APPEAL NO. 93786

This appeal arises under the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 (1989 Act) (formerly V.A.C.S., Article 8308-1.01 *et seq.*). On July 21, 1993, a contested case hearing (CCH) was held in (city), Texas, with (hearing officer) presiding as hearing officer. The issues unresolved from the benefit review conference (BRC) announced and agreed upon at the CCH were: 1) whether the Claimant reached maximum medical improvement (MMI), and if so, on what date; 2) whether the Claimant is entitled to temporary income benefits (TIBS) from April 23, 1992 to February 21, 1993; 3) whether Dr. K was an agreed designated doctor; and 4) what is the correct impairment rating. At the CCH, the parties resolved the third issue stated above and executed a Texas Workers' Compensation Commission (Commission) Form 24 (Benefit Dispute Agreement) reflecting their agreement. The heari ng officer determined that claimant reached MMI on February 22, 1993, with nine percent impairment pursuant to the designated doctor's report, that claimant had disability from April 23, 1992, to February 21, 1993, and the great weight of the other medical evidence was not contrary to the designated doctor's report.

Appellant, carrier herein, contends that the great weight of medical evidence is contrary to the designated doctor's report, that the appointment of a designated doctor "was completely unnecessary" and that there was not a timely dispute of the first impairment rating assigned by carrier's Medical Examination Order (MEO) doctor contrary to Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE §§ 130.3(b) and 130.5(e) (Rules 130.3(b) and 130.5(e)). Carrier, requests the Appeals Panel reverse the hearing officer's decision and render a new decision in its favor. Respondent, claimant herein, responds that the decision is supported by the evidence and requests that we affirm the decision.

DECISION

The decision of the hearing officer is affirmed.

It is undisputed that claimant sustained a compensable injury while stocking sodas in a cooler on (date of injury), while working for (employer), employer. Claimant testified that one or more cases of soda fell on him and that he sustained injuries to his left shoulder, neck and lower back. Claimant was seen at the local hospital emergency room and subsequently saw (Dr. G), M.D. Dr. G continued seeing claimant and had claimant off work from October 2, 1991, to February 22, 1993, when he released claimant to return to work at full duty. Dr. G in a series of progress notes and Specific and Subsequent Medical Reports (TWCC-64) recorded neck pain, backache, tenderness in the cervical and lumbar region. The diagnosis was "cervical spine strain with bulging disc at C3-C4, and lumbosacral spine strain with bulging disc at L5-S1 with right sided radiculopathy." Dr. G certified claimant reached MMI on February 22, 1993, with 11% impairment.

At some point in latter 1991, claimant was seen by (Dr. K), M.D. Claimant testified his then attorney told him that "you have to go for one time." Claimant was seen by Dr. K on November 14, 1991. There was apparently a problem that Dr. K did not have access to all the previous diagnostic studies at the time of his examination, however, the studies,

were eventually made available. Dr. K apparently requested another MRI in February 1992, because he felt the quality of the previous study was inferior. After reviewing the reports and MRI, Dr. K was of the opinion that claimant had not sustained a significant injury on (date of injury), and on a Report of Medical Evaluation (TWCC-69), dated May 11, 1992, found "no reason why he cannot return to work in an unrestricted fashion and be placed at (MMI)." Dr. K certified MMI on April 23, 1992 with 0% impairment. Although carrier, in its appeal brief recites that Dr. K's report was "sent to claimant, his physician, and his attorney . . ." there was little evidence of whether or when this occurred. Dr. K's report shows a check on "COPY TO: . . . Attorney 9/1/92" and Dr. K corresponded with claimant's present attorney by letter dated August 26, 1992.

A BRC was held on September 22, 1992, where claimant clearly disputed Dr. K's certification of MMI as "not valid because it was rendered almost six months after he examined [claimant]." Carrier's position at this BRC was "[Dr. K's] certification of MMI is valid under the law." Carrier made no allegation at the BRC that Dr. K's certification should be considered final because it had not been disputed within 90 days.

