APPEAL NO. 94288

This appeal is brought pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act). A contested case hearing was held on February 15, 1994, in (city), Texas, with (hearing officer) presiding as hearing officer. The issues at the hearing were whether the appellant (claimant) was due mileage reimbursement for medical treatment; whether he reached maximum medical improvement (MMI); and, if so, what is his correct impairment rating (IR). The hearing officer determined that the claimant was entitled to mileage reimbursement and that he reached MMI on June 7, 1993, with a five percent IR as certified by a Texas Workers' Compensation Commission (Commission) selected designated doctor. Neither party appealed the decision on mileage reimbursement. The claimant appeals the decision of the hearing officer as to MMI and IR on the basis that the great weight of the medical evidence was to the contrary. The respondent (carrier) replies that the decision of the hearing officer is supported by sufficient evidence and should be affirmed.

DECISION

The decision and order of the hearing officer are affirmed.

It was not disputed that on (date of injury), the claimant suffered a compensable trauma injury to the ring and little fingers on his right hand which he crushed against a door frame while moving furniture as an employee of (employer). He was first treated by (Dr. V) at a local clinic. Dr. V diagnosed contusion, swelling and a tender metacarpal phalangeal joint. Physical therapy provided some improvement, but the claimant was still unable to fully extend the affected fingers. He was then referred to (Dr. T) who diagnosed Boutonniere deformity and performed a "volar plate release" operation on January 10, 1993, which, according to the claimant and essentially confirmed by Dr. T, was unsuccessful. On July 16, 1993, Dr. T submitted a Report of Medical Evaluation (TWCC-69) which provided a date of MMI of June 7, 1993, and assigned a five percent IR. The TWCC-69 contained no other information about the claimant's medical condition, except a date of injury.

The claimant also saw (Dr. D) and (Dr. F), who apparently had a combined practice. On May 18, 1993, Dr. D diagnosed ankylosis of the fourth and fifth digits "without expected hope of return of function" with causalgia of the right hand. He considered these digits "permanently . . . useless." The only surgery he thought might change this, though he did not recommend it, was amputation. On July 29, 1993, Dr. D completed a TWCC-69 which found MMI as of June 29, 1993, and assigned a 10% IR based on the injury to his right hand. No explanation of how he arrived at this figure was provided on the form, but in a note of June 29, 1993, Dr. D states:

> Permanent disability with his right hand, fifth and fourth digits. His right hand upper extremity will be disabled by 20 percent of his extremity. That's about 10 percent of his body, permanent.

However, in response to an interrogatory on January 24, 1994, which asked, "[i]n reasonable medical probability, has (claimant) reached maximum medical improvement [MMI]?" Dr. D replied "undetermined" and that he could not state when the claimant would reach MMI.

On July 22, 1993, Dr. F stated:

> I agree with [Dr. D], I don't think any great changes are going to occur. [Dr. D] had spoken some about possible amputation of the ring and small fingers. Before I would try that, I would certainly try a ray amputation of the ring finger, but I am in agreement with [Dr. D], again that I don't think any surgery is indicated at this time.

X-rays taken on December 21, 1993, according to Dr. F, revealed "virtual complete loss of joint space" of the ring finger and some deformity of the small finger. Dr. F then expressed the view that a ring finger ray amputation "deserves at least consideration." The claimant testified that he was scheduled for surgery by Dr. F the Monday following the hearing which would have been February 21, 1994.[1] There was no evidence of the nature of the proposed surgery other than the claimant's description that the objective was to replace some bone in his ring finger with a plastic prosthesis and attempt to rehabilitate his little finger. Dr. F provided no date of MMI or IR.

The only other pertinent medical evidence introduced at the hearing was a TWCC-69 prepared by (Dr. TE), whom the parties agreed was a Commission-selected designated doctor. Dr. TE also found the date of MMI to be June 7, 1993, and assigned a five percent IR for the injury to the right hand.

Based on this evidence, the hearing officer determined that Dr. TE's report of MMI and IR was correct and that the great weight of the other medical evidence was not to the contrary. In his appeal, the claimant asserts that the great weight of the other medical evidence is to the contrary because on the one hand, Dr. TE's report contains no rationale for his conclusion that MMI was reached with a five percent IR. Alternatively, the claimant contends that at the time of Dr. TE's evaluation, surgery was recommended, which the claimant now has had, and Dr. TE was not able to evaluate the results of that surgery. According to the appeal, "[b]y definition, a claimant cannot be at MMI if he needs surgery."[2] The claimant asks either that the decision of the hearing officer on MMI and IR be set aside, or "that if he has reached maximum medical improvement, that his impairment rating is fifteen (15) %."

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[1]According to the claimant's appeal, the surgery took place within a week of the hearing.

