APPEAL NO. 92472

On August 10, 1992, a contested case hearing was held in (city), Texas, with (hearing officer) presiding as hearing officer, to determine two disputed issues not resolved at the benefit review conference, namely, whether appellant had reached maximum medical improvement (MMI), and whether appellant was still entitled to medical benefits for his undisputed back injury. Respondent was asserting the latter issue on the apparent theories that appellant had abandoned his medical care and had only recently returned to treatment to increase his impairment rating. The hearing officer advised the parties that appellant was entitled as a matter of law to all medical benefits reasonably required by his injury pursuant to the Texas Workers' Compensation Act (TEX. REV. CIV. STAT. ANN. art. 8308-4.61(a) (Vernon Supp. 1992) (1989 Act)), and that issue was not further pursued. However, the parties did agree to add an issue concerning appellant's correct impairment rating. The hearing officer took testimony from appellant, the sole witness, and considered the medical reports of appellant's treating doctor, a doctor selected by respondent, and a doctor designated by the Texas Workers' Compensation Commission (Commission). Giving presumptive weight to the designated doctor's report, consistent with Article 8308-4.26(g), and determining that the great weight of the other medical evidence was not to the contrary, the hearing officer found that appellant reached MMI on December 23, 1991, with an impairment rating of nine percent. In his request for review, appellant challenges the designated doctor's nine percent impairment rating contending generally that the designated doctor failed to evaluate his impairment in accordance with the AMA Guides to the Evaluation of Permanent Impairment (AMA Guides), and more specifically that he failed to assign ratings for "pain" and for "station and gait", and that he cited a table from the AMA Guides which pertained to the cervical rather than the lumbar region of the spine. Appellant contends he should be found to be 100 percent impaired, as his treating doctors opined. Respondent urges our affirmance stating that the hearing officer correctly determined that the great weight of the other medical evidence was not contrary to the designated doctor's report.

DECISION

Finding the evidence sufficient to support the hearing officers' findings and conclusions, we affirm.

Appellant, a resident alien and 56 year old native of (country) where he had taught science and mathematics, was injured on (date of injury), while employed by the (employer) as a kitchen laborer. He had picked up a kitchen floor mat to place on a cart when he slipped and fell on his right side injuring his back. He was taken to (Hospital) where he was examined and x-rays were taken. He said he saw his personal physician, (Dr. M), who gave him an "indefinite incapacity" and referred him to (Dr. H), a neurologist. (Dr. H) treated appellant and eventually told him he had an impairment rating of 135 percent. Appellant stated that he twice talked to (Dr. H) about his impairment rating and that (Dr. H) did not reduce the rating to 100 percent but maintained it was 135 percent. Appellant said he was then asked by respondent to see (Dr. T). Appellant disagreed with (Dr. T's) seven percent

rating because he felt it was too low and because he felt (Dr. T), an orthopedic specialist, was not qualified to assess impairment in a neurological case. Appellant said he was subsequently sent by the Commission to see the designated doctor, (Dr. L), a neurologist, who assigned a nine percent impairment rating. Appellant said he was then paid impairment income benefits for 27 weeks, and maintained he cannot perform physical work at this time.

(Dr. H's) report of March 14, 1991, indicated that appellant initially injured himself in a fall in September 1990, felt he had recovered and returned to work, and reinjured himself in the fall on (date of injury). His impression was lumbar injury with probable right lumbar radiculopathy (L5) and possible soft disc herniation. In his July 5, 1991 report, (Dr. H) stated that a Dynatron 2000 test performed on appellant to evaluate his physical condition showed "a deficiency very close to 100% on his working capacity." (Dr. H's) diagnosis was chronic right lumbar radiculopathy related to injury, lumbar spondylosis stenosis, and probable soft disc herniation. (Dr. H's) report stated that considering the impact of the injury in the lumbar region and the side effects, he could assert "this patient is 100% impaired." Having said that, (Dr. H) then detailed four components of appellant's impairment rating under the AMA Guides which totalled 140 percent, including 40 percent for chronic back pain and side effects. (Dr. H) said he considered the class V range of impairment from table 48 of the AMA Guides because appellant experiences severe and constant pain. He said he also considered the side effects and psychological consequences of the back injury including depression, frustration, isolation, and loss of social and sexual life. In an October 8, 1991 report, (Dr. H) said he discussed (Dr. T's) evaluation and the AMA Guides with appellant, and he reiterated his opinion that appellant's "disability easily adds over 100%," noting that appellant had not improved and had declined surgery because of the risk he perceived. In a March 27, 1992 report, (Dr. H) said he had reviewed and found "numerous contradictions" in the report of (Dr. L), the designated doctor. However, (Dr. H) then cited only apparent contradictions regarding appellant's muscle strength, and knee and ankle jerks. He stated that appellant needed a multifaceted approach to his pain problems.

