APPEAL NO. 990656

This appeal arises under the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq*. (1989 Act). On March 4, 1999, a contested case hearing (CCH) was held. With regard to the five issues before her, the hearing officer determined (1) that appellant's (claimant) compensable _____ (all dates are 1997 unless otherwise stated) head injury extends to the neck; (2) that the respondent school district, referred to as the self-insured, specifically contested compensability of a cervical injury; (3) that the self-insured did not timely contest compensability of the cervical injury; and (4) that claimant reached maximum medical improvement (MMI) on March 13, 1998, with a (5) zero percent impairment rating (IR). Only the MMI and IR issues have been appealed and consequently the hearing officer's determinations on the other issues have become final. Section 410.169.

Claimant appeals the assessments of Dr. D, the self-insured's independent medical examination (IME) doctor, and Dr. B, the Texas Workers' Compensation Commission (Commission)-appointed designated doctor, on the basis that they "disregarded" an MRI and range of motion (ROM) studies, and failed to assess either a specific disorder of the spine or ROM from the Guides to the Evaluation of Permanent Impairment, third edition, second printing, dated February 1989, published by the American Medical Association (AMA Guides). Claimant contends that the assessment of Dr. G certifying MMI on October 29, 1998, with a 16% IR should be used. Claimant requests that we reverse the hearing officer's decision and render a decision in her favor. The self-insured responds, urging affirmance.

DECISION

Affirmed on all the appealed issues.

It is undisputed that claimant was employed by the self-insured school district as a bus driver. The parties stipulated that claimant sustained a compensable head injury on _____ when she bent over to pick up a bus seat cushion and in straightening up struck her head on the air conditioner. In unappealed findings, the hearing officer found that the injury extended to include the neck. Claimant testified that she felt immediate pain in her head radiating into her neck. Claimant continued to work.

Claimant saw Dr. S on October 13th, who noted a head contusion and returned claimant to work with restrictions. Claimant next saw Dr. RS who, in a report dated October 22nd, had an impression of "contusion to the head producing symptoms related to the cervical and lumbar spine." Dr. RS prescribed physical therapy and pain medication. At some point, claimant began treating with Dr. G. A cervical MRI performed on January 26, 1998, showed bone spurs at C2-3 and a "2 mm concentric subligamentous herniated disc through the partial torn annulus at C3-4 with mild indenting upon the thecal sac at C3-4." (Another portion of the MRI is illegible.)

In a Report of Medical Evaluation (TWCC-69) and narrative dated January 12, 1998 (before the MRI), Dr. D, self-insured's IME doctor, certified MMI on December 23rd with a zero percent IR. Dr. D referred to a surveillance videotape which he states shows claimant "exhibiting no difficulty" with her cervical spine and noted no positive objective findings. (No surveillance videotape is in evidence.) Dr. D noted symptom magnification. Dr. D's evaluation was disputed and the parties stipulated that Dr. B is the Commission-appointed designated doctor. In a TWCC-69 and narrative dated March 16, 1998, Dr. B certified claimant at MMI on March 13, 1998, with a zero percent IR. Dr. B noted claimant's history, commented that there "is absolutely no indications for further medical treatment," that there were no positive objective findings and concluded "[i]t would also be extremely difficult for me to have a causal relationship between bumping your head and the severity of objective findings." Dr. B invalidated ROM due to "voluntary restrictions" commenting that it does not match his clinical observations. This report was sent to Dr. G, who in an April 7, 1998, letter states the IR "is obviously in error" as claimant "has three herniated discs documented on her MRI of January 26, 1998." Dr. G's April 7, 1998, letter was sent to Dr. B with a request to review the attached response. Dr. B replied by letter dated April 30, 1998, stating:

> I have reviewed [Dr. G's] notes on [claimant]. I have reviewed my records and his notes. I am quite familiar with [Dr. G's] medical treatment and [claimant] still has a 0 percent impairment.

