APPEAL NO. 94570

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 April 13, 1994. The issues to be decided at the hearing were the date appellant (claimant) reached maximum medical improvement (MMI) and his correct impairment rating (IR). The hearing officer found, in accordance with the report of the Texas Workers' Compensation Commission (Commission) selected designated doctor, that the claimant reached MMI on February 1, 1993, with a zero percent IR. The claimant appeals these determinations arguing that the great weight of the other medical evidence is contrary to the report of the designated doctor, because he failed to properly apply the Guides to the Evaluation of Permanent Impairment, 3d edition, 2d printing, dated February 1989, published by the American Medical Association (Guides). The claimant further argues that the designated doctor failed to comply with Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 130.1 (Rule 130.1) and for this reason his report "should be held null and void." The respondent (carrier) replies that the factual premises of the claimant's appeal are false and that the decision and order of the hearing officer should be affirmed.

DECISION

We affirm the decision and order of the hearing officer and reform Finding of Fact Number 6 to reflect that the claimant was assigned a 13% IR.

The claimant worked for the employer as a maintenance man; his duties involved lawn work and trash removal. It is undisputed that he injured his lumbar and cervical spine on (date of injury), when he picked up a 36 gallon container of recyclable materials. Since this time he has seen numerous doctors.

An MRI of the cervical spine taken on April 24, 1992, disclosed "bulging protrusion of the disc at C5-C6 level towards the left lateral aspect, slightly encroaching on the adjacent neural foramen." An MRI of the lumbar spine on the same date disclosed a "slight, almost diffuse bulging of L3-L4, L4-L5 and L5-S1 discs . . . and there is not evidence of frank extrusion of the nucleus pulposus."

The earliest record of medical treatment by a treating doctor in evidence was a letter of June 4, 1992, from a Dr. R, which noted no neurological or sensory deficits. His review of the claimant's April 24, 1992, MRI showed bulging at the C5-C6 and L4-5 levels "with no definite herniation." He saw no need for surgical intervention.

Records of the claimant's current treating doctor, Dr. S, over the period from June 29, 1992, to January 25, 1994, consistently diagnose lumbalgia, lower back sprain and cervical sprain. On June 29, 1992, Dr. S notes that the MRI of April 24, 1992, showed bulging discs at C5-6 and L3-4, L4-5 and L5-S1, but this does not appear as a separate diagnosis until June 15, 1993.

Dr. T, on referral from Dr. S, and apparently based on the same April 24, 1992, MRI

(the only MRI report in evidence), and one visit with the claimant stated in an "Initial Medical Report" (TWCC-61), Block 20, "MRI: HNP C5-C6 Lt by my review, but apparent C5 bulging protrusion C5-C6 Lt. MRI Lumbar: Grossly unremarkable." Dr. T did not determine a date of MMI or assign an IR.

Dr. M, also on referral from Dr. S, examined the claimant on July 22, 1992, and reported the MRI of the cervical and lumbar spine as showing bulging. No herniation was mentioned. EMGs and NCVs of the upper extremities and right lower extremity taken on August 4, 1992, were also normal. He also had administered EMG and nerve conduction velocities testing of the lower left extremity on December 3, 1992. These were within normal limits and no evidence of radiculopathy was found.

On April 26, 1993, Dr. L, at the request of Dr. S, examined the claimant for a functional capacity evaluation and disability rating. He found full range of motion of the cervical spine, but some limitation of range of motion of the lumbar spine. He found full range of motion of the extremities. He read the claimant's MRI of the cervical spine as "without significant abnormalities" even though he noted that "it was suggested on the April 24th reading as bulging protrusion at the disc at C5-6 level . . . ." He confirmed that, in his opinion, the MRI of the lumbar spine showed bulging "but no significant impingements were seen on that exam either." He completed a "Report of Medical Evaluation" (TWCC-69) in which he found MMI as of the date of his examination (May 10, 1993) and assigned an eight percent IR based solely on lumbar range of motion deficits. On September 27, 1993, Dr. S completed a TWCC-69 in which he found MMI on that date and assigned the same IR of eight percent based on the same analysis as that of Dr. L because in Dr. S' opinion "the injuries are most consistent with (Dr. L's) evaluation." In a letter of December 15, 1993, to the claimant's attorney, Dr. L stated:

