APPEAL NO. 950335

This appeal arises under the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act). On February 1, 1995, a contested case hearing was held in (City 1), Texas, with (hearing officer) presiding as hearing officer to consider the sole issue of respondent's (claimant) impairment rating (IR). The hearing officer determined that claimant's IR was 25% in accordance with the second report of the Texas Workers' Compensation Commission (Commission)-selected designated doctor. In its appeal, appellant (carrier) argues that the hearing officer abused her discretion in determining that claimant injured his lumbar spine in his _____, compensable injury arguing that "[t]here is no evidence in the record to support the Hearing Officer's finding that the Claimant suffered a lumbar injury on or about _____ or that any injury to the lower lumbar region of the Claimant's back is otherwise compensable." Carrier also argues that the hearing officer abused her discretion in adopting the designated doctor's second rating of 25%, which included rating for a specific disorder of the lumbar spine and for loss of range of motion (ROM) in the lumbar spine. Claimant's response urges affirmance of the hearing officer's decision and order.

DECISION

We affirm.

It is undisputed that on _____, claimant sustained a compensable injury and that he reached statutory maximum medical improvement (MMI) for that injury on November 15, 1993. Specifically, claimant testified that on _____, he was employed as a sheet metal apprentice with (employer). He stated at 7:30 a.m., just after his shift had started, he was bent over cleaning a work area, when a 10-foot aluminum ladder fell and struck him on his neck and upper back area. After the ladder struck him, claimant stated that he was dazed but he was not sure whether he lost consciousness. He further stated that he did not initially have pain after the incident, rather he felt stiffness in his back. Claimant was sent by employer's general foreman to the company doctor, Dr. S. In his report of _____, Dr. S stated that claimant complained of "stiffness from neck to lumbar" and diagnosed a contusion of the thoracic spine.

Claimant stated that in the early morning of (day after date of injury), he developed sharp pain that went down his back into his hips, along with pain in both arms and legs. Thereafter, he went to the emergency room at the hospital. An x-ray of claimant's cervical spine was normal and he was diagnosed with contusions and muscle strain. Claimant testified that the emergency room doctor advised him he could return to light duty work. He went to the employer on Monday and was told that no light duty was available; thus, he took the week off. The following week, claimant returned to full duty but by Thursday evening and Friday morning, his severe neck and back pain had recurred. Therefore, claimant scheduled an appointment with Dr. M, to whom he had been referred by the hospital and who became claimant's treating doctor. Claimant's first appointment with Dr. M was on November 26, 1991. In his Initial Medical Report (TWCC-61) and an

accompanying narrative summary, Dr. M diagnosed cervical and lumbar sprains. In his narrative, Dr. M noted decreased ROM and muscle spasms in claimant's neck, along with numbness and tingling into his arms. In addition, Dr. M noted pain in the right side of claimant's lower back and limited lumbar ROM. An MRI of claimant's cervical spine of November 27, 1991, revealed a moderate, central disc protrusion at C6-7 and moderate right bony neuroforaminal narrowing at C3-4. In a report of March 5, 1992, Dr. M repeated the diagnosis of cervical and lumbar sprain and possible ruptured cervical disc and suggested a continued course of conservative treatment.

On May 20, 1992, claimant was referred by Dr. M to Dr. P. In treatment notes dated May 28, 1992, Dr. P stated:

> At initial visit of 5/20/92 [claimant] had complaint of neck and shoulder pain and low back pain.
>
> At this time we will inject the facets and paraspinous muscles of L1 through the coccyx and will include the interspinous ligament bilaterally.

Similarly, in a letter dated June 9, 1992, Dr. P stated that claimant was seen on May 20, 1992, with the principal complaint of "persistent bilateral low back, mid-back, post cervical and interscapular pain." Dr. P further noted that:

> Studies completed on this date are consistent with (1) sub-occipital, post cervical and interscapular myofascitis; (2) facet irritation at the L4-5, L5-S1 levels: (3) paralumbar myofascitis.
>
> Accordingly, he was scheduled for facet and paralumbar infiltration with Maracaine and Depo-Medrol on May 28, 1992.

Claimant stated that the facet injections in his lumbar spine were successful in alleviating some of his pain and that Dr. P repeated the injections on approximately six occasions.

