that he has twice evaluated the claimant; that he has reviewed the additional documentation forwarded; that he does not believe that, based on Appeals Panel decisions and the dates of the injury and statutory MMI, additional impairment can be assigned for the IDET procedure or the fusion surgery; and that had the claimant contemplated the surgery when he saw him in 1999, he may have delayed the MMI determination but that it was his distinct recollection that the claimant was not then interested in any additional surgery whatsoever and that no additional treatment was contemplated at the time of this second evaluation.

The claimant disputes findings that the designated doctor was instructed by the Commission to determine only the IR and to use the MMI date of July 30, 1998, previously determined by Dr. AC; that the designated doctor amended the IR within a reasonable time and for a proper purpose; that the claimant's surgery on December 6, 2000, was not under active consideration on the date the claimant reached statutory MMI; that the designated doctor's July 30, 1999, report is entitled to presumptive weight; and that the designated

doctor's IR is not contrary to the great weight of the other medical evidence.

While a stipulation or specific finding of fact on the date the claimant reached statutory MMI would have been preferable, the hearing officer does state in his discussion of the evidence that the claimant did not actually begin to lose time from work until January 7, 1998, and that statement comports precisely with the claimant's testimony. Section 401.011(30)(B) provides that MMI, if not reached earlier, is reached upon the expiration of 104 weeks from the date on which income benefits begin to accrue. Thus, the hearing officer could infer that the claimant reached statutory MMI 104 weeks following the eighth day of lost time beginning January 7, 1998.

Sections 408.122(c) and 125(e) provide that the report of the designated doctor concerning the MMI date and IR has presumptive weight and that the Commission shall base its determination of whether the employee has reached MMI and the IR on such report unless the great weight of the other medical evidence is to the contrary. We are satisfied that the challenged findings are not so against the great weight of the evidence as to be clearly wrong or manifestly unjust. Pool v. Ford Motor Company, 715 S.W.2d 629, 635 (Tex. 1986); In re King's Estate, 150 Tex. 662, 244 S.W.2d 660 (1951). The claimant urges that the Commission should adopt the amended report of Dr. AC certifying an MMI date of August 2, 2001, and an IR of 30% because the designated doctor failed to take into account the second spinal surgery. However, the evidence does support the finding that only the claimant's IR was submitted to the designated doctor for determination. Further, the evidence does support the hearing officer's finding that the second spinal surgery was not under active consideration when the designated doctor re-examined the claimant in June 1999 and increased the IR to 14%. The hearing officer could consider that the claimant apparently reached statutory MMI sometime in January 2000 and that he did not undergo the second spinal surgery until December 6, 2000.

The decision and order of the hearing officer are affirmed.

The true corporate name of the insurance carrier is **THE CONNECTICUT INDEMNITY COMPANY** and the name and address of its registered agent for service of process is

CORPORATION SERVICE COMPANY
800 BRAZOS
AUSTIN, TEXAS 78701.

Philip F. O'Neill
Appeals Judge

CONCUR:

Judy L. S. Barnes
Appeals Judge

Thomas A. Knapp
Appeals Judge