APPEAL NO. 980091

Following a contested case hearing (CCH) held, on December 16, 1997, pursuant to the Texas Workers ' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act), the hearing officer, resolved the disputed issues by finding that the great weight of the medical evidence is not contrary to the report of the designated doctor and by concluding that based on that report, the appellant (claimant) reached maximum medical improvement (MMI) on November 30, 1995, with an impairment rating (IR) of zero percent. Claimant appeals, asserting that she had two additional operations following the designated doctor's examination, that the designated doctor did not reexamine her after her additional surgery, and that the designated doctor did not, in writing, decline to amend his report. The response of the respondent (carrier) details the evidence the carrier contends provides sufficient support for the challenged findings and conclusions.

DECISION

Affirmed.

The parties stipulated that claimant sustained a compensable injury on _____, , and that (Dr. E) certified that claimant reached MMI on November 30, 1995, with an IR of zero percent. Not appealed are findings that Dr. E is the designated doctor appointed by the Texas Workers' Compensation Commission (Commission); that (Dr. N), the treating doctor, certified that claimant reached MMI on July 21, 1995, with an IR of two percent; that claimant underwent three surgeries on, respectively, January 11, 1995, August 1, 1996, and in July 1997; and that additional medical reports were sent to the designated doctor by the Commission on two occasions requesting clarification of MMI and the IR.

In addition to the two dispositive conclusions, claimant has appealed on evidentiary sufficiency grounds findings that Dr. N did not amend or withdraw his original certification (MMI on July 21, 1995, with an IR of two percent); that on December 4, 1997, Dr. N maintained that claimant had an IR of two percent following the first two surgeries; that the designated doctor reviewed the additional medical records and did not amend his initial report and certification regarding MMI and IR; and that the great weight of the evidence is not contrary to the designated doctor's report. Claimant requests on appeal that the Commission select another designated doctor who will examine her, give her a fair evaluation, and respond to Commission inquiries. However, at the hearing she asked the hearing officer to find, based on Dr. N's records, that she reached MMI on the statutory date (Section 401.011(30)(B)) with an IR of four percent.

We note that at the outset of the hearing, claimant indicated that Dr. E was not properly appointed as a designated doctor for reasons which were not entirely clear but which apparently had to do with whether she had actually disputed the first IR, the two percent assigned by Dr. N. Claimant specifically declined to request the addition of an

issue on the matter but nevertheless sought in argument to have the hearing officer consider the matter so as to cast further doubt on the validity of the designated doctor's report. Not surprisingly, the hearing officer's decision and order gives no indication that she did so.

Claimant's only testimony was that she is right-hand dominant.

Dr. N's Report of Medical Evaluation (TWCC-69) dated "7/21/95" certified that claimant reached MMI on that date with an IR of "2%." The Commission sent claimant an EES-19 form letter dated August 29, 1995, stating that Dr. N had determined that she had reached MMI on July 21, 1995, with an IR of "4%." According to claimant, when she called the Commission to advise that Dr. N had assigned an IR of two percent, the Commission treated her communication as a dispute of the IR and appointed Dr. E to be the designated doctor.

Dr. E's TWCC-69 dated "11/30/95" certified that claimant reached MMI on that date with an IR of "0%." In his accompanying narrative report, Dr. E stated that one year earlier, claimant developed right wrist and hand pain; that on January 11, 1995, she underwent surgery for her DeQuervain's syndrome; that she presently complains of thumb and first finger pain and some pulling with grasp of the right hand; that she has no impairment of range of motion (ROM) from the thumb and fingers; that she has had an excellent result from the DeQuervain's tenosynovitis surgery; and that she has reached MMI with an IR of "0%." Attached to Dr. E's narrative report is the November 30, 1995, report of a physical therapist reflecting ROM values for the right hand and wrist and stating that the impairment due to the upper extremity and whole body was found to be "1%."

Dr. N wrote on October 8, 1996, that claimant had two separate surgeries for two different pathologies in the distal right forearm; that she initially had DeQuervain's syndrome and made a good recovery after a release; that she then developed an intersection syndrome in the distal forearm and is making a good recovery after a release; that she knew he had assigned a two percent IR; and that after receiving a communication from the Commission indicating that Dr. N had assigned a four percent IR, she called the Commission to correct the error, not to dispute the rating.

Dr. E wrote on October 25, 1996, that he had carefully reviewed the additional information concerning claimant and the medical information from Dr. N, (Dr. K), and (Dr. M); that in his opinion claimant does not need to be reexamined; and that it remains his opinion that her IR is "0%."

Dr. N wrote on January 13, 1997, that Dr. E had referred claimant to a physical therapist who determined a one percent rating for loss of wrist ROM and that the remainder of claimant's upper extremity did not appear to have been evaluated by the therapist; that claimant has made a good recovery from the DeQuervain's release and the intersection release; that on that date he, Dr. N, finds a residual loss of ROM of the wrist as a

consequence of her previous injuries and surgeries; that her right side (dominant hand) grip strength is significantly weaker; and that these documented impairments would give claimant an IR of "at least 4% to the body as a whole."

A Commission Dispute Resolution Information System (DRIS) note of May 20, 1997, states that a Commission benefit review officer (BRO) will write Dr. E to see if he sees a change in the MMI date. A June 30, 1997, DRIS note states that the BRO received a call from Dr. E's office saying he was not changing the MMI date.

Dr. N wrote the Commission on December 4, 1997, stating the claimant has undergone three separate surgeries to the right upper extremity, a DeQuervain's release, an intersection syndrome release, and, most recently, a right carpal tunnel release in July 1997; that claimant "has recovered quite nicely"; that after the first two surgeries he assigned a two percent IR; and that he has given her a two percent whole body IR based predominately on the fact of some residual restriction of flexion and extension to the wrist and some minor weakness in the thenar musculature.

Sections 408.122(c) and 408.125(e) provide in part that the report of the designated doctor concerning the MMI date and IR shall have presumptive weight and that the Commission shall base its determinations of MMI and IR on such report unless it is contrary to the great weight of the other medical evidence. We are satisfied that the appealed findings are not so against the great weight and preponderance of the evidence as to be clearly wrong or manifestly unjust. Cain v. Bain, 709 S.W.2d 175, 176 (Tex. 1986); In re King's Estate, 150 Tex. 662, 244 S.W.2d 660 (1951). Even after the third operation, Dr. N reported that claimant's IR was two percent and there was no evidence that he rescinded his earlier determination that claimant had reached MMI. Dr. E stated that he had reviewed the additional medical records, did not feel it necessary to reexamine claimant, and saw no basis to change his opinion as to her MMI date and IR. It may well be that he did not regard the minor wrist stiffness and weakness which Dr. N rated at two percent to be permanent and thus qualify as impairment. Section 401.011(23) defines impairment to mean any anatomic or functional abnormality or loss existing after MMI that results from a compensable injury and "is reasonably presumed to be permanent." Dr. N's opinion that claimant has a two percent IR is a professional difference in opinion but can hardly be said to constitute the great weight of the other medical evidence.

Finally, we find no error in Dr. E's having responded to a Commission inquiry by telephone on June 30, 1997.

The decision and order of the hearing officer are affirmed.

Philip F. O'Neill
Appeals Judge

CONCUR:

Alan C. Ernst
Appeals Judge

Tommy W. Lueders
Appeals Judge