APPEAL NO. 931010

This appeal arises pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq*. (1989 Act) (formerly V.A.C.S., Article 8308-1.01 *et seq*.). A contested case hearing was held in (city), Texas, on October 7, 1993, (hearing officer) presiding, to determine the following disputed issues: 1. On what date did Appellant (claimant) reach maximum medical improvement (MMI); 2. What is claimant's correct impairment rating (IR); and 3. Did Claimant timely dispute his MMI date and IR. The hearing officer found that two forms entitled Report of Medical Evaluation (TWCC-69), signed by a doctor who treated claimant for approximately eight months in (state), were not valid certifications of the respective MMI dates (January 29, 1992, and May 12, 1992) nor of the IRs (10% and 15-20%) stated therein because the doctor later acknowledged, in a letter of June 29, 1993, responding to a June 11, 1993, inquiry from a Texas Workers' Compensation Commission (Commission) ombudsman, that he did not use the Guides to the Evaluation of Permanent Impairment, third edition, second printing, dated February 1989, published by the American Medical Association (AMA Guides). Consequently, the hearing officer concluded that the issue of whether claimant timely disputed his MMI date and IR was moot. The hearing officer further concluded, having found that the great weight of the other medical evidence was not contrary to the report of the designated doctor, that claimant reached MMI on May 12, 1992, with a seven percent IR. Claimant has appealed the determination that his MMI date and IR were as determined by the designated doctor, pointing out that the May 12, 1992, MMI date determined by the designated doctor substantially preceded the date of the designated doctor's examination, that on March 3, 1993, his current doctor diagnosed a "blown" disc based on the results of a discogram, and that his doctor has recommended surgery. He contends he should have been paid temporary income benefits (TIBS) for 104 weeks without an MMI date or IR being determined. The response of the respondent (carrier) asserts the sufficiency of the evidence to support the hearing officer's decision and seeks our affirmance.

DECISION

Finding the evidence sufficient to support the challenged findings and conclusion of the hearing officer, we affirm.

Claimant testified that he injured his back on (date of injury), while working as a journeyman electrician installing conduit in an enclosed area low to the ground. The medical records refer to the injury date as (date); however, there was no disputed issue concerning the injury date. Claimant said he thought at first he had just pulled a muscle but said his back got worse and his medical records show he sought treatment about ten days after his injury which included an extensive course of physical therapy (PT). A July 11, 1991, record of (Dr. DB) indicated that no progress was being made with PT, that Dr. DB "was not convinced that surgical fusion is going to solve his problem," and that he referred claimant to another provider. A July 25, 1991, report from (Dr. PP) stated a diagnosis of "subacute lumbar syndrome with significant spasm, early deconditioning syndrome, and rule out adjustment reaction with pain sensitivity." Dr. PP's report of

August 6, 1991, stated that a lumbar MRI scan confirmed a spondylolisthesis but no herniated disc or other structural abnormality.

In a May 27, 1992, letter, (Dr. HP) of (city), (state), stated that he had been treating the claimant since September 27, 1991, when claimant moved to (state), and that claimant's last visit was on May 12, 1992, at which time he continued to complain of lumbar back pain and showed constant paraspinal muscle spasm. Dr. HP went on to state his opinion that claimant had reached MMI and that continued office visits and therapy could be discontinued on a regular basis with claimant being seen intermittently when the pain was very severe. Dr. HP also said he considered claimant's "disability to be in the range of 15-20%." Claimant said he was last treated by Dr. HP in May 1992.

The carrier contended that the claimant failed to dispute not later than 90 days, as required by Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 130.5(e) (Rule 130.5(3)), the first IR assigned, namely, the 10% IR assigned for his "dorsal trunk-vertebrae" by Dr. HP on a TWCC-69 which also stated an MMI date of "1-28-92." Claimant denied having received this TWCC-69 or otherwise having been made aware of that rating. He did, however, acknowledge that in February 1992 he received a copy of a Payment of Compensation or Notice of Refused/Disputed Claim form (TWCC-21), dated "2/19/92," in which the carrier stated: "Received Doctors Report starting IIB effective 1-29-92 to run for 30 weeks @ $254.90."

Claimant said he called the carrier in August 1992 and learned that his income benefits had been paid out in full. A TWCC-21 form showed that claimant's last payment of impairment income benefits (IIBS) was made on August 24, 1992, and that he had received income benefits from "(date)" to "08/26/92" in the total amount of $17,1651.30. Claimant acknowledged that sometime in August 1992, he learned that Dr. HP felt he had reached MMI with an IR "in the range of 15 to 20%," as stated in Dr. HP's May 27, 1992, letter. Dr. HP executed another TWCC-69 on March 1, 1993, stating an MMI date of "5/12/92" and assigning an IR of "15 - 20%" for "dorsal trunk." Claimant's testimony seemed to vary as to whether it was in May or in August 1992 that he became aware that Dr. HP had assigned an IR in the range of "15 to 20%." He did state that in August 1992 he obtained a copy of Dr. HP's May 27th letter. Claimant conceded he did not dispute that IR until February 1993.

The carrier urged the hearing officer to find that the first IR of 10% became final for lack of dispute under Rule 130.3(e) and, in the alternative, to accept the designated doctor's MMI date of May 12, 1992, and IR of seven percent as not being against the great weight of the other medical evidence. The claimant argued that the 90 day rule only applied to valid IRs, that Dr. HP's IR was invalid owing to his concession in his June 29, 1993, response to the ombudsman that he failed to use the AMA Guides, and that he, claimant, did not therefore have to dispute it not later than 90 days after becoming aware of it. Since it is not an appealed issue, we need not decide the correctness of the hearing officer's conclusion that the timely dispute issue was moot. We do not, however, intend that our not addressing the issue be interpreted as indicating our agreement that claimant

was not required to dispute the first IR assigned not later than 90 days after the date he became aware of it, notwithstanding that the IR was at a much later date shown to be defective.

