

APPEAL NO. 992025

This appeal arises under the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act). On August 18, 1999, a contested case hearing was held. With respect to the issues before him, the hearing officer determined that the appellant (carrier) had not timely contested compensability of a claimed neck injury, that respondent's (claimant) neck injury was a result of a compensable (lifting) injury of _____ (all dates are 1997 unless otherwise stated), and that claimant has a 25% impairment rating (IR) as assessed by the designated doctor, whose report was not contrary to the great weight of other medical evidence.

Carrier appeals and stakes its case on the contention that the compensable thoracic back injury did not include or extend to the neck; that without a compensable neck injury "there is no duty for the Carrier to dispute a neck injury, and thereby, no waiver of a compensable injury"; and that claimant's IR is either four percent or seven percent when the cervical injury is not included. Carrier requests that we reverse the hearing officer's decision and render a decision in its favor. Claimant responds, urging affirmance.

DECISION

Affirmed.

There was no live testimony and the case was submitted on the documentary evidence. Medical reports indicated that claimant sustained a compensable injury while carrying a carpet cleaning machine down some stairs on _____. The machine is variously described as weighing 60 to 70 pounds. The injury is variously described as a "back" injury, a "thoracic spine" injury, "pain in the thoracic region and into the right shoulder," "back, neck and shoulder pain" (in a September 11th report from Dr. A) and a "back, shoulder and lower extremities" injury in an early report of the designated doctor. Carrier has accepted liability for a thoracic back injury and there is a stipulation that claimant sustained a compensable thoracic spine injury. At issue is whether that injury includes or extends to a cervical or neck injury.

Claimant began treating with, D. C. Dr. T, who, in a report of a May 5th visit, noted that claimant "felt his back give," took thoracic x-rays and performed chiropractic manipulation. Dr. T prescribed physical therapy without making more specific reference to the back. Referring to an anatomical chart, claimant's position is that the upper back is the cervical spine, which is commonly called the neck. Claimant, in an Employee's Notice of Injury or Occupational Disease and Claim for Compensation (TWCC-41) dated July 29th, refers to the part of the body affected as "Thoracic Region of Back." Dr. T, in a Specific and Subsequent Medical Report (TWCC-64) dated August 8th, referred claimant to Dr. A (who the hearing officer refers to as a neurosurgeon, but whose letterhead and signature block indicates he is a neurologist). In the September 3rd report, Dr. A comments on complaints in the "thoracic region and into the right shoulder." Dr. A's diagnosis was:

- 1) Probable muscle tear of the paraspinals or rhomboids on the left side, in addition to work-related disc extrusion at the T7-T8 level (MRI 05-27-97).
- 2) Right sided brachial plexopathy with cervical strain and weakness involving the shoulder girdle muscles on the right, though predominantly the triceps (EM/NCV 09-03-97).

Claimant argues that brachial plexus refers to the lower cervical spine. The hearing officer, in the Statement of Evidence, commented:

[Dr. A] found swelling and tenderness in the claimant's thoracic spine are [sic, area] and a right shoulder problem, which he wrote was brachial plexopathy "with cervical strain" and weakness in the shoulder girdle muscle. Brachial plexopathy is a disorder in the nerve network in the area of the neck and shoulder. The EMG results showed abnormal studies in the median and ulnar nerves, which originate in the nerve cords of the cervical and brachial plexus from the C6-T1 intervertebral levels of the spine.

As noted above, in a report dated September 11th, Dr. A commented that claimant has "back, neck and shoulder pain, right greater than left." Dr. A's studies make no mention of a specific cervical injury. In a report dated October 21st, Dr. A commented, "there does not appear to be a reason to obtain a cervical MRI, as his changes are most consistent with those of brachial plexus injury." In a separate form report, also dated October 21st, Dr. A lists the diagnoses as "brachial plexus injury, thoracic disc HNP [herniated nucleus pulposus], cervical musculoligamentous injury." The hearing officer comments that these reports from Dr. A were sent to the carrier and finds that carrier had received "adequate" written notice of a neck injury on September 8th.

Claimant was seen by Dr. C, carrier's required medical examination doctor and, in a report dated January 17, 1998, Dr. C diagnosed "thoracic spondylosis," certified maximum medical improvement (MMI) on September 1st (the parties stipulated that claimant reached MMI on January 13, 1999), and assessed a five percent IR, based on two percent impairment from Table 49, Section IIB of the Guides to the Evaluation of Permanent Impairment, third edition, second printing, dated February 1989, published by the American Medical Association (AMA Guides), and three percent range of motion (ROM). No neurologic impairment was assigned. Dr. A, in a report dated March 17, 1998, disagreed with that report and repeated his diagnosis of brachial plexopathy with cervical strain. , D. C. Dr. D, was appointed as the designated doctor and, in a report dated April 17, 1998, stated claimant was not at MMI and an IR would not be assigned. Claimant's records were sent to Dr. S for a record review and, by report of October 21, 1998, Dr. S critiqued the various reports, agreeing with some and not with others.