> Thank you for bringing [sic] attention the findings of the MRI showing the findings. Indeed there should be a slight alteration in the disability rating for this patient with a 4% given for the MRI at the cervical disc and 5% given in the lumbar area. However, the Guides to the Evaluation of Permanent Impairment, 3rd Edition, Unrevised, does not give additional percentage for each additional level. That is the manual required currently for use. Additionally, the combined values rating would at most give a disability rating of 13%. In light of that, I would be able to adjust my rating on (claimant) to 13% rating.

There is no evidence that Dr. S revised his rating.

On February 1, 1993, Dr. K examined the claimant at the request of the carrier. He noted the previous MRI, EMG and nerve conduction studies done on the claimant and found "complete range of motion in all directions in the cervical spine . . . ." He found no "clinical evidence of disc herniation" and observed that:

> Bulging disks do not contribute pathology unless associated with objective

> clinical findings, in my opinion. I personally feel that this man has reached maximum medical improvement from what appears to be a cervical and lumbar sprain. The type of injury that he describes could not have caused any cervical disk herniation. He has mild degenerative changes of the lumbar spine which could be aggravated by his repeated bending, stooping, and lifting. He also has mild degenerative changes in the routine x-rays of the cervical spine.

He also stated his agreement with Dr. R. "that there are no surgical lesions in this patient." On August 12, 1993, Dr. K completed a TWCC-69 in which he found MMI on February 1, 1993, with a zero percent disability for his (date of injury), back injury.

On June 28, 1993, Dr. C, the Commission selected designated doctor, also found MMI as of February 1, 1993, and assigned a zero percent IR. The total of his comments on the TWCC-69 are substantially:

> . . . he has full ROM of the back . . . MRI shows bulging discs, which are normal. With a normal examination and MRI, the disability rating remains at 0% and should return to a gainful employment.

Based on this evidence, the hearing officer determined that Dr. C's "findings were made in accordance with the requirements of the correct edition of the Guides and were consistent with objective medical evidence in the case." He found Dr. C's report was not contrary to the great weight of the other medical evidence and that the claimant reached MMI on February 1, 1993, with a zero percent IR.

The claimant appeals this decision contending that the assigned IR and date of MMI of Dr. L constitutes the great weight of the other medical evidence[1] and should be adopted or another designated doctor appointed. Specifically, the claimant contends that the existence of objective clinical and laboratory findings that the claimant has bulging at the C5-C6 level "slightly encroaching on the adjacent neural formen [sic]" and bulging at L3-L4, L4-L5 and L5-S1 mandates a rating other than zero percent; that Dr. C's TWCC-69 in insufficient because it failed to provide a narrative history of the claimant's medical condition; and that Dr. C failed to use the prescribed edition of the Guides.

"Impairment" is defined in the 1989 Act as "any anatomic or functional abnormality or loss existing after maximum medical improvement that results from a compensable injury and is reasonably presumed to be permanent." Section 401.011(23). An "injury" for purposes of this appeal is "damage or harm to the physical structure of the body." Section 401.011(26). An impairment must be based on "objective clinical or laboratory findings" and, where assigned by a treating doctor, must be confirmable by a designated doctor, if

[1]The hearing officer found that Dr. L assigned an eight percent IR apparently in disregard of his later increase to 13%. We reform Finding of Fact 6 of the hearing officer to reflect that Dr. L assigned a 13% IR.

disputed. Section 408.122(a). Doctors who assign an IR must use the prescribed Guides. Section 408.124(b).

