APPEAL NO. 94186

This appeal arises under the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq*. (1989 Act). On December 29, 1993, a contested case hearing (CCH) was held in (city), Texas, with (hearing officer) presiding. The issues remaining unresolved from the benefit review conference (BRC) were:

Did Mr. F reach maximum medical improvement and if so, on what date.

What is Mr. F' impairment rating, if any.

In response to the BRC report, carrier sought to add an additional issue at the CCH. Claimant objected. The requested issue was: "Did Dr. R impairment rating become final by operation of Rule 130.5(e)." The hearing officer found no good cause to add this issue. That ruling has not been appealed and consequently will not be discussed further.

The hearing officer determined that the appellant, claimant herein, reached maximum medical improvement (MMI) on July 30, (year), with a zero percent whole body impairment rating (IR) in accordance with the designated doctor's report. Claimant contends that the designated doctor's opinion has been overcome by the current treating doctor's opinion, that claimant has not reached MMI and hence an IR is premature. Claimant further contends that the designated doctor "has been an independent doctor for Insurance Companies and that destroyed the impartiality of his recommendations. . . ." Respondent, carrier 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.

Claimant testified, and it is undisputed, that he was working for (employer), employer herein, on (date of injury) (all dates will be (year) unless otherwise noted), putting tops on boxes when he lost his balance and injured his back. Carrier accepted liability for the injury. Claimant began seeing (Dr. R) for his back injury and continued to work for the employer until the end of July when he was laid off due to a reduction in force. In October, Dr. R filed a Report of Medical Evaluation (TWCC-69) certifying MMI on July 30th with zero percent IR. (Medical evidence is discussed more in detail below.) In February 1993, claimant requested and received permission to treat with (Dr. G) who in a narrative report of February 11, 1993, indicated claimant had reached MMI "as far as conservative modalities are concerned." Subsequently, Dr. G. filed an Initial Medical Report (TWCC-61) on February 22, 1993, reporting a small herniated disc. Claimant requested a BRC on August 4, 1993, and subsequently (Dr. D) was appointed as a Texas Workers' Compensation Commission (Commission) selected designated doctor to determine issues of MMI and an IR. By TWCC-69 and narrative report dated October 19, 1993, Dr. D certified MMI on "7/30/92" (the same date as Dr. R) and a zero percent IR.

The medical evidence consists of a CT of the lumbar spin dated March 23rd, giving as an:

IMPRESSION:Mild central focal L5-S1 annular bulge impinging slightly on the thecal sac. Minimal L4-5 diffuse annular bulge.

A TWCC-61, dated May 6th by a (Dr. B), released claimant to limited work on March 17th, and had a treatment plan of muscle relaxants and anti-inflammatory medication. An April 14th TWCC-61 by a (Dr. J) recorded back pain and recommended "PT 2x weekly." As noted above, claimant began treatment with Dr. R on April 1st. Dr. R, in a report dated April 1st, gave as an impression "Thoracolumbar strain." In an undated report, Dr. R stated that he discussed claimant's MRI and that the study failed to show a herniated nucleus pulposus. A lumbosacral MRI dated July 16th was interpreted as showing degenerative disc disease and mild posterior bulging at L5-S1 with no nerve root impingement. A July 2nd report documented claimant's "persistent low back pain and thoracic strain with radiation to both hips." A July 16th Specific and Subsequent Medical Report (TWCC-64) noted no improvement and a change of medications. Dr. R, in an undated TWCC-69, certified MMI on 7-30-92 with zero percent IR.

Claimant then began seeing Dr. G, who, in a TWCC-69 report dated February 10, 1993, noted "CT Scan of L-Spine 1-25-93 showed small herniated disc 3.5 mm in size, mild spondylosis." A brief narrative report dated February 11, 1993, from Dr. G gives a diagnosis of "L5-S1 disc disease with sciaticalgia" and returns claimant to light duty. Dr. G's discussion indicated claimant ". . . is not a surgical candidate . . . [but] further investigation such as a discogram and possible surgery [may be required]." Dr. G's final report (in evidence) dated October 19, 1993, states:

DIAGNOSIS:L5-S1 disc herniation with S-1 nerve root impingement

PLAN OF TREATMENT:I am recommending he undergo a discogram followed by CT to determined whether indeed the disc that is herniated is causing him his provocative pain and an EMG/nerve conduction study of his lumbar roots. We will review him once this is available. In view of the fact that he is having this chronic sciatica, I believe he is moving toward a surgical resolution to his current pathology.

