APPEAL NO. 001115

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 April 26, 2000. With regard to the issues before him, the hearing officer determined that the appellant (claimant) reached maximum medical improvement (MMI) on January 7, 1999 (all dates are 1999 unless otherwise noted) with a two percent impairment rating (IR), as assessed by the designated doctor whose report was not contrary to the great weight of the other medical evidence. The claimant appealed, attacking the qualifications of the designated doctor and asserting that the ratings of two other doctors constitute the great weight of other medical evidence. The claimant requests that we reverse the hearing officer's decision and render a decision that the claimant did not reach MMI until April 2, 2000. The respondent (carrier) responded, urging affirmance.

DECISION

Affirmed.

The claimant had been employed as a furniture repairman for the employer furniture store and sustained a compensable injury on _____, when he hit his left elbow while delivering furniture. It is undisputed that the claimant sustained a compensable injury on that date. The claimant was initially diagnosed with "olecranon bursitis" and a bursectomy was performed in June 1998. According to the medical records, sometime thereafter the claimant "felt a pop in his elbow" and an "MRI demonstrated a triceps avulsion" which was repaired in August 1998.

The claimant was subsequently examined by Dr. H, who at that point was the carrier's independent medical examination doctor. In a report dated January 7th, Dr. H diagnosed ulnar neuropathy, post triceps tendon rupture and repair, and olecranon bursitis, status post bursectomy. Dr. H noted that complications sometimes occur and that the claimant "continues to smoke cigarettes and drink alcohol" which should be discontinued. Dr. H certified MMI on January 7th with an eight percent IR based on six percent impairment for "radial motor weakness," five percent impairment for left upper extremity loss of range of motion (ROM), and two percent impairment for ulnar sensory loss which is combined for 13% impairment for the left upper extremity or eight percent whole body IR. At some point, the claimant became dissatisfied with his then treating doctor and selected Dr. H as his new treating doctor. The request was approved on April 20th.

The claimant disputed Dr. H's MMI certification and Dr. C was appointed as the Texas Workers' Compensation Commission (Commission)-selected designated doctor. Dr. C, in a Report of Medical Evaluation (TWCC-69) and narrative both dated April 12th, certified MMI on January 7th (the same date as Dr. H) and assessed a two percent IR based on loss of ROM. Dr. C gave a zero percent diagnosis impairment and a zero percent neurologic impairment. Dr. C's diagnosis was essentially similar to that of Dr. H

in Dr. H's January 7th report. No surgery or significant treatment beyond pain relief was being contemplated at that time.

In a progress note dated April 15th, Dr. H noted that the claimant "had marked increase in his pain and paresthesias" and recommended that the claimant be seen by "an upper extremity surgical specialist." In a report dated April 22nd, Dr. H references Dr. C's report and two percent IR, comments that the claimant "has taken a turn for the worse," and "amends" or rescinds his prior January 7th certification of MMI. The claimant was referred to Dr. P, who performed a submuscular transposition of the ulnar nerve of the left elbow on May 25th. That procedure was apparently unsuccessful and a note by the carrier's then medical case manager suggests that the claimant "has had every complication and unintended results with each procedure performed" and that Dr. H has recommended that the claimant "stay away from doctors."

In a letter dated May 19th, a Commission disability determination officer wrote Dr. C, forwarding Dr. H's report of April 22nd, and asked if that changed Dr. C's opinion. Dr. C replied by letter dated May 28th that his opinion remained the same and that a "finding of MMI does not preclude further treatment even surgical" and that if the claimant's status "changes significantly, it would be reasonable to re-evaluate 2-3 months post-operatively." In evidence is a report by Dr. W, a referral doctor who in a report dated September 17th recommended a "pain psychological evaluation" and commented that the claimant was not at MMI. The Commission again contacted Dr. C, submitting additional information and asking if that changed Dr. C's mind. Dr. C replied by a note dated December 19th, stating "Despite ongoing treatment and additional surgery, the claimant's condition & symptoms have persisted or worsened. In my opinion the prior determination of MMI was appropriate." Additional progress notes of Dr. H indicate continued pain. The claimant was released and returned to work in September.

The hearing officer, in his Statement of the Evidence, commented:

> The Claimant has continued to have problems, but he has had no significant improvement. The surgery he has had was not contemplated at the time he was examined by [Dr. H] or [Dr. C]. The Claimant has not shown that the great weight of the medical evidence is contrary to the findings of the designated doctor. Neither has the Claimant shown that there is any other reason to disturb the findings of the designated doctor.

The claimant appeals, contending that Dr. C's examination "took no longer than five minutes" and that Dr. C is not qualified to be a designated doctor because "he does not have an active practice of seeing patients." Regardless of the claimant's perception, Dr. C is on the Commission's list of designated doctors and the extent of Dr. C's practice was not in evidence. Neither of those points constitute the great weight of medical evidence contrary to Dr. C's opinion. The only medical evidence contrary to Dr. C's opinion are Dr. H's report of April 22nd rescinding his prior certification of MMI, subsequent reports by Dr. H stating the claimant is not at MMI, and Dr. W's report of September 17th stating that

the claimant was not at MMI. The claimant cites Texas Workers' Compensation Commission Appeal No. 981622, decided August 26, 1998, for the proposition that "surgery after the designated doctor's report but prior to statutory MMI should be considered." We disagree that Appeal No. 981622 said any such thing and further point out that that case dealt with a designated doctor's amendment of MMI and IR prior to statutory MMI. In this case, it is not the designated doctor that seeks to amend his report.

With regard to an injured employee's MMI date and IR, 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 frequently 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. In Texas Workers' Compensation Commission Appeal No. 94421, decided May 25, 1994, we noted that subsequent surgery for the compensable injury does not automatically invalidate a prior finding of MMI. Moreover, in Texas Workers' Compensation Commission Appeal No. 93489, decided July 29, 1993, we stated that MMI does not mean that there will not be a need for some further or future medical treatment and that the need for additional or future medical treatment does not mean that MMI was not reached at the time it was certified. In this case, the designated doctor was given an opportunity to reconsider his evaluation both after Dr. H had rescinded his certification of MMI and, apparently, after Dr. W had indicated that the claimant was not at MMI in September, which is when the claimant returned to work. The hearing officer is the sole judge of the weight and credibility to be given the evidence (Section 410.165(a)) and in this case the hearing officer's decision is supported by sufficient 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.

Thomas A. Knapp
Appeals Judge

CONCUR:

Robert W. Potts
Appeals Judge

Robert E. Lang
Appeals Panel
Section Manager