The 1989 Act also provides that where a designated doctor is chosen by the Commission to determine MMI and IR, the report of the designated doctor shall have presumptive weight and 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. Sections 408.122(b) and 408.125(e). No other doctor's report, not even that of a treating doctor, is entitled to this presumptive weight. Texas Workers' Compensation Commission Appeal No. 92412, decided September 28, 1992. The "great weight" determination amounts to more than a mere balancing or preponderance of the medical evidence. Whether the great weight of the other medical evidence is contrary to the opinion of the designated doctor is normally a factual determination. Texas Workers' Compensation Commission Appeal No. 93459, decided July 15, 1993. The hearing officer at a contested case hearing is the finder of fact and sole judge of the weight and credibility to be given the evidence, including the medical evidence. Section 410.165(a); Garza v. Commercial Insurance Co. of Newark, New Jersey, 508 S.W.2d 701 (Tex. Civ. App.-Amarillo 1974, no writ); Texas Employers Insurance Association v. Campos, 666 S.W.2d 286 (Tex. App.-Houston [14th Dist.] 1984, no writ).

In the case under appeal, the claimant asks either that the date of MMI and IR of Dr. L should be adopted as constituting the great weight of the medical evidence or that a new designated doctor be appointed. The components of Dr. L's 13% rating were 8% for loss of range of motion of the lumbar spine only, and, as added some seven months later, five percent "for the findings of the MRI." Neither at the hearing nor on appeal did the claimant specifically argue or articulate reasons why Dr. L's range of motion IR constitutes the great weight of the other medical evidence. Under these circumstances, the hearing officer could have considered the range of motion question to be simply a professional dispute between doctors of the kind intended to be resolved by the statutory preference given the report of the designated doctor and that, as such, the contrary opinion of Dr. L did not rise to the level of "great weight." See Texas Workers' Compensation Commission Appeal No. 94555, decided June 10, 1994.

The key area of contention, judged by the attention given it at the hearing and on appeal if not by the actual five percent rating assigned by Dr. L, is whether the proper application of the Guides requires that a rating be assigned for the condition of the claimant's cervical and lumbar spine. With regard to the latter, the medical evidence is consistent in showing disc bulging only. With regard to the cervical spine, all doctors (including Dr. S) who read the MRI, with the exception of Dr. T, concluded that there was disc bulging. Only Dr. T read the MRI to show herniation of the cervical spine. A doctor who assigns an IR must base that rating on the existence of a compensable injury. Texas Workers' Compensation Commission Appeal No. 94081, decided March 10, 1994; Texas Workers' Compensation Commission Appeal No. 93246, decided May 10, 1993. The nature and extent of that injury is a question of fact to be determined ultimately by the hearing officer. In this case, only Dr. T finds evidence of herniation in the one MRI in

evidence. This isolated opinion can hardly be said to constitute the great weight of the evidence or compel a finding by the hearing officer that herniation exists which the designated doctor significantly failed to diagnose and which for this reason would render his report invalid. *See* Texas Workers' Compensation Commission Appeal No. 93489, July 29, 1993.

