APPEAL NO. 931033

This appeal is brought 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 on August 27, 1993, and October 13, 1993, in (city), Texas, with (hearing officer) presiding as hearing officer. A pre-conference hearing was held on July 12, 1993. The sole issue at the hearing was the appellant's (claimant) correct impairment rating (IR). The hearing officer determined that the great weight of the other medical evidence did not overcome the presumptive weight given the report of the designated doctor and concluded that the correct IR was seven percent. The claimant appeals urging that the correct IR was 14% as determined by her treating physician. Claimant also asserts, for the first time on appeal, that the self-insured respondent (employer) and its attorney both had improper unilateral communications with the designated doctor which resulted in a denial of her rights under the 1989 Act. The employer contends that the great weight of the medical evidence was not contrary to the certification of the designated doctor and that any communications it or its attorney had with the designated doctor were for purposes of clarification only and were not designed to influence or undermine the impartiality of the designated doctor.

DECISION

Finding the evidence sufficient to support the hearing officer's decision, we affirm.

It is not disputed that the claimant, a school bus driver, injured her back on (date of injury), or that, as stipulated by the parties, she reached maximum medical improvement on November 1, 1992. An MRI of the claimant's lumbar spine completed on June 24, 1992, at the request of (Dr. G), claimant's treating physician, disclosed disc herniation at L4-5 and mild diffuse bulging at L5-S1. In a Report of Medical Evaluation (TWCC-69) received by the employer on January 22, 1993, Dr. G assigned a 14% whole body IR to the claimant based on herniation of the lumbar spine. No additional narrative was attached to the report. By letter of June 7, 1993, Dr. G diagnosed herniated nucleus pulposus (HNP) at L4-5 and L5-S1.

(Dr. M), the designated doctor selected by the Texas Workers' Compensation Commission (Commission), certified in a TWCC-69 received by the employer on April 19, 1993, that claimant had a seven percent whole body IR. The seven percent IR was given only for the HNP based on Table 49, Part II. C. of the Guides to the Evaluation of Permanent Impairment, third edition, second printing, published by the American Medical Association, February 1989 (the AMA Guides). *See* Section 408.124 of the 1989 Act. He considered the claimant's range of motion testing invalid and gave no additional percentage rating for the bulge at L5-S1. He confirmed this rating in a subsequent TWCC-69 requested by the hearing officer after a question was raised as to whether he had reviewed the actual MRI report. Also introduced into evidence was a narrative report of the conduct of Dr. M's examination of the claimant and how he arrived at his IR.

The sole witness at the hearing was the claimant. She testified that she believed

the assignment of a 14% IR by Dr. G should defeat the presumptive weight afforded Dr. M's report under Section 408.125(e) because Dr. G, as her treating doctor and a "back specialist," was more familiar with her condition. According to the claimant, Dr. G arrived at a 14% IR by assigning seven percent to her herniated disc and also seven percent to her bulging disc because, if Dr G has to operate on the herniated disc, he would also have to remove the bulging disc. She admitted that Dr. G never gave this explanation of his rating in writing and has never broken his rating down this way, even though the claimant asked him to and Dr. G told her he could easily do so.

The claimant disagrees with the presumptive weight given the report of the designated doctor. In Texas Workers' Compensation Commission Appeal No. 93442, decided July 12, 1993, the Appeals Panel confirmed that the ultimate determination of impairment, if any, must be made upon medical and not lay evidence. We have also frequently noted the important and unique position occupied by the designated doctor as an agent of the Commission under the 1989 Act. *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*.

We are satisfied that the hearing officer correctly accorded presumptive weight to Dr. M's report upon determining that the great weight of the other medical evidence was not to the contrary. The 1989 Act provides that the hearing officer, as the fact finder, is the sole judge not only of the relevance and materiality of the evidence but also of its weight and credibility. Section 410.165(a). The speculations of the claimant about the unstated components of Dr. G's rating and that he indeed assigned an additional seven percent rating to the disc bulge is lay testimony that does not impeach the report of the designated doctor. *See* Texas Workers' Compensation Commission Appeal No. 93631, decided September 7, 1993. The diagnosis of Dr. G is otherwise generally consistent with that of Dr. M, as was to be expected given the common MRI report relied on by both. Dr. M gave a detailed report of his calculations of the IR. Dr. G's TWCC-69 contained only bare conclusions without specifics as to how he arrived at an IR of 14%. Under these circumstances, we conclude that the challenged findings and conclusions of the hearing officer are 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 Company, 715 S.W.2d 629 (Tex. 1986).

One other issue deserves comment. In her request for review, the claimant references two unilateral communications between the designated doctor, Dr. M, and on the one hand, the adjuster, and on the other hand, the attorney for the employer. She asserts that such communications violated her rights under the 1989 Act by giving the employer "an unfair advantage over me." The communication from the adjuster was prompted,

apparently,[1] by a statement of the claimant at the Benefit Review Conference that Dr. M did not review all her medical records, in particular the actual report of the MRI. In his response of June 28, 1993, admitted without objection as Carrier's Exhibit 4, and Hearing Officer's Exhibit 11, Dr. M described the medical reports available to him at the time he performed his examination of the claimant and described his procedure for examining a patient. The communication from the employer's attorney to Dr. M, dated October 6, 1993, and admitted without objection as Carrier's Exhibit 8 and Hearing Officer's Exhibit 13, was prompted by Dr. M's clarifying TWCC-69 which contained an MMI date of March 17, 1993, contrary to that in his first TWCC-69 and contrary to the stipulation of the parties as to the MMI date. In this letter, the attorney for the employer asks:

For clarification purposes I would like to know what is your opinion as to the correct MMI date. Is the MMI date November 1st, 1992 as per your original TWCC-69 or is the correct MMI date March 17th, 1993 as per our second TWCC-69?

Dr. M responded to the hearing officer that the correct date was November 1, 1992, and that his second TWCC-69 was in error on this point.

Although the existence of these unilateral communications was known to the claimant at the hearing, she raises an objection to them and asserts a denial of her rights arising therefrom for the first time on appeal. We will not address issues not first presented to the hearing officer for a decision. *See* Texas Workers' Compensation Commission Appeal No. 91100, decided January 22, 1992. In so doing, we do not now retreat from our position discouraging such unilateral communications with a designated doctor, but only point out the inappropriateness of such communications and the risk that they may compromise or appear to compromise the impartiality of a designated doctor to the detriment of all the parties. Counsel for the employer recognizes this and has expressed that in "hindsight" he probably should not have done this. Given the apparent good faith effort behind both communications to clarify certain problems contained in Dr. M's first TWCC-69, and the lack of any evidence of either overt or covert attempts to improperly influence or mislead the designated doctor, we find no merit in claimant's contention that these contacts require reversal of the decision. *See* Texas Workers' Compensation Commission Appeal No. 93762, decided October 1, 1993, and Texas Workers' Compensation Commission Appeal No. 93631, decided September 7, 1993.

[1]The actual letter from the adjuster to Dr. M was not in evidence.

The decision of the hearing officer is affirmed.

Philip F. O'Neill
Appeals Judge

CONCUR:

Robert W. Potts
Appeals Judge

Susan M. Kelley
Appeals Judge