APPEAL NO. 92451

On June 15, 1992, a contested case hearing was held in (city), Texas, with (hearing officer) presiding. The hearing was reconvened on July 10, 1992, briefly, for receiving additional evidence into the record. The hearing officer determined that the claimant, (Ms. N), had attained maximum medical improvement (MMI), based upon the report of (Dr. JS), the designated doctor appointed by the Texas Workers' Compensation Commission to resolve a dispute over MMI and impairment rating. The hearing officer, however, found that the report of the designated doctor was invalid as to impairment rating because there was no evidence that it had been rendered by using the American Medical Association *Guides to the Evaluation of Permanent Impairment*, as required by the Texas Workers' Compensation Act, TEX. REV. CIV. STAT. ANN. art. 8308-4.24 (Vernon's Supp. 1992) (1989 Act). The hearing officer appointed a second designated doctor to reassess impairment.

Both parties have filed timely appeals. The carrier argues that the hearing officer erred by finding the impairment rating of the designated doctor to be invalid, because there was no dispute or issue raised at the hearing concerning whether the doctor had used the proper edition of the impairment guides. The carrier further argues that the hearing officer erred by appointing a second designated doctor, pointing out that the statute contemplates the appointment of a single designated doctor to resolve disputes. Ms. N appeals the conclusions of law adopting the designated doctor's assessment that she has attained MMI, and finding that the great weight of medical evidence is not to the contrary. Ms. N notes that there is no evidence of a degenerative condition noted by the designated doctor and carrier doctor, and that the objective evidence, specifically a magnetic resonance imaging (MRI) test, is against the designated doctor's opinion. The carrier responds to this point by noting that the presumptive weight to be accorded to the designated doctor's report was not overcome by the other medical evidence.

DECISION

After reviewing the record, we affirm the determination of the hearing officer adopting the designated doctor's assessment of MMI. However, we reverse her determination that the impairment rating of the designated doctor is invalid, and render a decision adopting the impairment rating assigned by the designated doctor. Because of this, we void the order for appointment of a second designated doctor as moot.

I

The claimant injured her back in the course and scope of her employment for (employer) while lifting a heavy box, on (date of injury). She was initially seen by (Dr. L), who prescribed therapy. She then went to (Dr. M) who prescribed therapy, traction, and medication. There are not any medical records from either Dr. L or Dr. M in the record that indicate the initial diagnosis. The claimant was then examined by a doctor for the carrier, (Dr. Y), pursuant to a medical examination order. Dr. Y examined claimant on July 3, 1991. He reviewed an x-ray of her back, which he found to be essentially normal, although

suggestive of degenerative disease at the L5-S1 level. Dr. Y opined that such condition "certainly" pre-existed her (date of injury) injury. He noted that there were no medical records which accompanied her. Dr. Y concluded that she had a certain amount of exaggeration of her complaints, and the definite presence of functional overlay. He stated that "At this time, I am unable to find any objective changes on her physical examination, or by regular x-ray, to indicate any significant residuals of injury referable to her back or lower extremities." By a TWCC-69 report that was sent to the carrier and to the Commission on December 16, 1991, in apparent response to carrier inquiry dated December 10, 1991, Dr. Y indicated that the claimant had reached MMI on August 3, 1991 with a 0% impairment rating. A benefit review conference was held February 18, 1992, at which time a designated doctor was appointed to resolve the dispute over MMI and impairment. The claimant indicated she would also see an orthopedic specialist of her own choice, in addition to the designated doctor. The claimant thereafter saw (Dr. D), who ordered an MRI scan. The MRI scan, taken March 26, 1992, notes that the lumbar vertebrae are "decreased in signal, indicative of degeneration," and focal disc herniation is identified to the right of midline at L4-5. A mild bulge is noted at L3-4, and facet osteoarthritis is also noted at spots. A "study" done March 17, 1992, notes that there is no evidence, on oblique views, of spondylolysis. That study is deemed to be "essentially negative." Dr. D notes that claimant continues to experience pain. Although claimant testified that she was told she would need surgery, Dr. D noted in May 1992 that she was not a candidate for surgery at that time. He referred her to (Dr. S), whose June 26, 1992 records recite claimant's medical history and evaluate an impression of chronic low back pain, right-sided disc herniation, and facet osteoarthritis. There is no comment in this record, one way or the other, about MMI or impairment.

The records of the designated doctor, Dr. JS, indicate that he examined the claimant on April 29, 1992, and reviewed her records, including the MRI report, at a later time. He rendered a TWCC-69 report indicating that the claimant attained MMI on April, 29, 1992, with a 0% permanent impairment as a result of her compensable injury. Dr. JS acknowledged the herniation, but noted it did not encroach on the nerve roots. Dr. JS says that the presence of a preexisting degenerative condition is indicated, "which would represent lumbar spondylosis."