Although not entirely clear from the record, carrier recites in closing argument that after the September 1992 BRC, the case was set for a CCH "in December '92." Carrier recites "we had a telephone conference about that . . ." and that the hearing officer viewed the situation as involving a dispute on MMI and impairment rating and that the hearing officer ". . . felt at that time a designated doctor should be appointed or agreed upon among the parties." Carrier recites the parties were unable to agree upon a designated doctor "[s]o, ultimately the commission did appoint a designated doctor." Carrier's attorney recites that it was her understanding that the hearing officer ". . . said once a designated doctor was appointed, the carrier could make its argument about whether or not it felt that [Dr. K's] certification and evaluation was correct and the proper procedures had been followed when it came up before the contested case hearing." We note at this point carrier had not raised the issue that Dr. K's certification should be final because it had not been disputed within 90 days. The issue seemed to be whether Dr. K's certification was "invalid" because it had been rendered 160 days after the examination.

(Dr. J), M.D., was the Commission-appointed designated doctor and by TWCC-69 and narrative report dated April 20, 1993, certified MMI on "02-22-93" with nine percent whole body impairment. The four page narrative included history, examination, including range of motion, diagnosis, prognosis and rationale for the "permanent partial impairment" including "figures are based on the 3rd edition of the AMA guidelines, tables 51, 52, 56 and 49 II-B."

A subsequent BRC on May 26, 1993, set out the issues as reported by the hearing officer. The carrier's position at this BRC was that "[Dr. K] was the Agreed Designated Doctor . . ." and that "[b]ased on carrier's dispute that [Dr. J] was not an appropriately Designated Doctor . . ." the carrier argued that Dr. K's rating of 0% rating should be adopted based on the objective findings of Dr. K. The benefit review officer (BRO) recommended that the designated doctor's report had presumptive weight and should be adopted. Carrier

did not file a response to the BRC report or request the addition of an issue.

After the May 26th BRC carrier apparently sent Dr. J's report to (Dr. S), M.D., vice-president for medical operations of an impairment rating firm, for evaluation. Dr. S differed in some respects with Dr. J's report, for example; Dr. J in his report records using "an inclinometer (single)" while the AMA Guides (Guides to the Evaluation of Permanent Impairment, third edition, published by the American Medical Association) ". . . suggest the double inclinometer method . . . ." Dr. S complains that
Dr. J ". . . does not give data to measure the validity criteria . . ." and that "'slight bulge at L5-S1' and 'subtle changes at C3-4'" do not amount to objective findings.

The hearing officer announced and obtained the agreement of the parties that the issues were as recited at the beginning of this decision. The hearing officer then gave presumptive weight to the designated doctor's report, determined claimant reached MMI on February 22, 1993, as certified by both the designated doctor and treating doctor and accepted the designated doctor's 9% impairment rating (the treating doctor certified 11%), that claimant was entitled to TIBS for the period of April 23, 1992, to February 22, 1993 and that the great weight of other medical evidence was not contrary to the designated doctor's report.

Carrier appealed contending that Dr. J, the designated doctor "did not issue findings which were objective and confirmable," and that "it was unnecessary for the Commission to have appointed a designated doctor in this matter as a timely dispute of the first certification and evaluation was never filed by claimant."

