APPEAL NO. 94357

This appeal arises under the Texas Workers' Compensation Act of 1989, TEX. LAB. CODE ANN. § 401.001 *et seq*. (1989 Act). On March 2, 1994, a contested case hearing was held in (city), Texas, with JP presiding. He determined that appellant (claimant), who had stipulated that maximum medical improvement (MMI) was reached on March 30, 1993, had an impairment rating (IR) of nine percent as found by the designated doctor, (Dr. O). Claimant asserts that (Dr. M), who stated his IR was 13%, should be given more weight because he is a neurology specialist and gave five percent for pain. Carrier made no reply.

DECISION

We affirm.

Claimant drove a truck for (employer). On (date of injury), he was in a collision with a car at an intersection and the truck turned onto its side, crushing part of his left foot. Claimant stated that x-rays showed that his big toe was fractured. After being seen in an emergency room, claimant saw (Dr. G) approximately monthly for eight months. Dr. G on February 22, 1993, found MMI was reached on February 22, 1993, with seven percent impairment. (Dr. C), who acted as an independent examining doctor in evaluating claimant, found MMI on March 30, 1993, with six percent impairment.

On July 3, 1993, Dr. O, as the designated doctor, evaluated claimant. He referred to the fracture of the proximal phalanx of the big toe and the fact that claimant has no motion at the "IP joint" of the big toe on the left foot. He stated, "range of motion of all the toes were measured because this was the contusion involving not only the big toe with obvious fracture but involving all the soft tissues of all the toes with obvious tendon involvement and adhesions with consequential stiffness of the joints." He wrote of "sole wedging" to alleviate pain in his foot, and he also referred to a "metatarsal bar" beneath the shoe as possibilities to relieve symptoms. He ruled out surgery. He believed that MMI had been reached and recorded March 30, 1993, as the date thereof. His IR was made up of eight percent for range of motion and one percent for pain, acknowledging that the Guides to the Evaluation of Permanent Impairment, third edition, second printing, dated February 1989, published by the American Medical Association (AMA Guides) give no specific impairment for pain. He then closed his narrative with a request directed at the carrier and the Texas Workers' Compensation Commission (Commission), "[i]t is hoped that the Commission and the insurance carrier will show magnanimity in understanding and the wisdom in the calculation of the impairment in this particular patient."

Thereafter claimant saw Dr. M on September 17, 1993, and in January 1994. Dr. M is a neurologist who on January 24, 1994, found MMI to have occurred on March 30, 1993, with 13% impairment. He also noted range of motion to be eight percent, but then added five percent for "chronic pain." Dr. M did not discuss the basis for assigning five percent for pain or indicate what section of the Guides allowed him to assign impairment based on pain.

With claimant's concern regarding the designated doctor's report of Dr. O, the Commission wrote a letter to Dr. O inquiring into the basis for his impairment rating. Dr. O

replied that his range of motion figures included all toes. He noted that claimant's foot was not misaligned with his leg; he adds that claimant did not have nerve injury regarding deep tendon reflexes. Dr. O, however, in the last paragraph of his letter was imprecise with his language. He states, "[f]inally given the objective condition of his foot there is no contraindication to operating a truck or getting in and out of one. Remember, he did not sustain any fractures!, then such patients are able to return to such activity." At the hearing, carrier characterized this statement as Dr. O referring to the foot, not the big toe in which there was a fracture. All parties agreed that Dr. O had considered the fracture to the toe at the time he assigned the impairment rating. Claimant stressed this statement in Dr. O's letter to attack the credibility of Dr. O. The hearing officer was aware of both the report of Dr. O and his letter when determining that the great weight of other medical evidence was not contrary to the opinion of Dr. O.

The hearing officer is the sole judge of the weight and credibility of the evidence. *See* Section 410.165. In giving presumptive weight to the report of Dr. O, as set forth in Section 408.125(e), the hearing officer could consider that both Dr. G and Dr. C assigned impairment ratings that were smaller than that of Dr. O. Only Dr. M assigned a higher rating, and he did not explain the basis for rating pain as being allowed under any section of the Guides. Texas Workers' Compensation Commission Appeal No. 93432, dated July 16, 1993, stated that criteria of Section 408.125, in regard to presumptive weight, "clearly requires a higher standard than does `preponderance of the evidence"' to determine that the presumption should not be applied. Texas Workers' Compensation Commission Appeal No. 93705, dated September 27, 1993, repeated the earlier Appeals Panel declaration that generally a designated doctor did not have to be of a particular specialty to be accorded presumptive weight. In addition, the portion of Dr. O's letter that claimant criticizes addresses how claimant can do his job. Texas Workers' Compensation Commission Appeal No. 93735, dated October 4, 1993, stated that ability to work is not a criterion in impairment under the 1989 Act.

Finding that the decision and order are not against the great weight and preponderance of the evidence, we affirm. *See* In re King's Estate, 150 Tex. 662, 244 S.W.2d 660 (1951).

Joe Sebesta
Appeals Judge

CONCUR:

Thomas A. Knapp
Appeals Judge

Gary L. Kilgore
Appeals Judge