APPEAL NO. 93942

This appeal is considered in accordance with the Texas Workers' Compensation Act (1989 Act), TEX. LAB. CODE ANN. § 401.001 *et seq.* (formerly V.A.C.S., Article 8308-1.01 *et seq.*). On January 15, 1993, a contested case hearing was held in (city), Texas, with (hearing officer) presiding, to determine the correct impairment rating to be assigned to the claimant. Neither party disputed that the claimant reached maximum medical improvement (MMI).

The record was held open in the case until September 28, 1993, during which time the hearing officer appointed a second designated doctor, after determining that the first designated doctor did not use the correct version of the "Guides for the Evaluation of Permanent Impairment," third edition, second printing, published by the American Medical Association (Guides) and was not able to complete his duties as designated doctor. The hearing officer gave presumptive weight to the report of the second designated doctor, and determined that the great weight of other medical evidence was not to the contrary. That report assessed claimant with an 18% impairment rating. (That doctor also concurred in the MMI date of the treating doctor).

The carrier has appealed the decision only to the extent that the second designated doctor's report was used by the hearing officer without a second contested case hearing. The carrier argues that it has timely disputed that second designated doctor's report within 90 days, in accordance with the applicable rule of the Texas Workers' Compensation Commission (Commission), and that it has been deprived of the opportunity to show that the second designated doctor's report was against the great weight of contrary medical evidence. The carrier does not argue how the doctor's report <u>is</u> against the great weight of contrary medical evidence, merely that it "assumed" that carrier would retain its rights to dispute the second opinion. There is no appeal of the appointment of the second designated doctor. The claimant has not responded.

DECISION

After considering the record in light of the points of error raised, we affirm the hearing officer's decision.

On (date of injury), the claimant fell 15 feet from the top of the building of the employer, when doing carpentry work. The ladder on which he had attempted to climb also fell, and hit him "like a guillotine" across the wrist. Claimant suffered undisputed injury to his back and wrist. His primary treating doctor was (Dr. B). Dr. B diagnosed a stable compression fracture of the L1 vertebrae, and a distal radius fracture, right. Claimant's wrist fracture was surgically repaired.

Claimant subsequently had a right carpal tunnel release. His medical records document some loss of sensation and pain in his hand and right wrist. Dr. B certified that claimant had reached MMI effective June 11, 1992, and assessed a 13% whole body impairment rating due to the upper right extremity. The claimant stated that this

examination did not exceed 30 minutes.

He timely disputed this rating,[1] and was examined by a Commission-designated doctor,(Dr. SB), an orthopedic surgeon, on August 17, 1992. The letter issued by the Commission to Dr. SB gave no instruction as to the version of the Guides that was required. Dr. SB certified MMI effective on the date of his examination, with a 34% impairment rating, which included both claimant's wrist and back. It may be surmised from the statements made at the hearing and the record that the carrier disputed this and made payment of impairment income benefits to claimant based upon the 13% certification of Dr. B.

It wasn't until December 11, 1992, after the benefit review conference, that the carrier sought consultation from its own doctor. A letter of December 15, 1992, from (Dr. W), an orthopedic surgeon, to the carrier indicates disagreement only with the final result of Dr. SB's report; Dr. W opined that the combined values chart had not been correctly used and that Dr. SB's impairment should have been 31%. Dr. W did not examine claimant. (The carrier asserted that it did not timely exchange this letter because it had only received it the week before the hearing. It was exchanged to claimant the day of the hearing).

Also, the carrier appears to have initiated discovery from Dr. SB and Dr. B by letters and questions to these doctors on December 8, 1992. The letters do not reflect copies being sent to the claimant, nor were questions promulgated through the Commission. A subsequent deposition on written questions to Dr. SB was copied to the claimant. It appears that Dr. SB answered shortly before the hearing; claimant's objection to the untimely exchange conceded by carrier was overruled by the hearing officer and has not been appealed.

