

APPEAL NO. 981210
FILED JULY 24, 1998

This appeal arises pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act). A contested case hearing (CCH) was held on March 3, 1998. The record was closed on March 10, 1998. The issues were the date that the claimant, who is the respondent, reached maximum medical improvement (MMI) and his impairment rating (IR).

The hearing officer held that the claimant reached MMI on August 28, 1997, with an 18% IR. This decision was based upon the report of the designated doctor, which was not overcome by the great weight of contrary medical evidence.

The appellant, who is the carrier, appeals and its sole basis for appeal is that a video surveillance tape taken of the claimant around a month prior to the date he was examined by the designated doctor proves a different date of MMI and a lower IR. The carrier contends that the true MMI date and IR should be nearer to those assessed by another doctor. There is no response from claimant.

DECISION

Affirmed.

The claimant was a truck driver who sustained back and neck injuries, including herniated cervical discs, when his vehicle was struck from behind. This occurred on _____, while he was employed by (employer).

There is only one certification of MMI and IR in evidence. It is that of the designated doctor, (Dr. F), who certified that claimant reached MMI on August 28, 1997, with an 18% IR. He recites that claimant had a cervical MRI showing two herniated discs. Another doctor reviewed this report for the carrier, and noted that he had no quarrel with the report except that a five percent specific disorder condition impairment assigned to claimant's cervical area was not indicated on Table 49 of the Guides to the Evaluation of Permanent Impairment, third edition, second printing, dated February 1989, published by the American Medical Association. Dr. F subsequently noted that he made a

clerical error and this figure should have been described as lumbar, rather than cervical, impairment.

Another MMI and IR certification is referred to in the benefit review conference report and in Dr. F's report. Apparently, (Dr. S) assessed MMI on July 3, 1997, with a 12% IR. The actual report, however, was not offered into evidence. (A seven percent certification by Dr. S, cited in the appeal, is neither referred to nor in evidence in the record of the CCH.) A report from a consulting doctor who examined the claimant on April 8, 1997, concluded that claimant had strains and sprains of the neck and back with preexisting lumbar degeneration; this report does not mention review of any cervical MRI.

By now, nearly eight years after the 1989 Act went into effect, the statute and rules and burdens of proof for overcoming the report of a designated doctor should be well known to carriers. The administrative interpretation of these provisions is long-standing. The report of a Texas Workers' Compensation Commission-appointed designated doctor is given presumptive weight. Sections 408.122(c) and 408.125(e). Both of these provisions expressly state that the presumptive weight of that report can only be overcome by a "great weight" of evidence. The videotape in evidence, although made a month before Dr. F's examination, does not appear to have been provided to him nor did carrier request to have it reviewed afterwards. The designated doctor has a unique status under the 1989 Act and no other doctor's report is given such special status. See Texas Workers' Compensation Commission Appeal No. 92412, decided September 28, 1992. Moreover, it is also expressly stated that this must be a great weight of medical evidence, not lay evidence. Texas Workers' Compensation Commission Appeal No. 92164, decided June 5, 1992; Texas Workers' Compensation Commission Appeal No. 941010, decided September 8, 1994. "Medical evidence" is that which is generated by persons who qualify as health care practitioners as defined by Section 401.011(21). See Texas Workers' Compensation Commission Appeal No. 952148, decided January 22, 1996. Observations of private investigators, whether taped or not, do not qualify as "medical evidence." We cannot agree that the hearing officer "did not consider" the videotape and surveillance report. Further, under the facts of this case, because carrier did not take steps to ensure that the designated doctor could review the videotape even though it was in the carrier's possession, we perceive no error. A videotape does not

in and of itself constitute medical evidence. Texas Workers' Compensation Commission Appeal No. 952106, decided January 24, 1996.

The burden of overcoming the report of the designated doctor is upon the party that disagrees with it. Texas Workers' Compensation Commission Appeal No. 960352, decided April 8, 1996. Leaving aside the videotape, there is no "medical evidence" setting forth a contrary opinion on MMI and IR. Considering that Dr. S's report would appear to be an essential part of the medical evidence countering the designated doctor's report, it is astonishing that the actual report itself was not offered into evidence. Therefore, the basis for the IR purportedly found by Dr. S could not be evaluated by the hearing officer as part of any "great weight" analysis and obviously cannot be reviewed by the Appeals Panel. There is nothing in the treatment records of the claimant which constitutes a great weight of evidence against the examination and tests cited by the designated doctor. We therefore affirm the decision and order of the hearing officer.

Susan M. Kelley
Appeals Judge

CONCUR:

Joe Sebesta
Appeals Judge

Judy L. Stephens
Appeals Judge