

## APPEAL NO. 002149

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 August 15, 2000. With regard to the issues before her, the hearing officer determined that the appellant (claimant) reached maximum medical improvement (MMI) on July 20, 1999, with a 9% impairment rating (IR) as assessed by the designated doctor whose report was not contrary to the great weight of other medical evidence.

The claimant appeals, attacking the qualifications of the designated doctor and arguing that the designated doctor's opinion was contrary to that of a number of other doctors. The claimant requests that we reverse the hearing officer's decision and render a new decision that the claimant is not at MMI. The respondent (carrier) responds, urging affirmance.

### DECISION

Affirmed.

The parties stipulated that the claimant sustained a compensable injury on \_\_\_\_\_. A prior CCH which resulted in Texas Workers' Compensation Commission Appeal No. 000781, decided May 18, 2000, dealt with the extent of the claimant's injury and the mechanics of how his injury occurred. At issue in this case is whether the claimant is at MMI and what is the impairment rating of his low back injury. The claimant's treating doctor at the time the designated doctor was appointed was Dr. L. The parties stipulated that the Texas Workers' Compensation Commission (Commission)-appointed designated doctor was Dr. S.

The claimant was examined by Dr. WS, the carrier's required medical examination doctor, who, in a Report of Medical Evaluation (TWCC-69) and narrative both dated June 18, 1999, certified the claimant at MMI on April 12, 1999, with a 0% IR. Dr. WS diagnosed left shoulder tendinitis and a lumbar strain; declined to give a rating 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; and found normal lumbar range of motion (ROM). The claimant disputed that rating. Dr. S was appointed the designated doctor to determine MMI and IR by letter dated July 6, 1999. In a TWCC-69 and narrative report dated July 20, 1999, Dr. S certified MMI on that date and assessed a 9% IR based on a 12% impairment of the left upper extremity which translates to a 7% whole person impairment for the left shoulder and a 2% impairment of the lumbar spine for right and left lateral flexion loss of ROM. Other ROM had a 0% impairment and no impairment was given for "sensory or motor criteria."

The claimant was examined by Dr. A on referral from the claimant's treating doctor who, in a report dated October 11, 1999, recited the results of a number of tests and recommended cervical and lumbar MRIs. Dr. A seems to indicate that the claimant is not

at MMI and does not give an IR. A lumbar MRI was performed on March 2, 2000, which indicated an "[a]nnular tear at L4/5 otherwise unremarkable." The claimant again saw Dr. A and was subsequently referred to Dr. E, a rehabilitation and occupational medicine doctor. Dr. E, in a report of April 4, 2000, assessed a left shoulder strain, contusion of the lumbar spine and an annular tear at L4-5, and recommended an epidural injection and referral to an orthopedic surgeon. The claimant saw Dr. C, an orthopedic surgeon, who, in a report dated May 2, 2000, recommended reconditioning exercises, walking, possible "diagnostic [f]acet [b]locks" and perhaps a discogram. Dr. C opined that epidural steroid injections "are not going to be of much help" to the claimant and commented that he does "not see any focal disc herniations and [the claimant] has no leg pain." Dr. C said that since the MRI was not done before the IR, the claimant "should have been allowed to have a full work-up prior to declaring MMI and doing an [IR]."

Dr. A's report and the lumbar MRI, which indicated an L4-5 annular tear, were sent to Dr. S for comment. Dr. S replied by letter dated May 5, 2000, stating:

It is my opinion from reviewing [Dr. A's] report that [the claimant] may have sustained a lower back strain from lifting the weights at Work Assessment Center causing him increased lower back discomfort.

The MRI on [the claimant] did not indicate herniation, protrusion or pathology of the disc involving surrounding soft tissues.

I can find no reason based on this information to change my original impairment of over eight months ago.

The claimant argued that that statement shows that Dr. S believes that the claimant sustained a new injury during work hardening at the assessment center. The carrier argued that Dr. S was just trying to explain the claimant's continued complaints and represents that an annular tear is just a soft tissue injury and that it "is the designated doctor's prerogative not to give any [IR] for a soft tissue injury such as an annular tear—the tear of the small muscle surrounding the disc." The hearing officer, in the Statement of the Evidence, commented that the 1989 Act and the Appeals Panel decisions give presumptive weight to the designated doctor's report and in this case, "the evidence to the contrary amounts merely to a difference of medical opinion and does not rise to the required level to overcome the presumption afforded to the designated doctor." The claimant's appeal discusses the various doctors' reports, stresses that the claimant "remains under active treatment of [Dr. L] three times per week" and asserts that the claimant was unable to move forward and backward during ROM testing because of the annular tear.

Sections 408.122(c) and 408.125(e) provide that the report of the designated doctor 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 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 designated doctor was made aware of the annular tear. The significance of the annular tear and whether the claimant had reached MMI, Dr. L's continuing treatment notwithstanding, constituted medical judgment. The fact that Dr. C, and to an extent Dr. A, disagrees with that judgment is insufficient to provide the great weight of medical evidence contrary to Dr. S's reports, so as to mandate reversal of the hearing officer's decision.

Upon review of the record submitted, we find no reversible error. 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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Tommy W. Lueders  
Appeals Judge

CONCUR IN THE RESULT:

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Gary L. Kilgore  
Appeals Judge