On January 27, 1994, Dr. M certified that claimant reached MMI, with an IR of 31%, comprised of six percent for a specific disorder of the cervical spine, seven percent for a specific disorder of the lumbar spine and 18% for loss of function of the upper extremities. The carrier disputed Dr. M's IR and Dr. B was selected by the Commission as the designated doctor. On April 7, 1994, claimant was examined by Dr. B. On a Report of Medical Evaluation (TWCC-69) dated April 12, 1994, Dr. B assessed an IR of 11%, comprised of six percent for a specific disorder of the cervical spine and five percent for loss of ROM in the cervical spine. In a narrative report accompanying his TWCC-69, Dr. B noted that he obtained lumbar x-rays because none were provided to him, despite the evidence of Dr. P's facet injections in the lumbar area. Finally, Dr. B noted that his back examination revealed that claimant "has good extension of his low back and lateral flexion

in either direction. He can bend forward at the waist and bring his fingertips to within 2 to 3 inches of his toes."

After receiving Dr. B's 11% IR, claimant requested a benefit review conference (BRC). The claimant asserts in his response to the appeal that at the BRC, the carrier's representative acknowledged that the lumbar area was part of the injury. The ombudsman assisting the claimant at the CCH also stated on the record that at the BRC the carrier's representative agreed that the lumbar was a part of the injury. Although there is no report of the first BRC, the medical reports in evidence tend to show that the lumbar area was a part of the injury during the lengthy course of treatment. This, together with the lack of any indication of objection or response by the carrier to the second BRC report, tends to support the notion that the lumbar area was considered by all parties to be a part of the injury--at least until the designated doctor's second report with comments about the lumbar area. The benefit review officer (BRO) issued an order dated November 4, 1994, which ordered claimant to return to Dr. B for reexamination on November 23, 1994. In an apparent clerical error, the BRO's order stated that Dr. B was to serve as the designated doctor "for maximum medical improvement only." Nevertheless, as is apparent from Dr. B's second report, he was actually advised to reevaluate claimant and to include a rating for any impairment related to his lumbar injury. In a TWCC-69 dated November 29, 1994, Dr. B assessed a 25% IR comprised of the 11% previously assessed for a specific disorder of the cervical spine and loss of cervical ROM, five percent for a specific disorder of the lumbar spine and 11% for loss of lumbar ROM. In an accompanying narrative report, Dr. B states:

> Because I am asked to rate his lumbar spine in this impairment rating, I am doing so and because of his specific disorders of degenerative changes in his low back, he has 5% impairment based on Table 49 II-B, page 73, he also has 11% range of motion impairment as indicated in his range of motion testing. Since his original injury was the fall ladder across the C7-T1 level in his back, I am not convinced that his lumbar problems are related to the injury, but I have not been asked to address this issue and will, therefore, report the impairment rating combined with his previous findings of 11% and this results in a **25% impairment rating** based on the previous 11% for cervical spine, the present 11% for lumbar spine range of motion and 5% for specific disorder.
>
> As stated, I have serious doubts that the lumbar spine impairment rating is related to his injury but rather represents a progressive arthritic disorder in his low back. [Emphasis in original.]

Finally, Dr. B stated that the April 1994 x-rays of claimant's low back "showed moderately severe degenerative joint disease with anterior and lateral degenerative spurring in his lumbar spine."

In its appeal, carrier argues that the hearing officer abused her discretion in deciding that claimant's compensable injury included a lumbar injury, as well as, a cervical injury. Carrier maintains that that issue was not before the hearing officer, instead insisting that she was only presented with the issue of claimant's correct whole body IR. Although there was not a distinct issue framed on the extent of claimant's injury, and it is clear that the carrier did not preserve such issue by objecting or responding to the BRC report to bring the issue to the CCH (Rule 142.7(b)), it is evident from a review of the hearing that the extent of injury issue was addressed by the carrier in making its argument on the IR issue. Specifically, carrier argued at the hearing and again on appeal that the evidence did not support a determination that claimant's lumbar condition was causally related to the compensable injury and, therefore, any impairment related to the lumbar condition is not properly included in assessing an IR herein. The hearing officer's finding on this matter was apparently in response to the carrier's presentation on the claimant's lumbar condition, although such finding may well not have been required on the issue of IR. As we stated in Texas Workers' Compensation Commission Appeal No. 941333, decided November 21, 1994, "we believe it was incumbent upon the carrier to activate any dispute over the extent of injury well before any dispute is formulated on the correct IR. . . ." In addition, we note that where, as here, a hearing officer is presented with an IR issue it is incumbent upon the hearing officer to resolve necessary collateral matters affecting the IR issue, in that a claimant's IR is to include a rating for all permanent impairment related to the compensable injury. Accordingly, the hearing officer's finding that the lumbar area was part of the injury was appropriate in order to evaluate whether the designated doctor's IR considered and rated the entire compensable injury.