Claimant reported a "recurrence" of her injury on (Alleged date of injury), explaining at the CCH that she was only reporting that her original _____ injury was getting worse. At some point, Dr. G took claimant off work and in a TWCC-69 and narrative dated November 3 and October 29, 1998, respectively, certified MMI on October 29th with a 16% IR which was arrived at by assessing a six percent impairment from Table 49, Section II C of the AMA Guides for a specific disorder of the cervical spine, nine percent impairment for loss of ROM and two percent impairment for loss of motor and sensory disorders. Claimant was in a motor vehicle accident (MVA) in November 1998, where she also sustained a cervical injury.

The hearing officer gave presumptive weight to Dr. B's report, noting that Dr. B had considered the claimed neck injury, determined that it did not warrant an IR under Table 49, that clarification had been sought and that Dr. D's IR was the same as that of Dr. B. Only Dr. G's rating was different and the hearing officer found that Dr. B's report was not contrary to the great weight of the other medical evidence. Claimant appeals, contending that the January 1998 MRI shows a herniated disc and that the AMA Guides require an IR for specific disorders of the spine, ROM and motor and sensory disorders.

The designated doctor, Dr. B, was fully aware of the MRI and Dr. G's opinion regarding the herniated cervical discs but nonetheless affirmed his zero percent IR. It was clearly Dr. B's opinion that claimant needed no further treatment; he found no positive objective findings, the MRI notwithstanding, and concluded that claimant had a zero percent IR. That opinion was concurred in by Dr. D, who apparently did not have the MRI results but did have a surveillance videotape. Section II C of Table 49 of the AMA Guides

assesses a six percent impairment for an unoperated disc "with medically documented injury and a minimum of six months of medically documented pain, recurrent muscle spasm or rigidity . . . including unoperated herniated nucleus pulposus, with or without radiculopathy." We are reluctant to speculate why Dr. B (and Dr. D) did not assess an impairment from Table 49 and substitute our lay opinion for Dr. B's medical judgment. Further, we have noted that otherwise valid ROM measurements can be invalidated by the designated doctor where, based upon his clinical judgment, he determines that the restricted motion is the product of volitional conduct on the part of the claimant, which has been described as voluntary restriction, suboptimal effort and symptom magnification. *See* Texas Workers' Compensation Commission Appeal No. 961097, decided July 17, 1996; Texas Workers' Compensation Commission Appeal No. 960034, decided February 5, 1996; and Texas Workers' Compensation Commission Appeal No. 980027, decided February 23, 1998.

Sections 408.122(c) and 408.125(e) provide that the report of the designated doctor selected by the Commission shall have presumptive weight and that the Commission shall base the MMI date and IR on the designated doctor's report unless the great weight of the other medical evidence is to the contrary. The Appeals Panel has frequently noted the important and unique position occupied by the designated doctor under the 1989 Act. *See, e.g.,* Texas Workers' Compensation Commission Appeal No. 92412, decided September 28, 1992. We have just as frequently stated that a "great weight" determination amounts to more than a mere balancing or preponderance of the medical evidence (Appeal No. 92412) and that a designated doctor's report should not be rejected "absent a substantial basis to do so." Texas Workers' Compensation Commission Appeal No. 93039, decided March 1, 1993. Under the circumstances of this case, where the designated doctor clearly considered Dr. G's opinion, had available the MRI and had responded to the Commission's request for clarification that his opinion had not changed, we find the hearing officer's decision supported by sufficient evidence.

Upon review of the record submitted, we find no reversible error and we will not disturb the hearing officer's determinations unless they are so against the great weight and preponderance of the evidence as to be clearly wrong or unjust. In re King's Estate, 150 Tex. 662, 244 S.W.2d 660 (1951). We do not so find and, consequently, the decision and order of the hearing officer are affirmed.

_____
Thomas A. Knapp
Appeals Judge

CONCUR:

_____
Susan M. Kelley
Appeals Judge

_____
Dorian E. Ramirez
Appeals Judge