APPEAL NO. 030857
FILED MAY 29, 2003

This appeal arises pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq*. (1989 Act). This case is back before us after our remand in Texas Workers' Compensation Commission Appeal No. 023246, decided February 19, 2003. We had remanded this case for the hearing officer to determine whether the designated doctor had rated the appellant's (claimant herein) entire compensable injury in placing the claimant at maximum medical improvement (MMI) on February 7, 2002, with a zero percent impairment rating (IR), and if so, to explain how this was consistent with the earlier spinal surgery determination, or to seek clarification from the designated doctor to obtain an IR which considered the claimant's entire compensable injury, and if the designated doctor would not do so, to appoint a second designated doctor. The hearing officer chose not to hold a hearing on remand, but issued a decision on remand in which he again adopted the MMI date and zero percent IR of the designated doctor selected by the Texas Workers' Compensation Commission (Commission). The claimant appeals the decision of the hearing officer, arguing that he clearly was not at MMI on February 7, 2002, and that the IR of the designated doctor failed to properly rate his compensable injury. The respondent (carrier herein) responds that the hearing officer did not err in adopting the MMI and IR of the designated doctor.

DECISION

We reverse the decision of the hearing officer and render a new decision that the issues of MMI and IR remain unresolved in this case. We order the appointment of a second designated doctor to resolve the issues of MMI and IR.

We summarized the facts in this case in our decision in Appeal No. 023246, *supra*, as follows:

> Most of the relevant facts in this case are undisputed. The parties stipulated that the claimant sustained a compensable injury on _____, and that Dr. R was the designated doctor selected by the Commission to determine the date of MMI and IR. On February 7, 2002, Dr. R certified that the claimant attained MMI on that date with a zero percent IR.
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> It is apparent that the claimant's treating doctor strongly disagreed with Dr. R's certification; and It [sic] is also clear that Dr. R certified MMI and IR while the claimant was going through the second opinion spinal surgery process. That process resulted in the Commission determining that the carrier was liable for spinal surgery. This determination was disputed and taken to [contested case hearing] at which the hearing officer determined that the claimant was entitled to spinal surgery. This decision was appealed to the Appeals Panel, which affirmed the decision of the hearing

officer in Texas Workers' Compensation Commission Appeal No. 021282, decided June 26, 2002. Medical records in the present case show that spinal surgery was performed on July 16, 2002.

The designated doctor, when asked for clarification of his MMI and IR certifications in light of the claimant's surgery, refers the Commission back to his original report. In his original narrative report dated February 7, 2002, the designated doctor states as follows:

> [The claimant] suffered strain of his lower back and right knee to some degree on _____. Strains resolve in a relatively short time.

The treating doctor responded to the designated doctor's certification in a letter of March 13, 2002, stating as follows:

> This is not consistent with an injured worker who sustained a severe injury to his back as well as his knee. He underwent a myelogram with a post myelogram CT on February 19, 2002, which is twelve days after he saw [Dr. R] and I enclose a copy of the report that shows a herniated lumbar disk at five millimeters, intraforaminal and extraforminal with mass effect on the nerve roots with incomplete filling of the nerve roots as well as bulging disk above his herniation of 5-1 and 4-5.

In response to our remand the hearing officer stated as follows in his decision on remand:

> The fact that provoked the questions regarding the thoroughness of [Dr. R's] examination was that in a separate proceeding the Commission had upheld the claimant's request to have his injury treated surgically. While this indeed would seem inconsistent with a determination here that the claimant's injury did not result in any permanent impairment, it should be noted that each of the conflicting "facts" was presented to the Commission in such a fashion that the proposition had to be overcome by a "great weight" of contrary evidence. In each instance, the proposition itself (i.e. that the claimant needs back surgery, that the claimant's back injury did not permanently impair him) could well be wrong or inaccurate under the standard usually employed in both legal and non-legal realms, viz a preponderance of the credible evidence. Nevertheless, each of the conflicting propositions must be upheld if the opposing party fails to bring forward a "great weight" of contrary evidence, and that presumably is what occurred regarding the claimant's back surgery, and certainly occurred here.

We find the hearing officer's attempt to reconcile the incongruity of the hearing officer's having earlier held that the claimant's compensable injury required spinal surgery with an MMI and IR determination that is clearly inconsistent with the need for spinal surgery fails to do so. Lacking statutory authority for any further remands, we reverse the decision of the hearing officer and render a decision that the issues before the hearing officer have not been resolved. Texas Workers' Compensation Commission Appeal No. 980502, decided April 15, 1998; Texas Workers' Compensation Commission Appeal No. 93992, decided December 13, 1993; Texas Workers' Compensation Commission Appeal No. 93902, decided November 19, 1993; and Texas Workers' Compensation Commission Appeal No. 93323, decided June 9, 1993. Further, in light of the fact that clarification has already been sought from Dr. R without receiving any meaningful explanation of how he could reconcile his MMI and IR determinations with the claimant's need for surgery from the compensable injury, we find that seeking further clarification from him at this point would be futile. We therefore order that the Commission appoint a second designated doctor to resolve the issues of MMI and IR.

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

JEFF W. AUTREY
400 WEST 15TH STREET, SUITE 710
FIRST STATE BANK TOWER
AUSTIN, TEXAS 78701.

_____
Gary L. Kilgore
Appeals Judge

CONCUR:

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Robert W. Potts
Appeals Judge

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Edward Vilano
Appeals Judge