As noted above, Dr. D was appointed as a Commission-selected designated doctor by order dated September 3, 1993, to determine MMI and an IR. Dr. D's TWCC-69 and narrative certifying MMI on July 30th with zero percent IR noted claimant's history, treatment, complaints and the results of his examination, including range of motion (ROM) tests. Dr. D's report indicates he reviewed the records of Dr. B, an early hospital CT scan, the July 16th MRI, Dr. J's records, as well as the records and reports of Dr. R and Dr. G. Dr. D's diagnosis/impression was "Lumbosacral strain, resolved." Dr. D commented as follows:

His subjective complaints are really not focused, they are diffuse in nature, low back pain with some numbness or pain going down the anterior aspects of his legs starting at the groin and going down to the feet, nothing along the back part of the leg. He states his legs sometimes go to sleep.

Upon physical examination, there are no objective findings. He has a normal range of motion. Sensation is normal. There is no atrophy. There is no spasm. The reflexes are normal. There is some inappropriate responses to the Waddell's especially on axial loading and the pinch test with [claimant] referring pain from the back into his buttocks and down the back of his legs.

In my opinion, [claimant] has reached [MMI] and it is my opinion that he most likely achieved [MMI] on or about July 30, (year). There is no further treatment necessary at this time. Further, I find that he is able to return to work without any restrictions. [Claimant] states he stopped working after he was laid off. However, of and by the patient's own volition, he indicated that he would return to work if given the opportunity.

Based upon the lack of objective findings noted on today's physical examination and in accordance with the AMA Guides to the Evaluation of Permanent Impairment, Third Edition, I find that [claimant] has a zero percent (0%) permanent impairment rating.

Claimant in his appeal states that "the presumption of the designated doctor rubber stamping the insurance doctor was clearly overcomed (sic) by the evidence . . . ." Basically claimant argues that Dr. G's opinion that claimant has a herniated disc and requires surgery overcomes the presumptive weight of the designated doctor's (Dr. D), and the initial treating doctor's (Dr. R) opinions.

First of all there is no evidence that Dr. D lacks impartiality or objectivity and claimant offers none, other than Dr. D's opinion does not support his position. The record is clear that Dr. D was selected by the Commission and not the carrier. Furthermore, Dr. R was one of the early treating doctors, not an "insurance doctor."

Sections 408.122(b) and 408.125(e) provide that if a dispute exists on MMI and as to the IR, and if the parties are unable to agree on a designated doctor, a designated doctor is chosen by the Commission and that designated doctor's report shall have presumptive weight "unless the great weight of the other medical evidence is to the contrary." (Emphasis added.) The Appeals Panel has previously noted the "unique position" and "special presumptive status" that the designated doctor's report is accorded under the Texas Workers' Compensation system, and the fact that no other doctor's report, including that of a treating doctor is entitled to such deference. Texas Workers' Compensation Commission Appeal No. 92412, decided September 28, (year); Texas Workers' Compensation Commission Appeal No. 92366, decided September 10, (year); Texas Workers' Compensation Commission Appeal No. 931048, decided December 28, 1993. To

overcome the presumptive status accorded to the designated doctor's opinion requires more than a mere balancing of the evidence. Appeal No. 92412, *supra*. In the instant case both Dr. R and the designated doctor, Dr. D, appear to agree that claimant reached MMI on July 30th with a zero percent IR. Only Dr. G indicates that claimant requires further testing, may be a candidate for surgery, and has not reached MMI. 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* Texas Workers' Compensation Commission Appeal No. 93105, decided March 26, 1993, and decisions cited therein.

The claimant contends that the hearing officer erred in concluding that the claimant reached MMI on July 30th with a zero percent impairment rating, as reported by the designated doctor, and asserts that the great weight of the medical evidence is contrary to the report of the designated doctor. Having reviewed the record, we conclude that there is sufficient evidence to support the hearing officer's decision 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. Basically, there is a difference of medical opinion as the whether the claimant needs further treatment before MMI is reached. Given the difference of medical opinion and the fact that the designated doctor is not alone in his findings of MMI and IR we cannot conclude that the hearing officer erred in giving presumptive weight to the designated doctor's report and in finding that the great weight of the other medical evidence was not contrary to that report.

Having reviewed the record, including all of the medical records, we find sufficient evidence to support the hearing officer's determinations. An appeals level body will reverse the hearing officer's decision only if it so contrary to the overwhelming evidence as to be clearly wrong and unjust. Cain v. Bain, 709 S.W.2d 175, 176 (Tex. 1986); Pool v. Ford Motor Co., 715 S.W.2d 629, 635 (Tex. 1986). We do not so find.

Finding there is sufficient evidence to support the determinations of the hearing officer and applying the cited standard of appellate review, the decision and order of the hearing officer are affirmed.

Thomas A. Knapp
Appeals Judge

CONCUR:

Robert W. Potts
Appeals Judge

Gary L. Kilgore
Appeals Judge