APPEAL NO. 950417

This appeal arises under the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq*. (1989 Act). A contested case hearing was held in (city), Texas, on February 10, 1995. In response to the issues before him the hearing officer, (hearing officer), determined that the claimant reached maximum medical improvement (MMI) on July 7, 1994 with a 13% impairment rating (IR), as determined by the designated doctor selected by the Texas Workers' Compensation Commission (Commission). The claimant appeals, contending that his treating doctor's opinion that he has not reached MMI overrides the designated doctor's report. The appeals file contains no response from the carrier, a self-insured governmental entity.

DECISION

Affirmed.

The claimant suffered a compensable injury on (date of injury), when he was involved in a motor vehicle accident. He first treated with a chiropractor, (Dr. O), who ordered x-rays which showed degenerative spondylosis of the lumbar and cervical spine. The report of a subsequent CT scan of the lumbar spine stated the following impression: a small bulged disk at L3-4, a "sizeable" herniated disk at L4-5, and a "moderate-sized" herniation at L5-S1. On July 12th the claimant was referred to an orthopedic surgeon, (Dr. D), who ordered nerve conduction studies and electromyography which were read as normal, with no evidence of entrapment or peripheral neuropathy, myopathy, nerve root irritation or radiculopathy. An August 1993 lumbar myelogram showed moderate indentation on the anterior thecal sac at the L4-5 level; a CT performed following the myelography found mild diffuse disk bulge with superimposed mild broad based left central protrusion at L4-5, mildly indenting the anterior thecal sac.

On November 1, 1993, Dr. D referred the claimant to (Dr. H) for a neurosurgical consultation. Dr. H summarized claimant's diagnostic studies as suggesting a disk protrusion central and to the left at L4-5; he also noted claimant's complaints of persistent pain. Dr. H recommended an MRI which he said showed decreased signal intensity in the L4-5 and L5-S1 disks with generalized bulging of the disk annulus at both levels and increased signal intensity in the annuli centered to the left at L4-5 and centered to the right at L5-S1 "probably representing annular fissures." He said he discussed with claimant the possibility of surgery and that the claimant wished to consider this option. In a Specific and Subsequent Medical Report (TWCC-64) dated February 21, 1994, Dr. D also stated that the claimant was "being evaluated for surgery."

On April 4, 1994, Dr. D completed a Report of Medical Evaluation (TWCC-69) wherein he determined that the claimant reached MMI on that date with a 20% IR. On May 10th, he wrote that the claimant could return to work and stated in that note that claimant had reached MMI "according to law." On June 1st, however, Dr. D wrote in a Specific and Subsequent Medical Report (TWCC-64) that claimant had not reached MMI, and that his

earlier certification had been based upon his understanding that the claimant "had been off work for 102 weeks." Dr. D stated that the claimant continued to have a great deal of pain and under the section entitled "Treatment Plan" he wrote "Surgical correction of lesions."

The Commission selected as designated doctor (Dr. P), an orthopedic surgeon, who examined the claimant on July 7th and certified he had reached MMI as of that date, with a 13% IR due to impairment of his lumbar and cervical spine. In his report Dr. P summarized claimant's diagnostic studies but did not refer to the original CT scan revealing herniation; rather, he wrote that there was no evidence of herniation and that claimant had degenerative disk disease. Apparently at the claimant's request, on October 11th a Commission benefit review officer (BRO) wrote Dr. P, referencing the June 1993 CT scan showing herniations and questioning whether Dr. P considered this report in determining the claimant's IR. The BRO also asked whether claimant should be restricted in his work environment and whether Dr. P still believed claimant's IR was 13%. Dr. P replied as follows:

> Your letter indicates the CT Scan . . . revealed an L4-5 disc bulge with herniation at the L5-S1 level. I feel the CT Scan is not a reliable reproducible study in terms of assessing disc herniation. Indeed, when this patient had a lumbar myelogram . . . not only did it indicate there was no evidence of a disc herniation at either of those levels but there was only a mild impression present on the L3-4 level. The only objective change the patient had was a mild spondylitic bulge at the L3-4 level without evidence of disc herniation or neural element compromise. There was no evidence of significant abnormality. The CT Scan done following the myelogram suggested a spondylitic protrusion at the L5 level. Again, both of these changes are modest.

Dr. P went on to state that he believed claimant's 13% IR was still appropriate. He also stated that the claimant should avoid repeated bending, heavy lifting, and prolonged sitting.