Subsequently, in a report ("Reevaluation") dated January 13, 1999, Dr. A said claimant was at MMI and assessed a 25% IR, based on four percent impairment of the

cervical spine and two percent impairment of the thoracic spine, from Table 49, Section IIB of the AMA Guides; 10% impairment of the cervical spine; five percent impairment for ROM; and 10% impairment for "neurological loss." The regional impairment was 19% for the cervical region and seven percent for the thoracic, which combined for a 25% whole person IR. Claimant returned to Dr. C, who, in a report dated February 3, 1999, assessed a four percent IR based on two percent impairment for the thoracic spine from Table 49, Section IIB and two percent loss of thoracic ROM. Carrier disputed compensability of a cervical injury in Payment of Compensation or Notice of Refused/Disputed Claim (TWCC-21) forms dated January 22 and March 9, 1999.

Claimant returned to Dr. D and, in a Report of Medical Evaluation (TWCC-69) and narrative, both dated February 22, 1999, Dr. D certified MMI and assessed a 25% IR based on four percent and two percent impairments from Table 49, Section IIB, for the cervical and thoracic regions, respectively; 10% impairment for cervical ROM; five percent impairment for thoracic ROM; and a six percent impairment for upper extremity strength deficit. (This is essentially what Dr. A assessed in his January 13, 1999, report.) Dr. D's report was sent for a "peer review" to Dr. S, who, in a report dated April 15, 1999, critiqued Dr. D's report, citing various Appeals Panel decisions, and commented that Dr. D's and Dr. A's reports had "identical ratings and the exact same measurements." Dr. S questions the validity of Dr. D's IR. (We note that the specific ROM test measurements are not exactly the same, although the impairment percentages are.)

Carrier, in its appeal, basically summarized the medical reports, as we have done, and asserted that since claimant did not sustain a neck injury, there is no duty for the carrier to dispute such a neck injury and, thereby, no waiver, citing Texas Workers' Compensation Commission Appeal No. 981640, decided September 2, 1998. We find the evidence more problematical. While perhaps Dr. T, a chiropractor, did not reference a cervical injury, he, in August, referred claimant to Dr. A, a neurologist, or neurosurgeon, who fairly early on diagnoses a cervical sprain and continues to reference "brachial plexopathy with cervical strain" and a "cervical musculoligamentous injury." Apparently, that was sufficient for the hearing officer to find that claimant had indeed sustained a cervical injury on _____ and that those reports gave adequate notice to carrier that claimant was alleging an "upper back" or cervical injury. While, certainly, another fact finder could have drawn different inferences from the evidence, which would have supported a different result, that is not a basis for us to reverse the hearing officer's decision on appeal. Salazar, et al. v. Hill, 551 S.W.2d 518 (Tex. Civ. App.-Corpus Christi 1977, writ ref'd n.r.e.). We have frequently noted that the 1989 Act provides that the hearing officer is the sole judge of the weight and credibility of the evidence. Section 410.165(a). Where there are conflicts in the evidence, the hearing officer resolves the conflicts and determines what facts the evidence has established. This is equally true of medical evidence. Texas Employers Insurance Association v. Campos, 666 S.W.2d 286 (Tex. App.-Houston [14th Dist.] 1984, no writ). As an appeals body, we will not substitute our judgment for that of the hearing officer when the determination is not so against the overwhelming weight of the evidence as to be clearly wrong and unjust. Cain v. Bain, 709

S.W.2d 175, 176 (Tex. 1986); Texas Workers' Compensation Commission Appeal No. 950456, decided May 9, 1995.

In that we are affirming the hearing officer's determinations that claimant sustained a cervical injury in his compensable _____ incident, and the IR contrary to the designated doctor's report principally differs over a rating of the cervical injury, we also affirm the hearing officer's finding of a 25% IR. Further, Section 408.125(e) gives presumptive weight to the designated doctor's opinion, even if it is basically similar in rating to another doctor's report, but with different testing measurements (*compare with* Texas Workers' Compensation Commission Appeal No. 991969, decided October 25, 1999). The opinion of the designated doctor can only be overcome by the great weight of other medical evidence contrary to the designated doctor's report. In this case, we affirm the hearing officer's decision holding that the reports of Dr. C, and the record peer review observations of Dr. S, do not constitute the great weight of other medical evidence contrary to the report of the designated doctor.

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:

Stark O. Sanders, Jr.
Chief Appeals Judge

Judy L. Stephens
Appeals Judge