The hearing officer found that claimant's lumbar condition was the result of his _____, injury. As previously noted, claimant's treating doctor, Dr. M diagnosed a lumbar sprain at his initial appointment, which he attributed to claimant's compensable injury. In addition, Dr. P, who treated claimant's lumbar spine with facet injections, also indicated that the condition was causally related to claimant's compensable injury. Dr. B, the designated doctor, opined that claimant's lumbar condition was not related to the compensable injury. It is well-settled that only a designated doctor's opinion on MMI and IR is entitled to presumptive weight. Texas Workers' Compensation Commission Appeal No. 941732, decided January 31, 1995; Texas Workers' Compensation Commission Appeal No. 94607, decided June 24, 1994; Texas Workers' Compensation Commission Appeal No. 94256, decided April 20, 1994. His opinion on the extent of injury issue can be considered, but it is not entitled to presumptive weight and it is not controlling. In addition, claimant consistently maintained that he had injured his lumbar spine in the November 1st on-the-job injury. Thus, there was conflicting evidence on the issue of whether claimant's compensable injury included a lumbar injury, which conflict was for the hearing officer, as the finder of fact, to resolve. The hearing officer credited claimant's testimony and the opinions of Drs. M and P over that of Dr. B. She was acting within her province as fact finder in so doing and in reaching the ultimate question of the correct IR.

Next, we address the carrier's assertion that the BRO exceeded her authority in sending claimant back to the designated doctor for reevaluation so that the designated doctor could rate any impairment related to claimant's lumbar injury. Carrier argues that the BRO decided the extent of claimant's compensable injury and that it was not within her authority to do so. We cannot agree that the BRO decided the issue. Rather, our review indicates that she merely identified the existence of the issue. As indicated, the claimant asserts, as does the ombudsman assisting him, that the parties at the first BRC acknowledged that the lumbar area was a part of the injury. There was no objection to this and there was no reply to the BRC report to indicate otherwise. Under the circumstances, it was appropriate to obtain a rating for the complete injury. Once it became apparent the compensable injury included the lumbar injury and further, that the designated doctor had not included lumbar impairment in calculating his IR, the BRO quite properly sent the claimant back to the designated doctor for an evaluation that included any such impairment.

Finally, we briefly address carrier's argument that Dr. B's second report is entitled to presumptive weight only on the issue of MMI, because in the order sending claimant back to Dr. B for reevaluation the BRO stated that Dr. B was being appointed as designated doctor for "maximum medical improvement only". We have previously stated where a designated doctor is appointed for purposes of MMI or IR only, his opinion is entitled to presumptive weight only on the issue for which he was appointed to provide an opinion. *See* Texas Workers' Compensation Commission Appeal No. 93710, decided September 28, 1993. In this instance, it is undisputed that claimant reached MMI by operation of law on November 15, 1993, almost a year before the order sending claimant to the designated doctor for reevaluation. In addition, Dr. B's narrative summary clearly indicates that the BRO stated, and the designated doctor understood, that the purpose of the reevaluation was to calculate claimant's IR to include any impairment related to the lumbar condition. To suggest that Dr. B's second report is entitled to presumptive weight only on an issue that was undisputed at the time of the order is to blindly elevate form over substance. In this instance, it is apparent that the notation that Dr. B was to address MMI only in the BRO's order was an inadvertent error, which is of no significance herein.

For the foregoing reasons, the decision and order of the hearing officer are affirmed.

Stark O. Sanders, Jr.
Chief Appeals Judge

CONCUR:

Thomas A. Knapp
Appeals Judge

Alan C. Ernst
Appeals Judge