APPEAL NO. 93811

This appeal arises under the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq*. (1989 Act) (formerly V.A.C.S. Article 8308.101 *et seq*.). On August 16, 1993, a contested case hearing (CCH) was held in (city), Texas, with (hearing officer) presiding as hearing officer. The issues which were unresolved at the benefit review conference (BRC) were:

1.Has Claimant reached maximum medical improvement (MMI);

2.What is the correct impairment rating;

3.Has the Claimant suffered disability since August 10, 1992, when his treating doctor advised him to resume work?

The hearing officer determined that the claimant achieved MMI on June 3, 1993, with a 13% impairment rating as found by a designated doctor, that claimant suffered disability from November 30, 1992 to the date of the CCH and that the designated doctor's certification of MMI and his impairment rating were not contrary to the great weight of other medical evidence.

Appellant, carrier herein, contends that the hearing officer erred, that the decision was again st the great weight and preponderance of the evidence and requests that we reverse the hearing officer's decision and render a decision in its favor. Respondent, claimant herein, did not file a response.

DECISION

The decision of the hearing officer is affirmed.

Claimant does not speak English and testified through an interpreter resulting in some of the facts and dates being less than crystal clear. Claimant testified he worked for (employer), employer herein, as a manual laborer. On or about (date of injury), while lifting a bucket or can of steel and Zieline which weighed approximately 65 to 70 pounds, he injured his back. He was apparently seen shortly after the accident by (Dr. Y), who diagnosed lumbosacral strain, "Although I am unable to exclude a small HNP at L4-5." Dr. Y released claimant to light duty. Claimant testified that from the date of the accident until he stopped working he was in constant pain to one degree or another. This appears to be supported by monthly progress notes as recorded by Dr. Y. In Dr. Y's note of "12/17/91" he states it is necessary ". . .to proceed with lumbar myelography and discography. If these studies are positive, then I believe he [claimant] may well require surgical intervention." A subsequent progress note by Dr. Y on "3/13/92" shows claimant ". . .underwent discography which is definitely positive at L4-5. Myelography is also abnormal with an extra-dural defect, left greater than right at L4-5." By note dated "4/28/92," Dr. Y states that claimant is 11½ months out from injury and that claimant "desires surgical intervention." Dr. Y records that (Dr. E) did the discography and myelography and that (Dr. J) would do the surgery. In a "7/13/92" Dr. Y notes that Dr. J does not believe claimant is ". . .an ideal

surgical candidate at this time." Dr. J apparently recommended a work hardening program, however, Dr. Y notes "[t]he insurance company apparently refused a work hardening program." Dr. Y's note of "8/10/92" indicates "no significant change" in claimant's condition, that claimant has had a "work capacity assessment by HealthSouth (HS) and "they recommended that he return to work." Dr. Y's "9/16/92" note states claimant had returned to work full time and that claimant ". . .does not wish to consider surgical intervention for his HNP but wishes to be evaluated by the psychiatrist. He . . .has reached maximum improvement as long as he does not elect surgical intervention. He has a definite HNP at L4-5 and might well benefit from surgery." The "9/16/92" progress note is the last in Dr. Y's records. A Report of Medical Evaluation (TWCC-69) certifies MMI on "9/16/92" with seven percent impairment.

As previously indicated, because of the language barrier claimant was vague as to dates and the doctors he saw. The record does contain extensive medical records from a number of doctors. Dr. J's reports begin on "3/4/92" and continue with progress notes on "5/12/92," "8/12/92," "9/9/92," "10/27/92" and "12/22/92." Dr. J records that claimant definitely has a "two level disc disruption with a herniation at (L)4-5. He has a 10% permanent physical impairment." In Dr. J's "12/22/92" note he states claimant has reached MMI but states ". . .he may still undergo surgery at some point but he is trying to avoid or postpone this for as long as possible." A TWCC-69 certifies MMI on "12/22/92" with 10% impairment.

Claimant, in essence, agreed that his last day of work was November 30, 1992, although claimant's wife testified she believed his last day of work was sometime slightly before November 30, 1992. Neither claimant nor claimant's attorney could explain the significance of the August 10, 1992, date in the unresolved issue at the BRC.

At some point claimant was seen by (Dr. G). In what is labeled "Initial Consult," dated September 21, 1992, Dr. G noted:

1.LBP (lower back pain) with apparent significant disc injury.

2.Clinically his symptoms and findings are compatible with a left S1 radiculopathy.

3.Evidence to suggest progressive pain and decreased activity tolerance and is at high risk to stop work all together and perhaps develop symptoms of chronic pain syndrome.

