APPEAL NO. 001114

This appeal arises pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act). A contested case hearing (CCH) was held on April 18, 2000. The appellant (claimant) and the respondent (carrier) stipulated that the claimant sustained a compensable injury on _____; that Dr. M, the Texas Workers' Compensation Commission (Commission)-selected designated doctor, certified that the claimant reached maximum medical improvement (MMI) on November 10, 1995, with a 10% impairment rating (IR); and that Dr. S certified that the claimant's IR is 37%. The hearing officer determined that the claimant did not dispute the certification of MMI and IR of Dr. M in a reasonable time; that the certification of MMI and IR by Dr. M is supported by the great weight of medical evidence; and that the claimant reached MMI on November 10, 1995, with a 10% IR as certified by Dr. M. The claimant appealed and attached some documents. We interpret the request for review to be one of the sufficiency of the evidence to support the decision of the hearing officer. The carrier responded, stated that the documents attached to the appeal that are not in the record should not be considered, urged that the evidence is sufficient to support the decision of the hearing officer, and requested that it be affirmed.

DECISION

We affirm.

The evidence, including the medical evidence, is summarized in the decision of the hearing officer. In rendering this decision, we will consider the evidence in the record and will not consider information submitted with the appeal that is not in the record of the CCH.

The claimant was injured when he fell about 30 feet from a utility pole. He was taken to an emergency room and has been treated or seen by several doctors. In a Report of Medical Evaluation (TWCC-69) dated June 20, 1995, Dr. L, a neurosurgeon, certified that the claimant reached MMI on June 19, 1995, with a nine percent IR. In a narrative attached to the TWCC-69, Dr. L stated that an MRI of the lumbar spine showed disc bulges, but no evidence of significant focal disc herniation or nerve compression at L4-5 and L5-S1; that an MRI of the cervical spine showed no evidence of significant disc herniation or nerve compression; and that he assigned four percent for a specific disorder of the cervical spine and five percent for a specific disorder of the lumbar spine. In a letter dated July 19, 1995, Dr. P, who is board certified in neurology and psychiatry and treated the claimant, said that he agreed with the nine percent impairment assigned by Dr. L for the neck and back, but that he would add two or three percent for chronic headaches. Dr. P continued to conduct neurological follow-up examinations of the claimant and the last record of such examinations is in a letter dated August 28, 1997. In a TWCC-69 dated November 13, 1995, Dr. M certified that the claimant reached MMI on November 10, 1995, with a 10% IR. In a narrative attached to the TWCC-69, Dr. M stated that he assigned four percent for a specific disorder of the cervical spine; that he assigned six percent for loss of cervical range of motion (ROM); that he invalidated ROM for the lumbar spine and did

not assign impairment for loss of lumbar ROM; and that he did not assign impairment for a specific disorder of the lumbar spine. In a letter to the attorney who represented the claimant at the CCH dated October 31, 1998, Dr. S said that he disagreed with the IR assigned by Dr. M. In a TWCC-69 dated October 11, 1999, Dr. S certified that the claimant's IR is 37%. In a narrative attached to the TWCC-69, Dr. S said that the claimant had a 14% impairment of the cervical spine consisting of 4% for a specific disorder and 10% for loss of ROM; 3% for a specific disorder of the thoracic spine; and 25% for the lumbar spine consisting of 7% for a specific disorder, 12% for loss of ROM, and 8% for neurological deficit. Dr. S recommended lumbar surgery. In report dated January 22, 2000, Dr. E said that he agreed with Dr. S and thought that the claimant would require a decompression and fusion with instrumentation at L4-5.

We first address the determination that the claimant waived the right to contest the report of the designated doctor. The carrier cited Appeals Panel decisions concerning a designated doctor amending a report for a valid reason within a reasonable time. Those decisions are not directly on point since the case before us does not involve a designated doctor's amending a report, but rather whether the great weight of the other medical evidence is contrary to the report of the designated doctor. In Texas Workers' Compensation Commission Appeal No. 951494, decided October 20, 1995, the Appeals Panel stated that the 1989 Act, in many areas, applies waiver concepts to avoid prolonged disputes and that newly discovered evidence would be a consideration in a waiver case. In Texas Workers' Compensation Commission Appeal No. 990925, decided June 11, 1999, the Appeals Panel reversed and remanded for a hearing officer to determine whether the claimant through undue delay waived the right to contest the first report of a designated doctor. In her Decision and Order, the hearing officer stated that, in the case before her, waiting three years to dispute the report of the designated doctor was too long. She did not commit error in determining that the dispute of the designated doctor's certification was not raised within a reasonable time. That alone is sufficient to support the conclusion that the date of MMI and the IR in the report of the designated doctor should be adopted.

The 1989 Act sets forth a mechanism to help resolve conflicts concerning MMI and IR by according presumptive weight to the report of a doctor referred to as the designated doctor. Texas Workers' Compensation Commission Appeal No. 92495, decided October 28, 1992. If the Commission selects the designated doctor, as was done in this case, the Commission shall base its determination of whether the claimant has reached MMI and the claimant's IR on the report of the designated doctor unless the great weight of the other medical evidence is to the contrary. Sections 408.122(c) and 408.125(e). The Appeals Panel has held that it is not just equally balancing the evidence or a preponderance of the evidence that can overcome the presumptive weight given to the report of the designated doctor. Texas Workers' Compensation Commission Appeal No. 92412, decided September 28, 1992. No other doctor's report is accorded the special presumptive status given to the report of the designated doctor. Texas Workers' Compensation Commission Appeal No. 92366, decided September 10, 1992. The hearing officer resolves conflicts in expert evidence and assesses the weight to be given to expert evidence. Texas

Employers Insurance Association v. Campos, 666 S.W.2d 286 (Tex. App.-Houston [14th Dist.] 1984, no writ). The hearing officer did not specifically determine that the report of the designated doctor is entitled to presumptive weight and that the great weight of the other medical evidence is not contrary to the report of the designated doctor. Instead, she found that the certification of the designated doctor is supported by the great weight of medical evidence. In doing so, she was placing less of a burden on the claimant and more of a burden on the carrier than is required by the law. We infer findings of fact that the report of Dr. M is entitled to presumptive weight and that the great weight of the other medical evidence is not contrary to that report. Those inferred determinations are not so against the great weight and preponderance of the evidence as to be clearly wrong and unjust. In re King's Estate, 150 Tex. 662, 244 S.W.2d 660 (1951).

We affirm the decision and order of the hearing officer.

Tommy W. Lueders
Appeals Judge

CONCUR:

Elaine M. Chaney
Appeals Judge

Susan M. Kelley
Appeals Judge