APPEAL NO. 93778

At a contested case hearing held in (city), Texas, on August 6, 1993, the hearing officer, (hearing officer), concluded that the appellant (claimant) reached maximum medical improvement (MMI) on January 13, 1992, and that his impairment rating was seven percent as determined by a designated doctor selected by the Texas Workers' Compensation Commission (Commission). In his request for review, claimant states that he agrees with the MMI date determined by the hearing officer but challenges the designated doctor's impairment rating pointing out that his treating doctor stated his impairment as 100% and that a doctor selected by the respondent (carrier) determined his rating to be 30%. The carrier, after being provided with a copy of the claimant's request for review by the Commission on October 8, 1993, timely filed a response urging affirmance.

DECISION

Finding the evidence sufficient to support the challenged findings, we affirm.

Claimant's request for review did not contain a certificate of service showing that the request was served on the carrier as required by Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 143.3(b) (Rule 143.3(b)). *And see* Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 410.202(a). The Appeals Panel has viewed an appellant's failure to serve the other party as affecting neither the timeliness of the appeal (Texas Workers' Compensation Commission Appeal No. 91120, decided March 30, 1992), nor the jurisdiction of the Appeals Panel over the appeal (Texas Workers' Compensation Commission Appeal No. 92080, decided April 14, 1992), but rather as extending the time for an opportunity to respond until service is made (Texas Workers' Compensation Commission Appeal No. 91125, decided February 18, 1992). In this case, claimant's request for review was received by the Commission on September 2, 1993. After ascertaining that the carrier apparently had not been served, the clerk for the Appeals Panel sent a copy of the request for review to the carrier on October 8, 1993, by electronic document transfer. Carrier's response was filed with the Commission within 15 days after the request for review was received by the carrier, as required by Section 410.202(b) and Rule 143.4(a), and thus was timely.

Claimant testified that on (date of injury), while loading a heavy barrel of paint onto a truck, the barrel slipped, he tried to grab it, and immediately felt pain in his back. Claimant said his supervisor was present at the time and that he went to an emergency room because of the pain and commenced treatment with (Dr. L), an orthopedic surgeon. That claimant sustained a compensable injury on (date of injury), was not in dispute. He said that Dr. L referred him to a neurosurgeon, (Dr. WN), who recommended surgery, and that he was also seen by (Dr. RN), also a neurosurgeon, at the behest of the carrier. Claimant stated that Dr. RN told him he definitely needed surgery which Dr. RN said he would perform; however, after discussing the matter with Dr. L claimant said he declined because of the risks and lack of guarantee of successful results. According to claimant, when Dr. L examined him in January 1993 and assigned him a 100% impairment rating, he had claimant do leg raises and bending which he did to the extent he could. Claimant stated that Dr. RN assigned him

a 30% impairment rating and that Dr. RN's range of motion testing was similar to that of Dr. L. He said he was also seen by (Dr. A), the designated doctor selected by the Commission, who assigned him a seven percent rating. Claimant said that he cannot walk, sit or stand for prolonged periods because of the discomfort, nor can he perform tasks at home. He also said that no doctor has told him he will improve without surgery.

According to Dr. L's February 14, 1991, report, claimant had lower lumbar area muscle spasm and was responding to anti-inflammatory and muscle relaxant medications. His x-rays showed diffuse degenerative disc disease throughout the lumbar spine with marginal osteophytes and some arthritic changes. Dr. L's impression was low back strain with underlying degenerative disc disease and segmental instability with secondary arthritic changes. On May 23, 1991, Dr. L noted that a CT scan showed that claimant had severe spinal stenosis at more than one level, that his main complaint was of "discomfort," and that before recommending surgical decompression, which would have to be extensive, claimant would have to have much more pronounced symptoms. Dr. L's September 13, 1991, record indicated that both Dr. WN and Dr. RN felt that claimant's severe spinal stenosis would probably require surgical decompression and that claimant wanted to reduce and exercise before making a decision. As of August 18, 1992, Dr. L felt that claimant was doing well on one pain reliever per day and exercises and, as of October 8, 1992, felt that surgery would not be beneficial. Dr. L's notes of January 12, 1993, stated that claimant's examination of that day was "normal," and that his "spinal stenosis is only really a problem when he does a great deal of walking." According to Dr L's Report of Medical Evaluation (TWCC-69), claimant reached MMI on "1/13/92" with a whole body impairment rating of "100%." On that document Dr. L stated that claimant wanted to wait before deciding on surgery, that he had severe spinal stenosis which Dr. L did not expect to improve and which may even worsen, that he has reached MMI on a non-surgical basis, and that he "is 100% disabled from his labor type job." On February 11, 1993, Dr. L felt that claimant should follow up with Dr. Neely to see if surgery would be helpful since "at this point all we are doing is semi-controlling his pain with pain medications."

In a July 29, 1991, report to the carrier, Dr. RN stated the results of his examination of claimant. He indicated that the CT scan showed very severe spinal stenosis at L4-5 and that claimant, then age 52, may also have some at L3-4. Dr. RN's impression was spinal stenosis aggravated by the accident. In a later report of April 16, 1992, Dr. RN stated that he had that day talked to claimant on the telephone, that claimant said he was "too scared to have surgery," and that he had also declined "a dye test" from Dr. WN. Dr. RN's report also stated: "I believe he has received maximum benefits from medical attention, unless he changes his mind in the future and decides to have surgery. I believe he has been rendered permanently disabled for heavy manual labor." Dr. RN signed a TWCC-69 form on April 16, 1992, which stated that claimant had reached MMI "now" and assigned him a 30% impairment rating for his lower back. This TWCC-69 did not indicate that claimant was seen by Dr. RN on April 16, 1992.

