APPEAL NO. 93190

This appeal arises under the Texas Workers' Compensation Act, TEX. REV. CIV. STAT. ANN. art. 8308-1.01 *et seq.* (Vernon Supp. 1992) (1989 Act). On February 10, 1993, a contested case hearing (CCH) was held in (city), Texas, with (hearing officer) presiding as hearing officer. The only issue was: "[w]hat is claimant's correct whole body impairment rating." The hearing officer determined that the appellant (claimant) reached MMI on September 21, 1992, with a nine percent (9%) whole body impairment rating. Claimant contends that the hearing officer failed to give sufficient weight to the treating doctor's rating, that the designated doctor's rating was "unfair" and "unprofessional" and requests that we reverse the hearing officer's decision and assign a 22% impairment as given by the treating doctor. Respondent (carrier) failed to file a response.

DECISION

The decision of the hearing officer is affirmed.

The parties stipulated that claimant suffered a compensable cervical and back injury, on or about (date of injury), while employed by employer, as a radar technician. Claimant was the only witness at the CCH and testified about complaints he had with several of the doctors. Claimant testified he had been employed with the employer for 31 years and was concerned he might be laid off. Claimant objected that the doctors told him he had to "just live with [his condition]."

Claimant apparently first saw (Dr. S) who eventually referred claimant to Dr. P), M.D. Dr. P by letter dated February 1, 1993 and separate report to (apparently a health insurance carrier) also dated February 1, 1993 explained that he had examined claimant, found a disc protrusion at the C5-C6 level, and detailed his tests and how he arrived at a physical impairment rating of 22% physical impairment. The carrier introduced a letter from Dr. P to the carrier, dated February 13, 1992 where Dr. P took issue with a report by Dr. K), and opined the claimant had a "Ruptured Disc Syndrome that is producing the present symptoms." Dr. P concluded ". . . I believe that [Dr. K] is just procrastinating for ulterior reasons. The American Medical Association rating for this type of condition would be 6% for the neck and 3% of the thoracic region or 9% overall."

Dr. K, to whom Dr. P was responding, by report dated January 7, 1992 gives a diagnosis of "1. Cervical and upper dorsal strain (DRGs omitted), 2. Preexisting underlying degenerative osteoarthritis." MMI was given as September 17, 1992, but no impairment was given because claimant was not yet six months post injury.

(Dr. A) was the Commission's designated doctor. By report dated September 21, 1992, Dr. A interpreted an MRI of the cervical spine dated 3-3-92 as "reveals spondylitic protrusion of C5-C6 with soft component leftward" and findings compatible with bilateral cervical radiculopathies. Dr. A also filed a Report of Medical Evaluation (TWCC-69) finding MMI on September 21, 1992 and assessing a 9% whole body impairment rating. Although

the TWCC-69 states "See Attached Report" no report was attached. Claimant, however, submits an Indpependent Medical Report from Dr. A, dated September 21, 1992 with a diagnosis of "cervical spondylosis (MRI positive) Bilateral cervical radiculopathies" and impairment ratings of 6% loss of range of motion in the cervical spine and 3% EMG abnormalities for a total impairment of 9%, which corresponds to Dr. A's TWCC-69.

Claimant was also seen by (Dr. H) for "a second opinion." Dr. H, by report of January 4, 1993, stated claimant was in a cast [for an unrelated injury] and that he could not give claimant a rating. Dr. H subsequently saw claimant on January 27, 1993 and by TWCC-69 certified an MMI date of September 17, 1992, and a 12% impairment. On the TWCC-69 Dr. H details how he arrived at the 12% impairment.

(Dr. B) apparently did an MRI on November 24, 1992 and stated an impression of "[d]egenerative change C5/6. Otherwise normal."

The hearing officer accepted the designated doctor's, Dr. A, report of 9% impairment and found the great weight of the other medical evidence was not contrary to the opinion of the Commission designated doctor.

Claimant appeals alleging the designated doctor, Dr. A, only examined him a few minutes and then Dr. A used the February 13, 1992 letter from Dr. P to arrive at a 9% impairment rating. Claimant, on appeal as in the CCH, alleges that Dr. A refused to consider an MRI claimant offered to show him. Claimant also alleges that the carrier's adjustor, after the hearing, had a conversation with the hearing officer in which claimant was not included.

Regarding the issue of the impairment rating, the 1989 Act provides that if there is a dispute and the parties are unable to agree on a designated doctor, the Commission will select a designated doctor to examine the claimant. In such a case, "the report of the designated doctor shall have presumptive weight and the Commission shall base the impairment rating on that report unless the great weight of the other medical evidence is to the contrary . . . ." Article 8308-4.26(g). The hearing officer pointed out this provision at the beginning of the hearing, and advised claimant that it would take the great weight of other medical evidence to overcome the presumptive weight of Dr. A's opinion. The Appeals Panel has repeatedly emphasized the unique position occupied by the designated doctor under the 1989 Act. *See* Texas Workers' Compensation Commission Appeal No. 92555, decided December 2, 1992; Texas Workers' Compensation Commission Appeal No. 92142, decided September 28, 1992. It is not unusual to have disagreement or some degree of disparity between the reports of various doctors who have treated or examined an injured worker. *See generally*, Texas Workers' Compensation Commission Appeal No. 92522, decided November 9, 1992; Texas Workers' Compensation Commission Appeal No. 92561, decided December 4, 1992. Similarly, we have observed that no other doctor's

report, including a report of a treating doctor, is accorded the special presumptive weight of the designated doctor's report. *See* Texas Workers' Compensation Commission Appeal No. 92412, decided September 28, 1992 and Texas Workers' Compensation Commission Appeal No. 92366, decided September 10, 1992. Although not necessary for the resolution of this case because of the presumptive weight of the designated doctor's report, we note there is an inconsistency in the treating doctor's opinions. By letter dated February 13, 1992, Dr. P states claimant had a 9% overall impairment. Then in letter reports dated February 1, 1993, Dr. P assigns a 22% impairment rating. One can only speculate as to what caused the differences in ratings. In any event, as noted above, the treating doctor's opinion, in and of itself, in this case does not overcome the presumptive weight of the designated doctor's opinion. The hearing officer's decision that the designated doctor's opinion is not contrary to the great weight of other medical evidence (reports from Dr. P and Dr. H) is supported by sufficient evidence.

Of some concern is the claimant's allegation that there was some type of communication between the carrier's adjustor and the hearing officer upon conclusion of the CCH. We would point out that Article 8308-6.34(i) states "[e]xcept in regard to procedural matters, a party and a hearing officer may not communicate outside the contested hearing unless the communication is in writing with copies provided to all parties." Hearing officers must strive to avoid the perception that somehow the carrier had special access to the hearing officer. In this case, as the findings of the hearing officer gave presumptive weight to the designated doctor's report and that the great weight of the other medical evidence was not to the contrary, were supported by sufficient evidence, we can only conclude that the complained of communication, if any, was regarding procedural matters. We would however, caution hearing officers from engaging in "friendly discussions" with one party, to the exclusion of the other party, as leading to the perception of improper communications.

We find that there is sufficient evidence to support the hearing officer's determination which accorded presumptive weight to the designated doctor's report and found that the great weight of the other medical evidence was not contrary thereto. The decision is affirmed.

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Thomas A. Knapp
Appeals Judge

CONCUR:

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Robert W. Potts

Appeals Judge

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Lynda H. Nesenholtz
Appeals Judge