(Dr. L's) report of December 23, 1991, reviewed (Dr. H's) reports, mentioned the Dynatron evaluation, the normal EMG results, and recognized that both (Dr. H) and (Dr. M) listed appellant as "one hundred percent disabled." (Dr. L) also noted the seven percent impairment rating given by (Dr. T). Upon examination, (Dr. L) found appellant to have bilateral muscle spasm and tenderness, but not to be in acute distress, and found his gait and station were within normal limits. His Report of Medical Evaluation (TWCC-69) reflected that a CT scan, as well as a functional capacity evaluation, showed a three level herniated disc. (Dr. L's) impression was lumbar spondylosis and stenosis, and chronic right lumbar radiculopathy, related to injury. (Dr. L) determined that appellant reached MMI on December 23, 1991, with a whole body impairment rating of nine percent. On the face of (Dr. L's) TWCC-69 he specified the components of his nine percent impairment rating as consisting of:

(1) Impairment due to specific disorders of the spine
2Intervertebral discs

cUnoperated with medically documented injury & a minimum of 6 months medically documented pain & rigidity, with or without muscle spasm, associated w/moderate to severe degenerative changes in the structural basis, inc. unoperated HNP with or without radiculopathy (seven percent)

(2)Multiple levels, w/or w/out operation (two percent).

Above this description were the words "Table 53 II."

In his statement of the evidence, the hearing officer noted the provisions of Article 8308-4.26(g) to the effect that the designated doctor's report on impairment shall have presumptive weight, and that the Commission shall base the impairment rating on that report unless the great weight of the other medical evidence is to the contrary. The hearing officer reviewed the medical evidence as well as (Dr. H's) impairment rating of 140 percent, (Dr. T's) rating of seven percent, and (Dr. L's) rating of nine percent. He found the latter to be reasonable based upon the medical evidence, and stated that the great weight of the other medical evidence was not contrary to (Dr. L's) report. Accordingly, the hearing officer found that appellant reached MMI on December 23, 1991, with an impairment rating of nine percent. We find the evidence sufficient to support that finding and do not disagree with the hearing officer's statement that the great weight of the other medical evidence was not to the contrary of (Dr. L's) report. Texas Workers' Compensation Commission Appeal No. 92126 (Docket No. redacted) decided May 7, 1992. (Dr. L's) report indicates he was cognizant of (Dr. H's) reports including his recommendation that appellant consider going to a pain clinic. He also found appellant's gait and station to be normal. Pain, and gait and station, were two elements which appellant complains were not considered by (Dr. L).

Article 8308-4.24 provides that the Commission shall use the second printing, dated February, 1989, of the AMA Guides, third edition, and that all determinations of impairment must be made in accordance with that guide. *And see* Article 8308-4.26(a) and Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 130.1(e). While it may be that on his TWCC-69 form (Dr. L) miscited the table he used from the AMA Guides, that matter was never mentioned at the hearing below, nor was any testimony or other evidence adduced concerning which edition of the AMA Guides was used by (Drs. H, T, and L). (Dr. H's) report referred to Table 48 while (Dr. L's) TWCC-69 referred to Table 53 II. *See* Texas Workers' Compensation Commission Appeal No. 92393 (Docket No. redacted) decided September 17, 1992. *Compare* Texas Workers' Compensation Commission Appeal No. 92072 (Docket No. redacted) decided April 8, 1992, where the hearing officer found the impairment ratings of the treating doctor and the designated doctor invalid because they were calculated using the AMA Guides, third edition (revised), rather than the third edition, second printing.

According to article 8308-6.34(e), the hearing officer is the sole judge, not only of the relevance and materiality of the evidence, but also of the weight and credibility it is to be given. We will not substitute our judgment for that of the hearing officer where, as here, the findings are supported by sufficient evidence. Texas Employers Insurance Association v. Alcantara, 764 S.W.2d 865, 868 (Tex. App.-Texarkana 1989, no writ). The challenged

finding is not so against the great weight and preponderance of the evidence as to be manifestly unjust. In re King's Estate, 150 Tex. 662, 244 S.W.2d 660, (1951); Pool v. Ford Motor Co., 715 S.W.2d 629, 635 (Tex. 1986).

The decision of the hearing officer is affirmed.

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Philip F. O'Neill
Appeals Judge

CONCUR:

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Robert W. Potts
Appeals Judge

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Lynda H. Nesenholtz
Appeals Judge