APPEAL NO. 041296
FILED JULY 16, 2004

This case returns following our remand in Texas Workers' Compensation Commission Appeal No. 033088, decided January 8, 2004, where we remanded for the appointment of a second designated doctor to reconsider the issues of the respondent's (claimant) date of maximum medical improvement (MMI) and his impairment rating (IR). A contested case hearing on remand was held on May 6, 2004. The hearing officer determined that the claimant reached MMI on November 12, 2002, with a 17% IR as certified by the designated doctor. In its appeal, the appellant (carrier) argues that it was error to appoint a second designated doctor and that the hearing officer erred in giving presumptive weight to the designated doctor's report and adopting his MMI date and IR because they are based upon the claimant's condition following spinal surgery that occurred after statutory MMI. The appeal file does not contain a response from the claimant.

DECISION

Affirmed in part and reversed and rendered in part.

Initially, we note that the carrier asks us to reconsider our decision in Appeal No. 033088. We are disinclined to reconsider our decision because the evidence supports a determination that the claimant reached MMI statutorily on November 12, 2002, and not on March 6, 2001, as Dr. B, the first designated doctor had certified. Dr. B examined the claimant on March 6, 2001, and certified that the claimant reached MMI as of that date with a zero percent IR. In his report, Dr. B states the following:

> It is my finding, as of the important information that has been given to me, that [**the claimant] should be returned to work in a light duty situation for no more than four to five hours for the first four weeks. His bending, lifting, and twisting should be reduced to, limited to almost nothing. He should not be allowed to pick up more than 15 pounds, preferably doing office or a desk type work. After this period of time, he should be slowly integrated back into his daily job functions as his health permits**. The [claimant] was given an [IR] today and placed at [MMI]. The [claimant] also stated that [Dr. Z] states that he would like to try a series of spinal injections for pain. The [claimant] seemed to agree to this protocol and this protocol is within the treatment guideline. I believe that the [claimant] can go ahead with this procedure and still be allowed to be returned to work in a light duty situation.

Thus, as the highlighted language suggests, Dr. B certified MMI despite giving a contradictory opinion that the claimant's condition was likely to materially improve. In addition, the record reflects that the claimant was given a course of treatment following the date of MMI certified by Dr. B (some 21 months prior to statutory MMI), which

culminated in spinal surgery. It seems axiomatic that the continued treatment was undertaken in an effort to and was reasonably calculated to improve the claimant's condition. Accordingly, the record supports Dr. H, the second designated doctor, certification that the claimant reached MMI statutorily on November 12, 2002, and not clinically on March 6, 2001, as the first designated doctor had found. As such, we affirm the determination that the claimant's date of MMI is November 12, 2002.

However, we cannot affirm the determination that the claimant's IR is 17% as Dr. H certified. Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 130.1(c)(3) (Rule 130.1(c)(3)), which became effective March 14, 2004, provides that "[a]ssignment of an [IR] for the current compensable injury shall be based on the injured employee's condition as of the MMI date considering the medical record and the certifying examination." The 17% IR cannot be adopted because it is clearly based upon a change in the claimant's condition due to the surgery after statutory MMI. Thus, we reverse the determination that the claimant's IR is 17% and render a new determination that the claimant's IR cannot be determined. There is no IR that is based upon the claimant's condition at the time of statutory MMI. Dr. B's IR is based upon the claimant's condition on March 6, 2001, well before the November 12, 2002, date of MMI and Dr. H's IR is based upon the claimant's condition following a post-MMI surgery. Dr. H should be asked to determine the claimant's IR as of the date of statutory MMI, before the surgery took place. While that determination will no doubt be a difficult one to make, it is required under Rule 130.1(c)(3). And, despite the obvious challenge that Rule 130.1(c)(3) imposes, we cannot agree that, as the carrier suggests, the solution lies in foisting upon the claimant an IR certified some 21 months before the date of MMI. If Dr. H will not assign an IR as of the date of statutory MMI, then the Commission will have to continue to appoint designated doctors until a doctor that is willing to certify an IR based upon the claimant's condition on November 12, 2002, can be found.

The hearing officer's determination that the claimant reached MMI on November 12, 2002, is affirmed. The determination that the claimant's IR is 17% is reversed and a new decision rendered that the IR cannot yet be determined.

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

CORPORATION SERVICE COMPANY
800 BRAZOS STREET, SUITE 750, COMMODORE 1
AUSTIN, TEXAS 78701-2554.

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Elaine M. Chaney
Appeals Judge

CONCUR:

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Gary L. Kilgore
Appeals Judge

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Margaret L. Turner
Appeals Judge