[2]The claimant also contended on appeal that Dr. TE conducted only a brief, inadequate examination. No evidence was presented on this matter at the hearing and we will not address it for the first time on appeal. Section 410.203(a); Texas Workers' Compensation Commission Appeal No. 93924, decided November 17, 1993.

Sections 408.122(b) and 408.125(e) provide that a Commission-selected designated doctor's report shall have presumptive weight and that the Commission shall base the determinations of MMI and IR on that report unless the great weight of the other medical evidence is to the contrary. The ultimate determinations of MMI and IR must be made upon medical and not lay evidence. Texas Workers' Compensation Commission Appeal No. 92394, decided September 17, 1992. This "great weight" determination amounts to more than a mere balancing or preponderance of the medical evidence and is clearly a higher standard than that of a preponderance of the evidence. Texas Workers' Compensation Commission Appeal No. 93432, decided July 16, 1993. In Texas Workers' Compensation Commission Appeal No. 93528, decided August 10, 1993, we pointed out several aspects of the medical evidence that a hearing officer could consider in determining where the great weight lies. These included the thoroughness of the reports, the stated basis for the opinions reached, the results of tests performed and whether or not, in the opinion of the designated doctor, surgery would or would not be beneficial. In a report attached to Dr. TE's TWCC-69, Dr. TE extensively discussed the course of treatment already given to the claimant since his injury. He stated he considered existing radiographs and diagnosed "stiffness in right dominant small finger and ring finger." His IR was based on range of motion testing of the several joints of each finger. Calculations were given for each which were then converted into a whole body IR. Dr. TE also indicated an awareness that the claimant was considering amputation and agreed with Dr. T on the date of MMI. The only other medical evidence arguably inconsistent with Dr. TE's certifications are those of Dr. D. which find a 10% IR based on total loss of range of motion at two joints. Dr. D, however, includes no explanation of how he arrived at his final IR other than to say a 20% rating for the right hand is "about" a 10% whole body IR. His later deposition statement that the claimant has not reached MMI, could be considered a retraction of his earlier assignment of an IR, but there is no evidence that Dr. D actually amended his TWCC-69 before the hearing. In any event, we do not believe that Dr. D's evidence amounts to the great weight of the other medical evidence, and the hearing officer could conclude that the presumptive weight afforded Dr. TE's report as discussed above, was not overcome by the great weight of other medical evidence. Finding that this conclusion of the hearing officer is supported by sufficient evidence, we will not disturb it on appeal. Cain v. Bain, 709 S.W.2d 175, 176 (Tex. 1986); Pool v. Ford Motor Co., 715 S.W.2d 629, 635 (Tex. 1986).

The claimant also contends in the alternative that as a matter of law the claimant's pending surgery renders any prior date of MMI invalid. No expert evidence about the contemplated surgery was introduced. Drs. D and F spoke only of amputation. The claimant himself testified to a reluctance to undergo this and, obviously with significant imprecision, said that the planned operation involved some form of prosthesis.

The Appeals Panel has held in numerous cases that pending or scheduled surgery (most often spinal surgery) may require a remand to obtain the designated doctor's opinion on whether and how that surgery, when completed, would affect his opinion of MMI and IR. *See* Texas Workers' Compensation Commission Appeal No. 931099, decided January 11, 1994, and cases cited therein. When directing a remand, the Appeals Panel has been quick to point out that this in no way was intended to denigrate the position of the designated

doctor or status of the doctor's report under the 1989 Act. *See, e.g.,* Texas Workers' Compensation Commission Appeal No. 93336, June 16, 1993. Equally important, the Appeals Panel has observed that mere speculation about a possible surgery does not require remand particularly in those cases where discussions about the possibility of surgery could be considered a delaying tactic to forestall resolution of the issues of date of MMI and IR. Texas Workers' Compensation Commission Appeal No. 93856, decided November 4, 1993. The rule enunciated by the Appeals Panel is not that proposed surgery overcomes the presumptive weight of the report of the designated doctor, but that the "actual scheduling of the surgery itself, makes it prudent to determine whether (and if so, to what degree) the designated doctor's opinion on MMI and impairment may have changed because of the surgery." Texas Workers' Compensation Commission Appeal No. 93293, decided June 1, 1993.