Claimant testified that he disagreed with Dr. HP that he had reached MMI and should be assigned an IR. He conceded he had no medical treatment for his back injury from June 1992 until February 1993. The evidence showed that claimant moved back to Texas and on January 13, 1993, requested that (Dr. DS) be approved as his treating doctor. Claimant said that in February 1993 he began to see Dr. DS who obtained a discogram in March 1993 showing a "blown" disc and who has recommended spinal surgery. As for the possibility of surgery, claimant said he was trying to avoid surgery for as long as possible." In a March 8, 1993, report, Dr. DS said he felt claimant had spondylolisthesis since his early teens and that he injured the disc at L5-S1 when he lifted conduit because of the instability of the spondylolisthesis. Dr. DS further stated that "[o]ne of the options that could potentially occur at this time would be removal of the disc with interbody fusion and stabilization of the spondylolisthesis." In a July 28, 1993, report, Dr. DS stated: "Patient plans to avoid surgery. MMI will be assigned. Recommend pain center."

The parties stipulated that the designated doctor selected by the Commission was (Dr. BB). In his TWCC-69, dated July 30, 1993, Dr. BB certified that claimant reached MMI on May 12, 1992, with an IR of seven percent. One of the claimant's complaints is that Dr. BB's MMI date of "5-12-92," which is the same MMI date that Dr. HP determined in his second TWCC-69, substantially antedated the July 30, 1993, date of Dr. BB's examination. The detailed narrative report accompanying Dr. BB's TWCC-69 indicated he reviewed claimant's medical records including an MRI of February 1, 1993, which indicated bilateral spondylolysis of L5 and disc degeneration and protrusion at the L5-S1 level, and a lumbar discogram of March 13, 1993, which indicated bilateral spondylosis with 20% spondylolisthesis at L5-S1. Dr. BB's diagnosis was low back pain and shoulder strain. Dr. BB stated that he calculated the May 12, 1992, MMI date "according to medical standards." Dr. BB's report mentioned that claimant, then 46 years of age, had not worked since his injury, was treated with PT for one to one and one-half years, did not go to a work hardening program, and was presently on a "home program" and being medicated with Ansaid.

Dr. BB's report went on to state that claimant's seven percent IR was for his specific spinal disorder from Table 49 of the AMA Guides, that he assigned no IR for abnormal range of motion (ROM) since claimant invalidated the ROM testing, and that though he complained of loss of sensation and numbness in the back of both legs, claimant's response to pinwheel and pinprick tests in those areas was normal. Dr. BB further reported that claimant's inconsistencies in the strength loss testing were such that no specific loss could be assigned. In sum, Dr. BB concluded that claimant's subjective complaints concerning loss of sensation and strength were not objectively verifiable through testing.

In Texas Workers' Compensation Commission Appeal No. 92670, decided February 1, 1993, we observed:

> 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 an 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, under Article 8308-1.03(32)(A) [now Section 401.011(a)] of the 1989 Act, 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 possibility pain, from the injury. However, he has determined, based upon his medical judgment, that there will likely be no further substantial recovery from the injury.

We are satisfied that the hearing officer correctly accorded presumptive weight to the designated doctor's report and just as correctly determined that claimant reached MMI on May 12, 1992, with a seven percent impairment rating. The hearing officer is the sole judge of the weight and credibility to be given the evidence (Section 410.165(a)), and it is for the hearing officer to resolve the conflicts and inconsistencies in the evidence. We will not substitute our judgment for that of the hearing officer where the findings are supported by sufficient evidence. Texas Workers' Compensation Commission Appeal No. 93767, decided October 8, 1993. Sections 408.122(b) and 408.125(e) provide that a Commission-selected designated doctor's report shall have presumptive weight and that the Commission shall base the determinations of MMI and impairment rating on that report unless the great weight of the other medical evidence is to the contrary. The Appeals Panel has previously observed that the ultimate determination of the extent of impairment must be made upon medical and not lay evidence. Texas Workers' Compensation Commission Appeal No. 92394, decided September 17, 1992. We have frequently noted the important and unique position occupied by the designated doctor in the resolution of disputes over MMI and impairment ratings. *See* e.g. Texas Workers' Compensation Commission Appeal No. 92412, decided September 28, 1992. And we have stated that a "great weight" determination amounts to more than a mere balancing or preponderance of the medical evidence (Appeal No. 92412, *supra)*, and that the "great weight" standard is clearly a higher standard than that of a preponderance of the evidence. Texas Workers' Compensation Commission Appeal No. 93432, decided July 16, 1993. Both the designated doctor and Dr. HP felt that claimant reached MMI on May 12, 1992. That Dr. HP determined a higher impairment rating does not amount to the great weight of the other medical evidence being contrary to Dr. BB's report.

Finally, we note that in her Decision and Order the hearing officer failed to list all of the carrier exhibits admitted into evidence. Neither party has complained of this omission on appeal and there is no indication the exhibits were not considered.

The decision of the hearing officer is affirmed.

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Philip F. O'Neill
Appeals Judge

CONCUR:

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Thomas A. Knapp
Appeals Judge

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Gary L. Kilgore
Appeals Judge