APPEAL NO. 991096

This appeal is considered in accordance with the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act). On March 31, 1999, a contested case hearing (CCH) was held. The issues concerned the extent of the injury to the respondent, who is the claimant; whether the appellant (self-insured) disputed compensability of the extended injuries on or before the 60th day after it received written notice of them; and the claimant's date of maximum medical improvement (MMI) and his impairment rating (IR).

The hearing officer determined that the self-insured had timely disputed the extended injuries, and that the claimant's injury did not extend to a closed head injury and mental stress. She found that a thoracic strain was included in the injury. The hearing officer, finding that no medical evidence had been presented by the self-insured to the contrary, accorded presumptive weight to the report of the designated doctor, and found that MMI was reached on December 29, 1998, with a 10% IR, in accordance with that report. The hearing officer rejected the self-insured's contention that these matters were disposed of through res judicata in a prior hearing.

The self-insured has appealed. The self-insured argues that the previous hearing decision, in which the hearing officer made the observation that the claimant sustained only minor muscular injuries, either was res judicata on the issue of scope of injury, impairment, and MMI, or constituted an "inferential finding" on these issues. The self-insured further argues that "obviously, minor muscular strains do not result in permanent impairment." The claimant responds with additional evidence that was not presented at the CCH (and cannot therefore be considered), but also noted that the self-insured did not supply medical evidence to refute the designated doctor's report. The hearing officer's findings on extent of injury to mental stress or closed head injury, or carrier waiver, are not appealed.

DECISION

Affirmed.

The claimant had been employed by the self-insured at the time of his _____, injury. The claimant was injured when involved in an incident of breaking up a fight between students.

The claimant did not attend the CCH, and sent word that he would not appear as he did not request a hearing. Although the attorney for the self-insured argued that claimant's injury had been previously adjudicated as a minor muscle strain, and that such was not permanent and should not have resulted in an IR, absolutely no medical evidence, either from an examination or peer review, was tendered to support these assertions.

The self-insured's only exhibits are the hearing officer's decision and associated Appeals Panel decision from a prior CCH. The prior hearing was held on July 22, 1998, on

the stated issues of whether a compensable injury occurred and disability resulted. The hearing officer found in favor of an injury, but not disability, because he characterized the injury as involving minor muscle strains. In the appeal, Texas Workers' Compensation Commission Appeal No. 981912, decided September 28, 1998 (Unpublished), the decision that an injury occurred was upheld by the Appeals Panel, on appeal from the self-insured. The Appeals Panel did not opine on the nature of the injury itself, except to note that the hearing officer determined that it was not of a serious nature to warrant a finding of disability.

By the time of this CCH, nearly a year had passed since the injury. The only medical evidence offered was the report of the designated doctor, Dr. M. Dr. M's IR report recited the course of claimant's treatment, and noted complaints of neck stiffness and occasional midback pain, spasm, and headaches. She apparently had some, but not all, of the claimant's medical records. In her examination, she assigned four percent IR for six months of documented pain, and six percent for limitations on range of motion in the thoracic and lumbar spine, with no limitation found in the cervical spine. The hearing officer found that the thoracic spine was part of the injury in large part due to this report.

The statute rather plainly sets out what must be present in the record to overcome the presumptive weight of a designated doctor's report on MMI and IR. Sections 408.122(c) and 408.125(e). Whether the other party is present or not, the party who seeks to set aside the report of the designated doctor has the burden of proof. Neither the lay arguments of a claimant or carrier, unsupported by any medical opinions, as to the nature of the injury, the permanency of the impairment, or the proper use of the Guides to the Evaluation of Permanent Impairment, third edition, second printing, dated February 1989, published by the American Medical Association (AMA Guides), constitute "medical evidence" that will provide the hearing officer with a basis for setting aside the report of the designated doctor. *See* Texas Workers' Compensation Commission Appeal No. 960952, decided July 1, 1996 (unsupported arguments of counsel concerning the use of the AMA Guides will not constitute a "great weight" of medical evidence allowing the hearing officer to set aside the designated doctor's report). To argue that it should be "obvious" that any given injury would not result in an IR is simply a variation on lay evidence, and can never be used as a basis for outweighing a designated doctor's opinion. If this proposition is indeed "obvious" to the medical community, then the failure to exercise even minimal diligence to obtain medical evidence in support of this is inexplicable.

While the designated doctor's report is not necessarily accorded presumptive weight on the extent of injury, it will certainly preponderate over a void to the contrary. Nothing in the previous decision compelled a finding against a thoracic injury, which is consistent with the mechanism of injury. Moreover, the hearing officer's opinion in July 1998 that an injury consists of minor muscle strains, for purposes of evaluating the existence of disability <u>then</u>, simply does not constitute an adjudication that, at the time of a future determination of MMI, there will be no permanent result. The hearing officer was asked essentially to decide if a compensable injury had occurred and whether it resulted in the inability to obtain and retain wages. The observations about the nature and scope of the injury at that time did not fix,

for the entire future course of the claim, the extent and seriousness of the compensable injury, let alone IR and MMI.

The self-insured's assertion that the prior hearing decision resulted in an "inferential finding" that there was not permanent impairment is thus without foundation. No citation is supplied for the proposition that a hearing officer may make binding "inferential findings" on issues of MMI or IR, or extent of injury, which may arise based on facts that develop in the future. The only issues adjudicated in a CCH are those reported from a benefit review conference or otherwise added at the CCH. Section 410.151. Even a cursory reading of the prior hearing decision and Appeals Panel decision make it clear that IR and MMI were in no way litigated or brought before the hearing officer as "issues."

The burden of proof to refute the designated doctor's report not having been met in this case, and the evidence otherwise being in support of the hearing officer's decision on the appealed issues, we affirm the decision and order.

_____
Susan M. Kelley
Appeals Judge

CONCUR:

_____
Robert W. Potts
Appeals Judge

_____
Thomas A. Knapp
Appeals Judge