

APPEAL NO. 000108

This appeal arises pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act). In Texas Workers' Compensation Commission Appeal No. 990925, decided June 11, 1999, we affirmed the determination of the hearing officer that the appellant (claimant) reached maximum medical improvement (MMI) on April 8, 1996, as certified by the designated doctor, but reversed and remanded the hearing officer's determination that the claimant's impairment rating (IR) was eight percent (for the cervical spine only) for further clarification of the lumbar spine rating from the designated doctor. In her decision and order on remand, the hearing officer, again found that the claimant's IR was eight percent. The claimant appeals this determination, contending that she was also entitled to an IR for her lumbar injury. The respondent (carrier) replies that the decision is correct, supported by sufficient evidence, and should be affirmed.¹

DECISION

Affirmed.

The claimant sustained a compensable cervical and lumbar spine injury on _____. Dr. S, the designated doctor, assigned a zero percent rating for the lumbar spine. The purpose of the remand was to obtain from Dr. S an explanation of why he did not assign a two percent IR for loss of lumbar range of motion (ROM) even though his first measurements were valid for this loss, but instead assigned a zero percent for loss of lumbar ROM based on a second set of measurements. In response to an inquiry from the hearing officer, Dr. S wrote on October 6, 1999, that he tested the claimant again "to determine if the [ROM] deficits were reproducible." The second tests, also valid, showed normal ROM. He considered this second set of tests to more accurately reflect the claimant's true ROM. We believe this was a proper exercise of clinical judgment based on Dr. S's lack of confidence in the accuracy or reliability of the first test and need not have been construed as an attempt to defeat ROM by retesting until a later test invalidated prior ROM testing. See Texas Workers' Compensation Commission Appeal No. 980027, decided February 23, 1998, and Texas Workers' Compensation Commission Appeal No. 951142, decided August 28, 1995.

The other purpose of the remand was to have Dr. S clarify why he gave a four percent IR for a soft tissue specific disorder of the cervical spine, but not the lumbar spine in the face of an MRI showing at least bulging and a degenerative condition. In response to this concern, Dr. S wrote that he relied on a bone scan to indicate no lumbar abnormality;

¹Because the carrier did not pursue waiver in the proceedings on remand, we need not address the matter further. The hearing officer also described as "puzzling" our comments in Appeal No. 990925 that the claimant was not liable for attorney's fees for carrier even though the original decision and order did not order the claimant to pay these fees. We recognized this and included these two sentences as a matter of courtesy to the claimant who expressed concern about the matter.

an MRI to show no herniation; and other medical evidence to reflect "mild degenerative changes in the lumbar spine." He considered these changes normal and not part of the compensable injury. Therefore, in his opinion, he "did not feel that it was appropriate to award the claimant with 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)] as there was no objective data on diagnostic testing or my physical examination to base awarding impairment on."

The hearing officer accepted this explanation and found that the great weight of the other medical evidence was not contrary to Dr. S's eight percent IR. The claimant appeals this determination contending that Dr. S "dismissed my lumbar injury and attributed it to being age related, when in fact, it has been proven to be an actual injury, and not 'degenerative changes.' "

As noted previously, the claimant sustained a compensable lumbar injury. However, an IR is not given for an injury, but for "permanent impairment . . . resulting from a compensable injury." Section 401.011(24). Table 49 of the AMA Guides permits an IR of five percent for a documented disc or soft tissue lumbar injury "associated with none-to-minimal degenerative changes on structural tests." An IR must be based on objective medical tests. Section 401.011(33). In Texas Workers' Compensation Commission Appeal No. 94570, decided June 15, 1994, the designated doctor assigned a zero IR for a cervical injury where an MRI showed bulging, which the designated doctor described as normal, and the examination was otherwise normal. The claimant, in that case, appealed, arguing that objective evidence of bulging mandated some IR other than zero percent. We affirmed the decision and order of the hearing as not contrary to a proper application of the AMA Guides and wrote:

In our opinion, an abnormality (bulging in this case) is not necessarily in itself evidence of a compensable injury but can be simply a deviation from a norm, or ideal condition, that may or may not constitute damage or harm to the physical structure of the body produced by a compensable injury. To be the basis of an [IR] under Table 49, the bulging must rise to the level of a pathology or lesion caused by the compensable injury. See Texas Workers' Compensation Commission Appeal No. 94392, decided May 13, 1994. Compare Texas Workers' Compensation Commission Appeal No. 94471, decided June 7, 1994, which held that herniation was a lesion for which an IR must be assigned, or if not, explained by the designated doctor.

We later cited this case in Texas Workers' Compensation Commission Appeal No. 972089, decided November 24, 1997, and again in Texas Workers' Compensation Commission Appeal No. 951452, decided October 9, 1995, where we also observed that an IR for loss of ROM may be given without also assigning an IR for a specific disorder of the spine. See *also* Texas Workers' Compensation Commission Appeal No. 991702, decided September 24, 1999, where we reversed and remanded a determination of a hearing officer which did not give presumptive weight to the report of a designated doctor who declined to award

impairment for a disc or soft tissue injury because the designated doctor did not consider such rating warranted under Table 49. In this case, we quoted from our decision in Texas Workers' Compensation Commission Appeal No. 951921, decided December 11, 1995, that the "decision to include or not to include a rating for a specific disorder represents a medical difference of opinion as to whether claimant's compensable injury resulted in permanent impairment in claimant's cervical discs or soft tissue." The contrary opinions of other doctors who assigned a specific disorder IR were deemed to amount to no more than a professional disagreement that did not rise to the level of the great weight of the other medical evidence contrary to the designated doctor's report.

Consistent with these cases, we cannot conclude that evidence of claimant's disc bulging and degenerative condition mandates a rating under the AMA Guides. Dr. S did not conclude that these abnormalities reflected impairment from the compensable injury. Other doctors did. Whether these other opinions constituted the great weight of the other medical evidence contrary to the report of the designated doctor was a question of fact for the hearing officer to decide. The hearing officer concluded they did not. This determination in turn is subject to reversal on appeal only if it is so against the great weight and preponderance of the evidence as to be clearly wrong and unjust. Cain v. Bain, 709 S.W.2d 175, 176 (Tex. 1986); Pool v. Ford Motor Company, 715 S.W.2d 629, 635 (Tex. 1986). Applying this standard of review, we find the evidence sufficient to support the decision of the hearing officer on the disputed issues of IR and MMI.

For the foregoing reasons, we affirm the decision and order of the hearing officer.

Alan C. Ernst
Appeals Judge

CONCUR:

Thomas A. Knapp
Appeals Judge

Tommy W. Lueders
Appeals Judge