In a follow-up consultation of October 16, 1992, Dr. G noted ". . .evidence to suggest the presence of a low grade radiculopathy involving the left S1 nerve root."

A designated doctor was requested and the Commission appointed (Dr. T) as Commission-appointed designated doctor. Dr. T examined claimant on June 3, 1993, and in a comprehensive narrative report and TWCC-69, using the mandated version of the American Medical Association Guides to the Evaluation of Permanent Impairment (AMA

Guides) certified MMI as "6/3/93" with a 13% whole body impairment. In a cover letter to the Commission dated June 4, 1993, Dr. T reported his findings and how he computed impairment. Copies of that letter appeared to have been sent to claimant, claimant's attorney, carrier and Dr. J.

The hearing officer determined that Dr. T was a Commission-appointed designated doctor, that Dr. T's certification was not contrary to the great weight of medical evidence, that claimant reached MMI on June 3, 1993, with a 13% impairment rating and that claimant ". . .has suffered disability from November 30, 1992, to the date of this hearing." Carrier appealed contending the designated doctor's MMI certification and impairment rating are contrary to the great weight of medical evidence, that the 13% impairment rating is "erroneous" and that the hearing officer's determinations that claimant ". . .suffered disability from November 30, 1992, to August 16, 1993, the date of the contested case hearing, is contrary to the great weight and preponderance of the evidence so as to be manifestly wrong or unjust and require reversal."

At the outset we note that carrier did not appear at the contested case hearing, did not present any evidence and was not in a position to cross-examine claimant. Consequently, carrier is in the unenviable position of attempting to overcome the presumptive weight of the designated doctor's report on the basis of medical evidence offered by claimant at the CCH. Carrier points out that Dr. Y and Dr. J had certified MMI in September 16, 1992 and December 29, 1992, respectively. Both Dr. Y and J, in their reports, seemed to qualify their certifications of MMI based on claimant's decision whether or not to have surgery. In any event, we have held that the designated doctor occupies a unique position in the Texas worker's compensation system. Texas Workers' Compensation Commission Appeal No. 92255, decided July 27, 1992; Texas Workers' Compensation Commission Appeal No. 92275, decided August 11, 1992. In accordance with Sections 408.122 and 408.125, the report of the designated doctor shall have presumptive weight unless the great weight of the other medical evidence is to the contrary. Similarly we have observed that no other doctor's report, including a report of a treating doctor, is accorded this special presumptive status. *See* Texas Workers' Compensation Commission Appeal No. 92366, decided September 10, 1992, and Texas Workers' Compensation Commission Appeal No. 92412, decided September 28, 1992.

Carrier also asserts as error that Dr. T's certification and evaluation were not sent to the claimant's treating physician, citing two Appeals Panel decisions. First, we note that contention was not raised at the contested case hearing and consequently cannot be considered for the first time on appeal. *See* Texas Workers' Compensation Commission Appeal No. 91100, decided January 22, 1992. Furthermore, it appears that at least copies of Dr. T's cover letter were sent to claimant, claimant's attorney, carrier and Dr. J. Carrier's contention on this point is totally without merit.

Carrier argues that the hearing officer's determination of disability is in error because Dr. G only took claimant off work for four weeks starting November 30, 1992, that the only evidence to support the hearing officer's determination is the lay testimony of claimant and

his wife, and that "all of the objective, clinical, and laboratory findings indicate that the claimant did not suffer disability from November 30, 1992. . . ." We observe that objective and clinical medical evidence is not required to establish disability and that the hearing officer, as the sole judge of the weight and credibility of the evidence, may find disability based on the claimant's testimony alone, even if contradictory of medical evidence. *See* Texas Workers' Compensation Commission Appeal No. 92285, decided August 14, 1992; Texas Workers' Compensation Commission Appeal No. 92167, decided June 11, 1992. We find the hearing officer's determinations are amply supported by evidence in the record.

Where, as here, there is sufficient evidence to support his determinations, there is no sound basis to disturb his decision. Only if we were to determine, which we do not in this case, that the determinations of the hearing officer were so against the great weight and preponderance of the evidence as to be manifestly wrong or unjust would we be warranted in setting aside his decision. In re King's Estate, 244 S.W.2d 660 (Tex. 1951); Texas Workers' Compensation Commission Appeal No. 92232, decided July 20, 1992.

The decision is affirmed.

Thomas A. Knapp
Appeals Judge

CONCUR:

Lynda H. Nesenholtz
Appeals Judge

Gary L. Kilgore
Appeals Judge