Two previous decisions of the Appeals Panel are particularly instructive on the question in this case of the impact, if any, of claimant's proposed surgery on Dr. TE's date of MMI and IR. In Texas Workers' Compensation Commission Appeal No. 93293, *supra*, dealing with a back injury, the claimant testified he intended to have back surgery. A medical report confirming that he was a candidate for spinal surgery was also in evidence. The designated doctor in that case, however, gave no opinion on whether surgery "would result in further material recovery from or lasting improvement to the claimant's injury," and certified MMI on the basis that there would be no surgery. The Appeals Panel observed that there was medical evidence that claimant was a candidate for the surgery; that he intended to have it; that the designated doctor did not consider the impact of this proposed surgery on his certification of MMI; and there was no evidence that the claimant did not need surgery. With the evidence in this state, the Appeals Panel remanded the case for further consideration. Appeal No. 93293 distinguished Texas Workers' Compensation Commission Appeal No. 93290, decided June 1, 1993, which also involved a back injury. In that case, a carrier's doctor recommended disk surgery. The designated doctor considered this recommendation and specifically reported "I do not feel the surgical procedure would be effective" and gave a reason for this conclusion. The Appeals Panel affirmed a determination by the hearing officer that, under these circumstances, the great weight of the other medical evidence was not contrary to the designated doctors report.

We believe the facts of the case now under appeal more closely resemble the facts of Appeal No. 93290, *supra*. Dr. TE was aware that surgery (amputation) was a possibility at the time he prepared his TWCC-69, but knew it was generally disfavored by Drs. D and F and by the claimant who considered this option as "elective." Most importantly, however, and as in Appeal No. 93290, there was only vague evidence at the hearing about the contemplated operation and that consisted primarily of the non-expert testimony of the claimant which described a pending operation that may or may not have involved amputation. We do not believe that such non-expert speculation about an operation, even one immediately pending, amounts to the great weight of the evidence needed to overcome the presumptive validity of Dr. T's determination of the date of MMI or requires a remand. *Compare* Texas Workers' Compensation Commission Appeal No. 93518, decided August 5, 1993; Appeal No. 93856, *supra*; Appeal No. 93336, *supra*, all of which involved remands

to consider the results of back surgery which had been described by medical experts and approved by the Commission. To defeat this presumptive weight, the challenging party was required to present medical evidence. Yet, no attempt was made, or at least none is in evidence, that Dr. F gave any opinion or even description of the new surgery, if indeed he was to be the surgeon. We believe that the decision of the hearing officer that the great weight of the other medical evidence does not outweigh Dr. TE's certification of the date of MMI was supported by sufficient evidence.

Finding no error and sufficient supporting evidence, we affirm the decision and order of the hearing officer.

Alan C. Ernst
Appeals Judge

CONCUR:

Joe Sebesta
Appeals Judge

DISSENTING OPINION:

I dissent. The critical question here is not, in my view, whether the great weight of the other medical evidence overcame the opinion of the designated doctor. The question is whether the designated doctor had all possible relevant information before him when making his decision. In this case, the claimant was scheduled for surgery only days after the contested case hearing. It would seem to me that it would have been very easy for the hearing officer to have kept the record open and ascertained whether the surgery affected the opinion of the designated doctor.

The failure of the hearing officer to do this leaves us in a situation where we are relying on a pre-surgery opinions of the designated doctor in determining MMI and IR. In a number of cases we have held that surgery or the scheduling of surgery may require a remand to obtain the designated doctor's opinion on how surgery would affect his MMI opinion. Texas Workers' Compensation Commission Appeal No. 93293, decided June 1, 1993; Texas Workers' Compensation Commission Appeal No. 93336, decided June 16, 1993; Texas Workers' Compensation Commission Appeal No. 93518, decided August 5, 1993; Texas Workers' Compensation Commission Appeal No. 93856, decided November 4, 1993; *See also* Texas Workers' Compensation Commission Appeal No. 931099, decided January 11, 1994. For the same reasons, I would do the same thing in this case.

The majority's reliance on Texas Workers' Compensation Commission Appeal No. 93290, decided June 1, 1993, is, I believe, misplaced. In that case, the designated doctor stated that surgery would be ineffective. In effect, the designated doctor had already clearly stated that surgery would not change his opinion as to the claimant's condition and, therefore, was no reason to remand the case to ask him if it would. In the present case, I find no such clear indication. Nor do I agree that the cases I have cited above supporting remand are distinguishable from the present case. This is not a situation in which surgery has been avoided to delay the resolution of the case. Nor does the fact that this case involves hand rather than spinal surgery make the present case different. Since this case does not involve spinal surgery, there cannot be the same type of Commission order involving spinal surgery. However, just because the claimant's impairment involves his hand rather than his back, is there any less need for the opinion of the designated doctor to be based on the best information reasonably possible under the circumstances? I think not. In fact the great deference given to the opinion of the designated doctor requires that we do everything practical to assure its accuracy.

With all respect to the majority, I would remand this case to the hearing officer instructing her to contact the designated doctor and find out if his opinion as to either MMI or impairment have been changed by the claimant's surgery.

Gary L. Kilgore
Appeals Judge