Dr. P's TWCC-69 was sent to Dr. D, who indicated that he disagreed with both the assessment of MMI and the IR. Attached was a September 20, 1994, TWCC-64 in which Dr. D wrote that claimant was "awaiting evaluation for surgery or work hardening program." On November 30, 1994, Dr. D again indicated that claimant's treatment plan included "Surgical correction of lesions." At the hearing the claimant stated he was still in pain, that he continues to treat with Dr. D and has not returned to work, and that he was willing to have surgery.

The hearing officer determined that the report of Dr. P was not overcome by the great weight of the other medical evidence, which the 1989 Act provides as the means for overcoming the presumptive weight otherwise given the designated doctor's report. Sections 408.122(b), 408.125(e). Claimant's sole point on appeal is that Dr. P's report is

overcome by Dr. D's opinion that claimant has not reached MMI and that claimant would benefit from further treatment including surgery and work hardening.

"Maximum medical improvement" is defined as the earlier of the earliest date after which, based on reasonable medical probability, further material recovery from or lasting improvement to an injury can no longer reasonably be anticipated, or the expiration of 104 weeks from the date on which income benefits begin to accrue. Section 401.011(30). The Appeals Panel has previously addressed situations in which a claimant has contended that the potential for surgery indicates that further improvement can reasonably be expected. For example, in Texas Workers' Compensation Commission Appeal No. 93293, decided June 1, 1993, we reversed and remanded to allow a designated doctor to comment on whether he believed surgery, which had been recommended by the treating doctor and agreed to by the claimant, pending receipt of a second opinion, would result in further material recovery (the designated doctor had stated that "[w]ithout surgery he has reached MMI . . ."). However, we wrote in that decision that "[w]e do not take the position that simply because a treating doctor indicates that a claimant is a candidate for surgery that MMI may not be found," adding that each case had to be decided on its own merits "and factors such as when the claimant first learned of the need for surgery, the claimant's actions after obtaining that information, the reason for delay, if any, in scheduling surgery, and the opinions of doctors . . ."

In this case, while Dr. H first raised the possibility of surgery in November 1993 and Dr. D apparently agreed, there was nothing in the medical reports to indicate that these recommendations had been acted on. (*Compare, for example*, Texas Workers' Compensation Commission Appeal No. 93336, decided June 16, 1993, where the request for surgery had proceeded through the Commission's medical review process and the surgery itself had been scheduled for a date less than one month from the contested case hearing.) Indeed, Dr. D's reports late in 1994 appear to indicate that surgery was still just a possibility. Although Dr. P did not state directly, nor was he asked to comment on, whether he disagreed with surgical recommendations, we believe this can be fairly inferred from his opinion as to the extent of claimant's injury based upon his interpretation of claimant's diagnostic studies. In short, we find this case analogous to cases such as Texas Workers' Compensation Commission Appeal No. 93311, decided June 7, 1993, which affirmed the hearing officer's determination of MMI and IR based upon the designated doctor's opinion that the claimant would not improve with surgery, where the evidence also showed that surgery was a possibility but no second opinion had been sought nor surgery scheduled. That decision observed, as we have so many times, that it is not just equally balancing evidence or a preponderance of evidence that can overcome the presumptive weight given the designated doctor's report under the 1989 Act. Texas Workers' Compensation Commission Appeal No. 92412, decided September 28, 1992. No other doctor's report, including that of a treating doctor, is accorded such special, presumptive weight. Texas Workers' Compensation Commission Appeal No. 92366, decided September 10, 1992.

With regard to claimant's testimony and the medical evidence indicating persistent pain, we have written in Texas Workers' Compensation Commission Appeal No. 92670, decided February 1, 1993, as follows:

> It has become clear that many claimants do not understand how they can reach "maximum medical improvement" when they still continue to hurt and suffer from any injury. "Maximum medical improvement" appears to mean complete recovery to the ordinary person. But that is not what it means for purposes of workers' compensation benefits. That term means . . . the point at which further material recovery or lasting improvement can no longer be reasonably anticipated, according to reasonable medical probability. When the doctor finds MMI and assesses an impairment, he agrees, in effect, that the injured worker is likely to continue to have effects, and quite possibly pain, from the injury. [Citation omitted.]

As we have also noted, the 1989 Act provides that a claimant is entitled to "all health care reasonably required by the nature of the injury as and when needed." Section 408.021. However, that issue is not currently before us at this time.

Based upon our review of the evidence, the hearing officer's determination is not so against the great weight and preponderance of the evidence as to be manifestly unfair and unjust. Cain v. Bain, 709 S.W.2d 175, 176 (Tex. 1986). The decision and order of the hearing officer are accordingly affirmed.

Lynda H. Nesenholtz
Appeals Judge

CONCUR:

Robert W. Potts
Appeals Judge

Alan C. Ernst
Appeals Judge