APPEAL NO. 020295
FILED MARCH 22, 2002

This appeal arises pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act). A contested case hearing was held on January 4, 2002. The hearing officer resolved the disputed issues before him by determining that the respondent's (claimant) date of maximum medical improvement (MMI) is December 4, 2000; that the claimant's impairment rating (IR) is 13%; and that the claimant had disability from September 9, 1999, through December 4, 2000, resulting from the compensable injury of October 6, 1997. The appellant (carrier) appealed, asserting that the amended designated doctor's (DD) report the hearing officer gave presumptive weight to was not done within a reasonable amount of time; that the amended report is based on an erroneous date of statutory MMI; that the DD is not competent to determine whether the Intra-Discal Electro Thermal (IDET) procedure is a surgical procedure; that IDET is not a surgical procedure; and that the claimant did not have disability. The claimant responded, urging affirmance.

DECISION

We affirm.

The parties stipulated that the claimant sustained a compensable injury on _____. The records show that on March 8, 1999, a carrier-selected required medical examination (RME) doctor certified that the claimant was at MMI on March 8, 1999, with a 1% IR. The claimant disputed the certification and was sent to a (Commission) Texas Workers' Compensation Commission selected DD. On April 27, 1999, the DD certified that the claimant was not at MMI. On September 16, 1999, the carrier RME doctor certified that the claimant had reached MMI on September 8, 1999, with a 7% IR. On December 8, 1999, the DD certified that the claimant was at MMI on September 8, 1999, with a 5% IR. The DD acknowledged that the claimant was scheduled for an IDET procedure in January of 2000, but the Commission letter only asked him to address the IR. On March 31, 2000, a benefit review officer (BRO) sent the DD a letter of clarification as to the claimant's MMI/IR. On May 16, 2000, the DD certified that the claimant was at MMI on September 8, 1999, with a 12% IR. The DD gave the claimant a rating for the IDET procedure but did not mention the claimant's upcoming spinal surgery. Again, the DD was not asked to address MMI so he did not. On December 8, 2000, the Commission sent out a notice of approval for spinal surgery. On February 5, 2001, the claimant underwent spinal surgery. On July 9, 2001, a second BRO sent the DD a letter of clarification as to the claimant's MMI/IR due to the spinal surgery. In his letter to the DD, the BRO states, "Based on the information in the Commission file, [claimant] has a statutory [MMI] date of 12-4-00." On September 14, 2001, the DD certified that the claimant was at statutory MMI on December 4, 2000, with a 13% IR. It is this last DD certification to which the hearing officer gave presumptive weight.

On appeal, the carrier asserts that the hearing officer erred in determining that the

DD's September 14, 2001, certification was done within a reasonable amount of time. Before January 2, 2002, there was no Commission rule which specifically discussed a designated doctor's amendment of MMI. The hearing officer obviously applied the precedent which was previously developed regarding amendment for a proper purpose and in a reasonable amount of time, (re: proper purpose/reasonable time), in the absence of a Commission rule. However, the Commission has now promulgated a rule which specifically refers to amendments by designated doctors. That is Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 130.6(i) (Rule 130.6(i)), which provides, in relevant part, that when a DD responds to a Commission request for clarification, the DD's response is considered to have presumptive weight as it is part of the DD's opinion. The rule does not permit the analysis of whether an amendment was made for a proper purpose or within a reasonable time. Therefore, the hearing officer did not err in giving the DD's amended certification presumptive weight.

The carrier next asserts that the DD's amended report was based on an erroneous statutory MMI date. The hearing officer's determination that statutory MMI was December 4, 2000, is supported by the second BRO's July 9, 2001, letter to the DD in which he bases his determination of statutory MMI on Commission records, as well as the final certification of the designated doctor. The carrier presented no evidence that this date was incorrect. Under these circumstances, there is no basis for us to reverse the hearing officer statutory MMI date.

The carrier next asserts that IDET is not a surgical procedure for purposes of the Guides to the Evaluation of Permanent Impairment, third edition, second printing, dated February 1989, published by the American Medical Association (AMA Guides), and that the DD was not qualified to make the determination that IDET is a surgical procedure. The carrier relies on Advisory 2001-04 to support its position that IDET is not a surgical procedure.

We have previously held that IDET is a surgical procedure. Texas Workers' Compensation Appeal No. 011557, decided August 7, 2001; Texas Workers' Compensation Appeal No. 012635-s, decided December 13, 2001. We have also previously determined that Advisory 2001-04 is instructive in determining how to get the IDET procedure approved, but not instructive in determining whether or not the IDET procedure is surgery for purposes of the AMA Guides. Appeal No. 012635-s, *supra*. The hearing officer's determination that the IDET procedure is surgery for purposes of the AMA Guides is affirmed.

Finally, the carrier asserts that the hearing officer erred in determining that the claimant had disability from September 9, 1999, through December 4, 2000. Whether or not the claimant had disability was a question of fact for the hearing officer to resolve. Nothing in our review of the record indicates that the hearing officer's determination as to the claimant's disability is so against the great weight and preponderance of the evidence as to be clearly wrong or manifestly unjust. Accordingly, we affirm that determination. Cain v. Bain, 709 S.W.2d 175, 176 (Tex. 1986); Pool v. Ford Motor Company, 715 S.W.2d

629, 635 (Tex. 1986).

The hearing officer's decision and order are affirmed.

The true corporate name of the insurance carrier is **(a certified self-insured)** and the name and address of its registered agent for service of process is

CT CORPORATION SYSTEM
350 NORTH ST. PAUL STREET
DALLAS, TX 75201.

Gary L. Kilgore
Appeals Judge

CONCUR:

Elaine M. Chaney
Appeals Judge

Terri Kay Oliver
Appeals Judge