

## APPEAL NO. 991953

This appeal arises pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act). A contested case hearing was held on August 4, 1999. With regard to the issues before him, the hearing officer determined that appellant (claimant) reached maximum medical improvement (MMI) on September 28, 1998 (all dates are 1998 unless otherwise noted), with a zero percent impairment rating (IR) as assessed by the designated doctor whose opinion was not contrary to the great weight of other medical evidence.

Claimant files two appeals, both timely—one by Mr. G and one pro se. The gist of the appeals is that, although respondent (carrier) has accepted liability for an injury, the designated doctor found no rateable injury and failed to assess an impairment from Table 49 of the Guides to the Evaluation of Permanent Impairment, third edition, second printing, dated February 1989, published by the American Medical Association (AMA Guides). Claimant cites another report which assesses a nine percent IR and urges that that report, together with the treating doctor's report and a functional capacity evaluation (FCE), constitute the great weight of other medical evidence contrary to the designated doctor's report. Claimant requests that we reverse the hearing officer's decision and render a decision in her favor. Carrier responds, urging affirmance.

### DECISION

Affirmed.

Claimant was employed as a certified nurse's assistant for a county health agency. Claimant testified, and it is undisputed, that she sustained a compensable back injury on March 22nd, while assisting a patient. Claimant's treating doctor was Dr. F; however, most of the records from Dr. F were excluded upon objection that they were not exchanged.

Claimant was examined by Dr. S, apparently a carrier independent medical examination doctor. In a Report of Medical Evaluation (TWCC-69) and narrative both dated September 28th, Dr. S recited claimant's history, diagnostic studies "which indicated degenerative disc disease at L1-L2 with 2 mm diffuse posterior annular disc bulge" and diagnosed a cervical and lumbar strain. Dr. S certified MMI on September 28th and assessed a nine percent IR based on specific disorders from Table 49, Section II-B for both the cervical and lumbar spine. No impairment was assessed for range of motion (ROM) or motor sensory deficit. Dr. S noted that "there appeared to be considerable overlay in [claimant's] behavior."

Subsequently, Dr. C, was appointed as the designated doctor. In a TWCC-69 and narrative (together with testing results) dated December 1st, Dr. C recited claimant's history, treatment by Dr. F (and another doctor), and Dr. S's report and IR. Dr. C had a clinical impression of cervical and lumbar somatic dysfunction and right shoulder pain. Dr. C certified MMI on September 28th and assessed a zero percent IR. Dr. C commented

that all “neurological testing was invalid due to significant symptom magnification,” and that “no ROM impairment was assessed due to this patient significant symptom magnification.” Dr. C further commented:

This patient was very difficult to examine during the time in the room, including times of crying, resistance to the required testing, and general noncompliance with requested efforts. The muscle testing that was performed was met with complaints of extreme pain, even to the point of vocalized agony. This was inappropriate for the condition that I see in this case. The patient was resistant to the entire examination and asked on several occasions how much longer it was going to be, as she felt she could not take very much of the examination. As a result of her unwillingness or inability to perform the tests with valid effort, I did not perform the usual muscle testing on the lower extremities, nor did I do grip/pinch testing or lift testing as I would do in most cases. Suffice it to say that this was as weak of an effort by a patient as I have ever seen, and I have performed about 1000-1500 of these exams.

Claimant tested positive on six of eight Waddell's signs.

An FCE was performed on January 26, 1999, and recited claimant's history, noted “Wadell's testing; was not performed” and concluded that claimant “still has too much pain and is too limited in what she can do to return to the job she left.” By correspondence dated May 27, 1999, a Texas Workers' Compensation Commission (Commission) benefit review officer wrote Dr. C inquiring why Dr. C had not assessed an impairment from Table 49 “based on the MRI,” whether in his opinion claimant “sustained an injury” and the impact of the positive Waddell's signs. Dr. C replied on May 28, 1999:

The MRI shows a minor disc bulging which has no clinical significance to this patient. There is no indication that this lady was having pain for the amount of time she was injured, if at all. Table 49 does not apply because there was no verification of the pain and she was not a believable patient in her presentation due to severe symptom magnification and/or malingering.

I see nothing in the files or my examination to indicate that an injury actually happened and I do not believe that patient, if she were injured, was injured to the level she claims. This was verified by testing of the patient.

Presence of 6 of the 8 Waddell's signs indicates to me that this patient has severe inorganic pain. If I am unable to verify the pain in a patient, I do not rate a patient for **anything** that requires a patient effort. This would include [ROM], muscle testing, sensory testing or any other area that could have interference from the subject. I will note that this patient also had a present

Trochanteric Test, as well, indicating probable malingering.

In a note dated July 2, 1999, Dr. F states that claimant's pain does not "permit her to do simple activities" and that claimant has severe neck pain, lumbar neuritis, and restricted ROM.

The hearing officer in his Statement of the Evidence reviewed the reports and commented that a designated doctor is not required to include a rating from Table 49 of the AMA Guides "when he finds symptom magnification," *citing* Texas Workers' Compensation Commission Appeal No. 960393, decided April 15, 1996. Claimant appeals, contending (correctly) that the designated doctor's opinion does not carry presumptive weight on the issue of an injury. Claimant asserts that Dr. S's assessment on the IR and date of MMI constitutes the great weight of other medical evidence contrary to the designated doctor's report. (We note that Dr. C adopted Dr. S's September 28th MMI date.)

We have frequently noted that 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 also 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 indicated that he found no rateable impairment because of claimant's extreme symptom magnification, which was accepted by the hearing officer, we hold that the hearing officer's decision is supported by the 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.

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Thomas A. Knapp  
Appeals Judge

CONCUR:

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Robert W. Potts  
Appeals Judge

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Tommy W. Lueders  
Appeals Judge