APPEAL NO. 951562
FILED OCTOBER 25, 1995

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 July 31, 1995. Addressing the disputed issues, he (the hearing officer) determined that the appellant's (claimant herein) date of maximum medical improvement (MMI) was August 11, 1994, and that he had a 12% impairment rating (IR) as certified by Dr. H, a designated doctor selected by the Texas Workers' Compensation Commission (Commission). The claimant appeals arguing that these determinations are against the great weight and preponderance of the evidence. The respondent (carrier herein) replies that the decision and order of the hearing officer are supported by sufficient evidence and should be affirmed.

DECISION

We affirm.

It was not disputed that the claimant sustained a compensable injury on _____, while packing items at work. On November 9, 1994, Dr. B completed a Report of Medical Evaluation (TWCC-69) in which he found the claimant had reached MMI on that date and assigned a 13% IR. This rating was explained by Dr. B on the TWCC-69, in full, as follows:

> SPECIFIC DISORDERS IS [sic] 4 PERCENT. CERVICAL SPINE IS 2 PERCENT. THORACIC SPINE IS 5 PERCENT. POST TRAUMATIC STRESS DISORDER AND RANGE OF MOTION DIFFICULTY IS 1 PERCENT FOR THE THORACIC SPINE AND 1 PERCENT OF RANGE OF MOTION OF THE LEFT SHOULDER. THIS EQUALS 2 PERCENT. ELEVEN PERCENT PLUS 2 PERCENT EQUALS 13 PERCENT TO THE WHOLE PERSON.

No supporting work sheets or other medical records of Dr. B were offered into evidence. Dr. B diagnosed neck sprain/strain, thoracic sprain/strain and shoulder and upper arm sprain/strain.

On November 11, 1994, Dr. BA examined the claimant and completed a TWCC-69 at the request of the carrier. He found that the claimant reached MMI on that date and assigned a five percent IR. In an accompanying report, he diagnosed questionable left shoulder impingement syndrome, mild infraspinatus tendinitis and subacute sprain and strain of the cervical spine and left shoulder. X-rays of the cervical, thoracic and lumbar spine were normal. His IR consisted of three percent for loss of range of motion (ROM) of the cervical spine, one percent for loss of ROM of the thoracic spine and one percent for left shoulder ROM impairment.

It was not disputed that Dr. H was a designated doctor selected by the Commission.

On January 10, 1995, he completed a TWCC-69 in which he found the claimant reached MMI on August 11, 1994, and assigned a 12% IR. He diagnosed left shoulder strain with impingement syndrome and post-traumatic thoracic strain. His IR consisted of two percent for loss of thoracic ROM, two percent for a specific disorder of the thoracic spine and eight percent for impairment to the left shoulder. Apparently in response to an inquiry from a benefit review officer, Dr. H by letter of April 11, 1995, advised that he did not conduct ROM measurements of the cervical spine because the claimant had a "normal" neck examination and did not complain of neck pain. He concluded "I did not feel that the neck had been injured in the injury of _____."

No testimony was elicited by either party at the hearing.

The hearing officer found that the claimant sustained a compensable injury on _____, which did not include a neck injury. He also determined that the great weight of the other medical evidence was not contrary to Dr. H's report and that the claimant reached MMI on August 11, 1994, and has a 12% IR. On appeal, the claimant argues that Dr. B's date of MMI and IR are "correct" and that Dr. H "is exceeding his authority in omitting body parts [*i.e.*, the cervical spine] that he feels were not part of the accident."

The 1989 Act provides that the report of a designated doctor selected by the Commission to determine a date of MMI and assign an IR is entitled to presumptive weight and the Commission shall base the determination 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). When assigning an IR, a doctor is to provide a rating only for the impairment from a compensable injury "reasonably assumed to be permanent." Section 401.011(23). And, in doing so, the doctor must determine in his or her medical judgment what the compensable injury includes, though, of course, any dispute about the nature or extent of the compensable injury is resolved by the Commission based on a preponderance of the evidence. *See* Texas Workers' Compensation Commission Appeal No. 931098, decided January 18, 1994.

In this case, Dr. H considered the claimant's neck condition as of the date of his examination to have been normal and for this reason did not conduct ROM "studies." In the report attached to his TWCC-69, he refers to the claimant's lack of complaint of neck pain, his normal carriage of his head and to ROM of the neck in flexion, extension and lateral motion being full and pain-free. A reasonable reconciliation of these two statements is that Dr. H did not do formal cervical ROM measurements with an inclinometer, but relied on the application of his professional judgment to his observations of the claimant in concluding there was no cervical ROM deficit. In any event, in this case Dr. H believed that the claimant did not sustain a compensable cervical injury. Dr. B and Dr. BA found cervical sprain/strain and x-rays of the cervical spine were read as normal. Whether the compensable injury in this case included the cervical spine was a question of fact for the hearing officer to decide. Pursuant to Section 410.165(a), he was the sole judge of the weight and credibility of the evidence on this point and could accept or reject all, part or none of this evidence. Texas Employers Insurance Association v. Campos, 666 S.W.2d

286 (Tex. App.-Houston [14th Dist.] 1984, no writ). We are satisfied that the opinion of Dr. H on the extent of the claimant's injury provided sufficient evidence to support the determination of the hearing officer that the claimant's compensable injury did not include the cervical spine. In reaching this conclusion we believe it important to point out that the document attached to the claimant's appeal and purportedly bearing on the issue of the extent of injury, though signed and dated by the claimant almost two years before the CCH, was not offered into evidence at the hearing. We will therefore not consider it on appeal. *See* Texas Workers' Compensation Appeal No. 93924, decided November 17, 1993. We also note that the claimant, who was present at the hearing, represented by counsel, and who could have provided relevant evidence on the circumstances of his injury and whether that injury included his cervical spine, did not testify.

Whether the other medical evidence, in this case the report of Dr. B, constituted the great weight of the other medical evidence was a question of fact for the hearing officer to decide. Texas Workers' Compensation Commission Appeal No. 93459, decided July 15, 1993. Dr. B gave no rating for loss of cervical ROM and two percent for a specific disorder of the cervical spine. Given the determination of the hearing officer, which we have affirmed, that the claimant's compensable injury did not include his cervical spine, we find no error in the hearing officer's giving presumptive weight to Dr. H's certification of IR. As to the different dates of MMI of Dr. H and Dr. B, it has been noted that, although it may be more common for an examining doctor to certify MMI as of the date of the examination, nothing in the 1989 Act or our decisions prevents a doctor from certifying an earlier or "retrospective" date of MMI based on that examination, other medical reports and the exercise of professional judgment. Texas Workers' Compensation Commission Appeal No. 950336, decided April 14, 1995.

We are satisfied that the hearing officer correctly afforded presumptive weight to the report of Dr. H, the designated doctor, and that his findings and conclusions are not so against the great weight and preponderance of the evidence as to be manifestly unjust. In re King's Estate, 150 Tex. 662, 244 S.W.2d 660 (1951); Pool v. Ford Motor Co., 715 S.W.2d 629, 635 (Tex. 1986).

The decision and order of the hearing officer are affirmed.

Alan C. Ernst
Appeals Judge

CONCUR:

Stark O. Sanders, Jr.
Chief Appeals Judge

Tommy W. Lueders
Appeals Judge