Succinctly, the carrier's dispute was over the methodology used by Dr. SB and his failure to use instruments to measure range of motion. The carrier maintained that Dr. B's 13% rating was correct. The carrier did not contend that Dr. SB did not use the proper version of the Guides. The hearing officer, after recessing the contested case hearing, ascertained that Dr. SB had not used the correct version and further determined that Dr. SB would not be able to comply. In a letter to the parties dated April 8, 1993, which solicited a response from either party, the hearing officer stated that he intended to appoint a second designated doctor, and enclosed Dr. SB's letter that was the basis.

There apparently being no dispute, he appointed a second designated doctor,(Dr. WB). *See* Texas Workers' Compensation Commission Appeal No. 93045, decided March 3, 1993. Dr. WB was appointed only to consider impairment. He examined claimant and issued a report August 6, 1993, with an MMI date of "no comment," and an impairment rating of 18%. The Commission thereafter wrote Dr. WB and asked him to supply a date of MMI, and he agreed with the treating doctor's June 11, 1992, date.

[1]The decision states that the carrier disputed the 13% rating, however, claimant testified that he was the one who disputed it.

Contemporaneously, Dr. B, the treating doctor, revised his 13% impairment rating (but not the June 11, 1992, MMI date) to 17%, to include claimant's back, and notified the Commission and carrier of this revision on April 8, 1993.

Carrier argues that it has timely contested Dr. WB's report, on September 13, 1993, and complains that it did not receive a copy of Dr. WB's follow-up report which supplied the MMI date. Even were we to agree that this latter matter of the follow-up report might be error, it would be harmless error because the MMI was not in dispute. Carrier concedes that it received a copy of Dr. WB's TWCC-69 assessing 18% impairment.

The 90 day deadline contained in TEX. W.C. Comm'n Rule, 28 TEXAS ADMIN. CODE § 130.5 (Rule 130.5), cited by the carrier, expressly does not apply to Dr. WB's report. Rule 130.5(e) sets a time limit for contesting the "first" impairment rating assigned to a claimant. Further, Rule 130.5 as a whole contemplates a mechanism by which the dispute process leading to the appointment of a designated doctor is set in motion. We do not believe that it creates a right to a hearing within a hearing once a designated doctor has been appointed and the issue of the accuracy of impairment is already before the hearing officer.

Further, carrier's proposal to send this case back yet again for a hearing comes in large part out of a situation of its own making. Favorable rulings, over claimant's objection as to untimely exchange, were made when carrier submitted the results of its somewhat 11th hour discovery concerning the basis for Dr. SB's opinion. We note that the doctor carrier urged was accurate, Dr. B, revised his rating to 17%, and carrier was aware of this for five months before the record closed in this case. The carrier was informed of Dr. WB's appointment, which it does not appear to have disputed, and was given a copy of his report as to claimant's impairment. That report represents a significant decrease from Dr. SB's impairment rating, and the record did not finally close until over six weeks after Dr. WB issued his report. It is clear from reviewing the record before us as a whole that the carrier has had more than enough time to develop medical evidence on what it believes claimant's correct impairment rating to be, and that it had opportunity to respond to Dr. WB's rating. We find no requirement that a full second hearing is required for such response. Although the carrier notes in its appeal that it declines to present argument and authorities as to why Dr. WB's report is incorrect because it would be arguing matters not properly in evidence, we see no such prohibition that would prevent carrier from making its assertions from the evidence already in the record, (including Dr. WB's report) as to what the "great weight" is against an 18% rating under the facts of this case.

The report of a Commission-appointed designated doctor is given presumptive weight. TEX. LAB. CODE ANN. §§ 408.122(b), 408.125(e). The amount of evidence needed to overcome the presumption, a "great weight," is more than a preponderance, which would be only greater than 50%. *See* Texas Workers' Compensation Commission Appeal No. 92412, decided September 28, 1992. Medical evidence, not lay testimony, is the evidence required to overcome the designated doctor's report. Texas Workers' Compensation Commission Appeal No. 92164, decided June 5, 1992.

We do not agree that either the rules or the 1989 Act have been violated by the hearing officer or that his findings and conclusions regarding Dr. WB's report and claimant's impairment are not amply supported by the evidence.

The decision of the hearing officer is affirmed.

Susan M. Kelley
Appeals Judge

CONCUR:

Stark O. Sanders, Jr.
Chief Appeals Judge

Robert W. Potts
Appeals Judge