MMI does not mean, in all cases, that the injured employee must achieve a pain-free state. It is either the earlier of the expiration of 104 weeks from the date income benefits begin to accrue, or "the point after which further material recovery from or lasting improvement to an injury can no longer reasonably be anticipated, based on reasonable medical probability." Article 8308-1.03(32)(A). Impairment is an anatomical or functional abnormality existing after MMI that results from a compensable injury and, further, "is reasonably presumed to be permanent." Article 8308-1.03(24). The impairment rating is the percentage of "permanent impairment" resulting from the compensable injury. Article 8308-1.03(25). Thus, although there may be pain and some limited function, an injured employee may still be found to have reached MMI. It appears from reading the entire report of Dr. JS that he determined that there were no objective findings to support complaints of pain in the lower back, and that he did not base his opinion only on an attribution of claimant's condition to a preexisting degenerative disease.

The hearing officer is the sole judge of the relevance and materiality, the weight and credibility, of the evidence offered in a contested case hearing. 1989 Act, art. 8308-6.34(e). In this case, the hearing officer would have had to find that the great weight of medical evidence indicated that MMI had not been reached. Article 8308-4.25. We would observe that the hearing officer could have reviewed the other medical evidence presented and found that there is no objective indication that further material recovery may reasonably be anticipated. The decision of the hearing officer will be set aside only if the evidence supporting the hearing officer's determination is so weak or against the overwhelming weight of the evidence as to be clearly wrong or manifestly unjust. Atlantic Mutual Insurance Co. v. Middleman, 661 S.W.2d 182 (Tex. App.-San Antonio 1983, writ ref'd n.r.e.). Any conflict among medical witnesses is a matter to be resolved by the trier of fact. Highlands Underwriters Insurance Co. v. Carabajal, 503 S.W.2d 336 (Tex. Civ. App.- Corpus Christi 1973, no writ).

Therefore, we affirm the hearing officer's adoption of the designated doctor's opinion that MMI had been reached, and that the great weight of other medical evidence was not to the contrary.

II

At the hearing, all medical reports were tendered into evidence as joint exhibits by the parties. No objection was made by either party, nor did either party contend that the impairment ratings on two of these reports (one of which was rendered by the designated doctor) were not performed in accordance with the requirements of the 1989 Act, or were substantively invalid for any other reason. Neither party contended that the reports had not been timely exchanged or that either was deprived of the opportunity to investigate the matters contained in the reports. Both claimant and carrier were represented by counsel. There is nothing on the face of the designated doctor's report that states the basis for the impairment rating, although the report describes an examination performed on the claimant.

The hearing officer may be literally correct by noting that there is no evidence that the impairment rating of the designated doctor was rendered by use of the *Guides*. It may be said with equal force, however, that there is no evidence that the *Guides* were not used. A hearing officer cannot simply conclude, because parties fail to raise an issue, that the pertinent questions were not asked and answered in the course of prehearing preparation or discovery. As the carrier notes in its appeal, had the hearing officer raised such concern at the hearing, it could have produced evidence responsive to the matter. Absent any affirmative requirement in either the law or applicable rules of the Commission for a doctor to expressly assert compliance, and in the additional absence of any assertion or evidence that the law was not followed, we hold that it was error for the hearing officer to infer lack of compliance and raise, on her own motion after the hearing, that the impairment rating rendered by the designated doctor was invalid for lack of evidence that the *Guides* were used. A longer discussion on this same issue may be found in Texas Workers' Compensation Appeal No. 92393 (Docket No. redacted) decided September 17, 1992.

Therefore, we reverse her decision regarding the impairment rating, and render a new decision, adopting the opinion of the designated doctor, that claimant's impairment rating is 0%.

This decision voids the order appointing a second designated doctor, which is now moot. We would observe, however, that it would seem that the better, quicker, more economical way to deal with such concerns that might arise in the future is to have the original designated doctor perform any necessary re-evaluation or supply missing or clarifying information while the record is held open. We would tend to agree that the appointment of multiple designated doctors to render opinions on the same issue does not appear to have been contemplated by the 1989 Act, given the presumptive weight to be accorded to the designated doctor's opinion. However, as there could be extraordinary circumstances (not found in the record of this case) that might call for appointment of another designated doctor, such as the death of the first designated doctor between the examination and completion of a TWCC-69, we will not hold, as a matter of law, that a second appointment could never be made.

In summary, the determination of the hearing officer to adopt the report of the designated doctor on MMI is affirmed, and her determination that the impairment rating of the designated doctor was invalid because of lack of evidence of use of the statutorily required *Guides* is reversed, and a decision adopting the 0% impairment rating assigned by the designated doctor is rendered.

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Susan M. Kelley
Appeals Judge

CONCUR:

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Joe Sebesta
Appeals Judge

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Lynda Nesenholtz
Appeals Judge