In essence the carrier attempts to disqualify the designated doctor by means of having another doctor find points of disagreement. We are mindful that a designated doctor is required to use the correct version of the AMA Guides and evidence of impairment be based on objective clinical or laboratory findings in accordance with Section 408.122(a) (formerly Article 8308-4.25(a)). There is no allegation in the instant case that anything other than the proper guides were used. Carrier cites Texas Workers' Compensation Commission Appeal 92335, decided August 28, 1992, in support of its proposition. In that case, as appears to be in the instant case, the appellant, the carrier in both instances, argues that evidence of impairment must be based on objective clinical and laboratory findings, and the term "objective" means "independently verifiable or confirmable results." Carrier in the cited case, "points to the variation between ROM (range of motion) assessments in this case as indicative of the nonobjective nature of these tests." In that case we held:

> We cannot agree with appellant's analysis. The requirement in Article 8308-4.25(a) (codified in §408.122(a)) that evidence of impairment must be based on an objective clinical or laboratory finding was intended to preclude recovery of impairment benefits where the only evidence of impairment is the employee's subjective complaint of pain. Montford, A Guide to Texas Workers' Comp Reform, *supra* § 4B.25. "Impairment" is defined in the 1989 Act as "an anatomical or functional abnormality or loss existing after maximum medical

> improvement that results from a compensable injury and is reasonably presumed to be permanent." Article 8308-1.03(24). Thus, a doctor must determine whether an objective clinical or laboratory finding of impairment exists and document same, before assigning an impairment rating.

Carrier in the instant case argues that because Dr. J did not record the right and left rotation angles and did not give data to measure the validity criteria, Dr. J's report does not have presumptive weight because the "impairment rating is not confirmable." As in Appeal 92335, *supra*, we reject carrier's argument that because all the measurements were not detailed in Dr. J's four page report that rating is not "confirmable." The designated doctor's report must be sufficiently detailed and complete in providing evidence that the impairment rating was not based solely on the employee's subjective complaint of pain. The hearing officer as the sole judge of the weight and credibility of the evidence (Section 410.165(a)) apparently found that Dr. J's report was based on objective clinical evidence, and we believe that position is supported by sufficient evidence. Dr. S, carrier's doctor, who reviewed the designated doctor's report, is entitled to his opinion; that opinion was no doubt considered by the hearing officer, who found there was not sufficient medical evidence constituting a "great weight" contrary to the designated doctor's opinion.

Carrier further seeks to disqualify the designated doctor's report by citing Dr. S's opinion that "a technically sub-optimal MRI study" which showed objectively a "slight bulge at L5-S1 and subtle changes at C3-4 . . . could easily be degenerative changes." Carrier cites Dr. S's reference to certain medical studies "that 30 to 40 percent of the <u>assymptomatic</u> (sic) population has disc bulges." Again it may be Dr. S's position that somehow this does not constitute an objective finding by the designated doctor. In Texas Workers' Compensation Commission Appeal No. 92650, decided January 20, 1993, carrier also attempted to attack the designated doctor's report by alleging non compliance with the AMA Guides based on minor points of disagreement. We noted:

> . . . that the use of a designated doctor is clearly intended under the 1989 Act to assign an impartial doctor to resolve disputes over MMI and impairment ratings. To achieve this end, the report of the designated doctor, if selected by the Commission, shall have presumptive weight in accordance with Articles 8308-4.25(b) and 4.26(g). This presumptive weight can only be overcome by the great weight of the other medical evidence. As the appeals panel has stated before, this requires more than a mere balancing of the evidence. *See* Texas Workers' Compensation Commission
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> Appeal No. 92570, decided December 14, 1992, citing Texas Workers' Compensation Commission Appeal No. 92412, decided September 28, 1992.

Consequently, we are unwilling to say, as a matter of law, based on the evidence before us, that the designated doctor's report is disqualified on the basis of Dr. S's opinion that the impairment rating is not confirmable or is not based on objective clinical findings. We will further note that the designated doctor's findings are supported, in large part by the treating

doctor. Both the designated doctor and the treating doctor certified MMI on February 22, 1993, with the treating doctor assessing 11% impairment and the designated doctor's 9% impairment. The hearing officer found that the report of carrier's doctor, Dr. K, who certified MMI on April 23, 1992, with 0% impairment, did not constitute the great weight of other medical evidence contrary to the designated doctor.