Assuming that the evidence establishes only disc bulging, the claimant argues that he is still entitled under Table 49, Part IIb, Intervertebral disc or other soft tissue lesions, of the Guides to some rating because the bulging is an abnormality independently confirmed by objective medical tests. Therefore, according to the claimant, it must be assigned a rating as a "medically documented injury" with six months of medically documented pain. We disagree. In our opinion, an abnormality (bulging in this case) is not necessarily in itself evidence of a compensable injury but can be simply a deviation from a norm, or ideal condition, that may or may not constitute damage or harm to the physical structure of the body produced by a compensable injury. To be the basis of an impairment rating under Table 49, the bulging must rise to the level of a pathology or lesion caused by the compensable injury. *See* Texas Workers' Compensation Commission Appeal No. 94392, decided May 13, 1994. Compare Texas Workers' Compensation Commission Appeal No. 94471, decided June 7, 1994, which held that herniation was a lesion for which an IR must be assigned, or if not, explained by the designated doctor. Dr. C considered the claimant's disc bulging to be "normal" which was consistent with EMG and nerve conduction testing, his own range of motion testing and degenerative changes noted by Dr. K. Dr. L, in supplementing his initial TWCC-69 which found no specific disorder of the spine under Table 49, refers to the "the findings of the MRI" as justification for the higher IR. To the extent that Dr. L is here referring to herniation as the basis for the new rating, the hearing officer could determine, based on the other medical evidence, that herniation did not exist and consider this rating unpersuasive for that reason. In short, we conclude that there was sufficient evidence for the hearing officer to determine that the claimant's bulges were not lesions ratable under Table 49 and that therefore he did not err in refusing to find that Dr. L's assigned rating constituted the great weight of the medical evidence to the contrary of Dr. C's report. Where the decision of the hearing officer is supported by sufficient evidence we will not substitute our judgement for that of the hearing officer or overturn that decision 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).

In support of its challenge to the date of MMI, the claimant says that "[t]he only significance of the February 1, 1993 MMI date is that was the date that the Appellee (sic) was examined by (Dr. K), an IME doctor selected by the carrier." One could infer from this that the claimant is suggesting that Dr. K's date of MMI should be disregarded because he was chosen by the carrier. Such is not a basis in itself for excluding his opinion on this or any other relevant medical issue. The date does become important because Dr. C concurred in this as the date of MMI and adopted it as his own. Thus it is entitled to presumptive weight. Both Dr. L's and Dr. S' dates of MMI are the dates they completed the TWCC-69, a not-untypical situation. We will only assume a date of MMI invalid on its face if the date is projected into the future, a circumstance not present in this case. For

these reasons, we do not believe that Dr. L's date of MMI (the date of his examination) constitutes the great weight of the other medical evidence which would deprive Dr. C's date of MMI of its presumptive validity. *See* Texas Workers' Compensation Commission Appeal No. 92453, decided October 12, 1992, for the proposition that the date of MMI need not only be the date of the examination by the designated doctor.

The claimant also asserts on appeal that the report of Dr. C is invalid because he did not use the statutorily mandated version of the Guides and that he did not comply with Rule 130.1. Specifically, the claimant contends that Dr. C "failed to provide a narrative history." In response to a specific inquiry from the claimant's attorney, the Benefit Review Officer on November 23, 1993, wrote Dr. C and asked him what version of the Guides he used. Dr. C responded on December 7, 1993, that he did use the mandated version. The claimant at the later hearing and on appeal presented no evidence to the contrary, other than his disagreement with how Dr. C applied the Guides. We find no merit in this contention.

Rule 130.1(c)(5) describes a narrative history for purposes of completing a TWCC-69, as including, but not limited to, a description of the onset and course of the claimant's condition and a recordation of the findings of previous treatments and examinations "not previously report to the insurance carrier and the commission by the doctor making the report." Dr. C's TWCC-69 does in fact report the history of the claimant's injury and the onset of pain. He also reports the "normal" results of his own examination and the one MRI in evidence. Although this narrative is brief and completely contained on the front of the TWCC-69, we are unwilling, absent a specific reference to how it is inadequate, to conclude as a matter of law that the narrative does not comply with the 1989 Act or Rule 130.1. The claimant identifies no specific inadequacy other than a general assertion that it is not legally sufficient and we find none. Compare Texas Workers' Compensation Commission Appeal No. 92611, decided December 30, 1992, where the Appeals Panel held "that where there is a challenge regarding the designated doctor's rating and where the challenge specifically attacks how the rating was determined using the AMA Guides, the designated doctor should provide some information how the impairment rating was arrived at . . . ." (Emphasis added.)

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

Alan C. Ernst
Appeals Judge

CONCUR:

Gary L. Kilgore
Appeals Judge

Tommy W. Lueders
Appeals Judge