In an August 19, 1991, report, Dr. WN stated that while claimant's CT scan showed spinal stenosis from L-3 through S-1 and marked degenerative changes but no definite disc

protrusion, he felt claimant presented with a "basically normal neurological examination." Dr. WN felt that a lumbar myelogram was indicated but noted claimant was reluctant to proceed with such or with surgery, and wanted to continue with conservative treatment.

In his September 1, 1992, narrative report, Dr. A observed that claimant has tried conservative treatment "and has not improved much but at the same time, he has not gotten any worse and he definitely does not want to have any surgical treatment." Dr. A stated that claimant has "marked degenerative disc disease of his lumbar spine, a lot of spondylosis with some stenosis of his lumbar spine, mainly at the L4-5 level and some at the L3-4 level." In Dr. A's opinion, claimant "has already reached [MMI] and his PPI is 7% of the whole person." In a TWCC-69 form, Dr. A stated that claimant had reached MMI on "9/1/92" with a 7% whole body impairment rating."

On August 5, 1993, the carrier wrote Dr. A enclosing copies of the TWCC-69 forms completed by Drs. L and RN and asked Dr. A if he had any reason to disagree with Dr. L's MMI date of January 13, 1992. Dr. A appended a note to the correspondence stating that Dr. L was in the best position to determine MMI and that he did not disagree with Dr. L's date. The carrier's letter did not reflect that a copy was sent to claimant or to the Commission. We have previously expressed our concern with such ex parte contacts by parties with designated doctors after the examinations have been conducted and the opinions rendered. *See* Texas Workers' Compensation Commission Appeal No. 93762, decided October 1, 1993.

The carrier urged the hearing officer to find that claimant reached MMI on January 13, 1992, the date determined by Dr. L, because the designated doctor responded to the carrier's inquiry that he did not disagree with that date, and to give the designated doctor's opinion on seven percent impairment presumptive weight since it was not contrary to the great weight of the other medical evidence. The carrier also urged that Dr. RN's report of 30% not be followed in that he had not examined claimant since July 1991, albeit he spoke with claimant on the telephone on April 16, 1992, the date he signed the TWCC-69. The hearing officer, finding that the great weight of the other medical evidence was not contrary to the designated doctor's report, concluded that claimant reached MMI on January 13, 1992, with a whole body impairment rating of seven percent. The hearing officer also found that Dr. L had certified that claimant reached MMI on January 13, 1992, and assigned a 100% rating, that the designated doctor determined claimant reached MMI on September 1, 1992, with a seven percent rating, and, when asked for "clarification" of the MMI date by the carrier responded that he had no reason to disagree with Dr. L's MMI date.

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. Section 408.125(e) provides that a Commission selected designated doctor's report 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 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.

We are satisfied here of the hearing officer's having correctly accorded presumptive weight to the designated doctor's seven percent rating. Section 401.011(23) defines "impairment" to mean "any anatomic or functional abnormality or loss existing after maximum medical improvement that results from a compensable injury and is reasonably presumed to be permanent." Section 401.011(24) defines "impairment rating" as "the percentage of permanent impairment of the whole body resulting from a compensable injury." Dr. L's TWCC-69 assigning the 100% rating also stated that claimant's rating was "100% from manual labor" and that "[h]e is 100% disabled from his labor type job." Dr. L's comments could be read to mean that the 100% rating refers to claimant's inability to perform manual labor. Dr. RN assigned 30% for "low back" in his April 16, 1992, TWCC-69 based on his July 29, 1991, examination which diagnosed "spinal stenosis aggravated by the accident in question." The designated doctor's TWCC-69 stated that the seven percent rating was for the "low back" "per table 49, pg 73, Guide to Impairment Rating, 3rd edition, AMA." *See* Section 408.124(b) which provides that "[t]he commission shall use for determining the existence and degree of an employee's impairment `Guides to the Evaluation of Permanent Impairment,' third edition, second printing, dated February 1989, published by the American Medical Association."

Similarly with respect to a dispute over MMI, Section 408.122(b) provides that the designated doctor's report shall have presumptive weight and that the Commission shall base its determination on the report unless the great weight of the other medical evidence is to the contrary. The hearing officer appears to have either decided that the great weight of the other medical evidence was contrary to the designated doctor's MMI date of September 1, 1992, or to have treated the designated doctor's report as if it had been amended to change the MMI date from September 1, 1992, to January 13, 1992, after the unilateral contact from the carrier's attorney. We are not here called upon to decide nor do we decide that the designated doctor's statement that he did not disagree with Dr. L's MMI date constituted an amendment or correction of the date he determined. We have stated that a designated doctor may, under limited and appropriate circumstances, amend or correct his or her certification and report. *See* Texas Workers' Compensation Commission Appeal No. 92503, decided October 29, 1992, and Texas Workers' Compensation Commission Appeal No. 92441, decided October 8, 1992.

We invite attention to our decision in Appeal No. 93762, *supra*, in which we discussed at some length our previous comments on the matter of ex parte communications between a party and the designated doctor and reiterated our discouragement of such unilateral contact so as to avoid the perception that the designated doctor is not impartial. However, under the circumstances of this case, where the claimant has stated in his appeal that he does not disagree with the January 13, 1992, MMI date found by the hearing officer, we need not consider taking corrective action.

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