Carrier also argues that "it was unnecessary for the Commission to have appointed a designated doctor in this matter as a timely dispute of the first certification and evaluation was never filed by claimant." Carrier, in its appeal, recites as fact, "[a]lthough claimant, his treating physician [Dr. G] and his attorney, (the former attorney) received a copy of [Dr. K's] report, claimant did not dispute [Dr. K's] certification and evaluation." Carrier cites Rule 130.3(b) and Rule 130.5(e). First of all, we note this was never an issue and was first raised by the carrier in its closing argument at the CCH. Next, although carrier blithely recites Dr. K's certification was received by claimant, there is absolutely no evidence of claimant's receipt in the record. Carrier's Exhibit 1 (Dr. K's TWCC-69) had a stamped notation "COPY TO: . . . Attorney 9/1/92 _" There was no evidence when, or even if, claimant received a copy of Dr. K's TWCC-69. Claimant clearly disputed the rating at the September 22, 1992, BRC where his position was recorded as "[Dr. K's] certification of [MMI] was not valid because it was rendered almost six months after he examined [claimant]."

We have early held that the Appeals Panel does not consider issues first raised on appeal. Texas Workers' Compensation Commission 91100, decided January 22, 1992, and Texas Workers' Compensation Commission Appeal No. 91057, decided December 2, 1991. The issue of whether claimant had timely disputed, the first impairment rating, apparently given by Dr. K in an undated TWCC-69, was not raised at the September 22, 1992, BRC, nor did carrier file a response to the BRC report. Nor was the issue raised at the May 26, 1993, BRC and carrier did not seek to add this as an issue by a response to the BRC report. At the CCH the hearing officer clearly announced the issues, recited at the beginning of this decision, and obtained agreement that those were the issues to be decided. During closing argument, carrier for the first time raised the issue of timely dispute of the first impairment rating, to which the hearing officer stated "[o]kay. But that issue is not in front of me, right. I'm not here to decide whether someone timely disputed it. The issue is whether the great weight is against the designator." Subsequently, again during closing argument, the hearing officer interrupted and stated "[t]here is no issue of timeliness of the response. (Meaning timeliness of the dispute of the first impairment rating). It's not an issue I'm going to resolve. It's something people have talked about (in the closing argument) but that is interesting but not anything I am going to do anything about." We find that the hearing officer did not abuse her discretion in refusing to rule on an issue first raised in the closing argument as it was not a matter considered at any prior stage of the dispute resolution process and we decline to consider it on appeal as not being timely raised.

Finding no reversible error and finding that the determination of the hearing officer was not so against the great weight and preponderance of the evidence as to be manifestly wrong or unjust, we affirm. In re King's Estate, 244 S.W.2d 660 (Tex. 1951); Pool v. Ford Motor Co., 751 S.W.2d 629 (Tex. 1986).

Thomas A. Knapp
Appeals Judge

CONCUR:

Gary L. Kilgore
Appeals Judge

CONCURRING OPINION

While I concur in the majority opinion, I think that the response to the carrier's emphasis on its own expert's opinion could be much more simple and direct: the designated doctor's opinion as to impairment was based upon specific objective spinal impairments, and not range of motion deficits. Therefore, the comments from the carrier's doctor as to the failure of the designated doctor to fully document range of motion measurements are of rather slight weight as an attack on the designated doctor's opinion and compliance with the Guides. When the resulting impairment for a particular component of spinal impairment is essentially nil, I would not fault a doctor for not fully describing the basis of that nil finding.

As to the carrier expert's opinion that the specific injuries indicated were degenerative changes, this appears to be an opinion as to causation, and not as to the existence of impairment. My response would be that the hearing officer could well have considered such matters to be "water under the bridge" where the evidence indicates that the claimant sustained an undisputed neck and back injury.

These are the reasons I would support the hearing officer's rejection of Dr. S's opinion as a "great weight" of medical evidence against the designated doctor's opinion.

Susan M. Kelley
Appeals Judge