APPEAL NO. 002245

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 July 6, 2000. With regard to the only issue before her, the hearing officer determined that the appellant (claimant) had a 10% impairment rating (IR) as assessed by the designated doctor, whose report was not against the great weight of other medical evidence.

The claimant appeals, challenging the designated doctor's credentials, alleging that the designated doctor improperly invalidated loss of range of motion (ROM), and that the claimant had spinal surgery after the designated doctor's examination (and after the claimant had reached "statutory MMI [maximum medical improvement]") which the designated doctor refused to consider, and that the designated doctor had improperly applied the Guides to the Evaluation of Permanent Impairment, third edition, second printing, dated February 1989, published by the American Medical Association (AMA Guides). The claimant requests that we reverse the hearing officer's decision and render a decision in his favor that he has a 33% IR as assessed by the treating doctor. The carrier responds, urging affirmance.

DECISION

Affirmed.

The claimant was employed as a "heavy line" mechanic for an automobile dealership and sustained a low back injury on _____. The parties stipulated that the claimant sustained a compensable injury on that date, that the claimant reached MMI "per statute" on July 26, 1998, and that the Texas Workers' Compensation Commission (Commission)-selected designated doctor was Dr. H (whose letterhead indicates that he specializes in "Weight Control, Family Practice, and Preventive Medicine.") The claimant's present treating doctor is Dr. K, an orthopedic surgeon. The claimant had initially been treated conservatively by Dr. C with physical therapy (PT), medication and epidural steroid injections. The claimant subsequently changed treating doctors to Dr. K.

The claimant was examined by Dr. G, an orthopedic surgeon and the carrier's required medical examination doctor, who, in a Report of Medical Evaluation (TWCC-69) and narrative dated July 18, 1997, certified MMI on July 1, 1997 (MMI is not an issue, having been stipulated as being July 26, 1998), and assessed an 11% IR based on a 7% impairment from Table 49(II)(C); and 4% impairment for lateral flexion. Other ROM was found invalid. Dr. G's report notes that the claimant "admits that his condition is essentially static." Dr. K, in a report dated September 10, 1997, certified MMI and assessed a 21% IR based on 7% impairment from Table 49(II)(C), and 15% impairment for loss of ROM using "the CA6000 Spine Motion Analyzer," which combine to result in the 21% IR. Dr. K noted that the claimant's condition was stable and that the claimant "does reasonably well when he does not move around much."

The claimant was subsequently examined by Dr. H, the designated doctor, who, in a report dated December 2, 1997, agreed to the MMI date certified by Dr. K and assessed a 10% IR based on a 7% impairment based on Table 49 (II)(C), a 1% impairment for right lateral flexion and 2% impairment for left lateral flexion. Dr. H commented that other flexion and extension failed "the validation criteria of straight leg raise [SLR]." Dr. H comments that these findings "confirm my examination which showed a negative Patrick test at 90 degrees." Dr. H also noted that at the time of the examination the claimant "was debating whether or not to have surgery." Dr. K disagreed with Dr. H's assessment and, in "a more extensive rebuttal" dated May 8, 1998, agreed with the 7% impairment from Table 49 but disagreed with the invalidation of the ROM studies, noting that they had not been done by Dr. H who had referred the claimant out to a rehabilitation hospital, whereas Dr. K had used another rehabilitation service which had used the CA6000 Spine Motion Analyzer which Dr. K contends is "more accurate than a handheld inclinometer." No mention is made in this report that surgery was being contemplated at that time. Dr. H, in a report dated July 20, 1998, notes that the claimant said that he had fallen in the shower ("I wiped out again") on June 19, 1998. The claimant's back condition apparently got worse after that event.

The parties stipulated that the claimant reached MMI by operation of law (*see* Section 401.011(30)(B)) on July 19, 1998. Dr. H, in a TWCC-69 and narrative dated September 8, 1998, confirms his 10% IR and, in the narrative, writes:

> The Commission decided that [claimant] legally reached statutory MMI on July 19, 1998. As such, an [IR] was necessary. Since it would be highly unlikely for [claimant] to become worse since his initial injury, the undersigned has used the initial rating of 10% for a final whole person impairment.
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> That rating of 10% is essentially in agreement with [Dr. G], another orthopedic surgeon, who awarded [claimant] 11% [IR]. As noted in both of our examinations, [claimant] did not meet reliability criteria. Furthermore, in the hands of this examiner, [claimant] did not pass the Patrick test. Therefore, admitting there is some subjectivity to the 3rd Edition of the AMA Guides, nonetheless, in my opinion, a 10% whole person [IR] should be given.

In a Recommendation for Spinal Surgery (TWCC-63) dated August 12, 1998, Dr. K recommended spinal surgery, which apparently was approved, and surgery, in the form of a two-level lumbar laminectomy with posterior-lateral fusion from L4 to S1 with instrumentation, was performed on October 27, 1998. Dr. K, in a report dated February 18, 1999, references Dr. H's September 8, 1998, report; notes the claimant's subsequent surgery, PT and rehabilitation; and assigns a 33% IR, based on an 11% impairment from Table 49(II)(F) and 25% impairment for loss of ROM, again using the Spine Analyzer, combined to arrive at the 33% IR.

In a letter dated May 10, 1999, the Commission writes Dr. H, inquiring whether the claimant's surgery of October 28, 1998, would change Dr. H's IR, and asks Dr. H to comment about Dr. K's validation of ROM. Dr. H replied by letter dated May 18, 1999, stating:

> [Claimant] had a statutory MMI on 09-10-97 with an [IR] of 10 percent. In my opinion, this [IR] should not be changed. From the information given, no new injury occurred, and the patient was at MMI. Therefore, in my opinion, the claimant should not be reevaluation for the injury that occurred _____, especially since surgery was performed over a year later. Accordingly, the claimant's rating, under table 49, does not warrant additional impairment.

Dr. K, in a letter dated June 16, 1999, to the Commission, takes issue with Dr. H's response, and comments "[i]ncidentally, this surgery was anticipated much before the date of the surgery, as preparations, second opinions, etc. had to be done." Dr. K argues that it is "impossible to think that a patient has the some [ROM] after this type of surgery as he had before surgery." In a report dated July 20, 1999, Dr. H noted that the claimant "has had exacerbations and remissions of his back pain," commented on Dr. G's report and noted that he Dr. H had spoken with Dr. K about a discogram. Dr. H went on to state that the claimant, in the past, "has declined the option of surgery," but with his last exacerbation the claimant "has changed his mind." Dr. H recommended a discogram.

The Commission again wrote Dr. H by letter dated August 10, 1999, forwarding a July 16, 1998, discogram "which indicates an abnormal L5/S1 [discogram] with posterior herniation on the right side with buttock discordant pain" and asks Dr. H if that changes his opinion or whether a further examination is needed. Dr. H replied by letter dated August 16, 1999, stating:

> The original injury occurred _____. An MRI performed in [A]ugust of 1996 revealed broad based protrusion at the L4-L5 level. That interpretation should guide the following recommendation to the [Commission].
>
> As [claimant] was operated upon after he had reached MMI, in my opinion the [IR] of 10% should not be changed.

The hearing officer made the following disputed findings:

FINDINGS OF FACT

8. There was insufficient evidence to support that spinal surgery was scheduled at the time of [Dr. H's] initial certification of MMI on September 10, 1997 with a 10% impairment.

9. [Dr. H's] initial findings of a 10% [IR] are valid and entitled to presumptive weight.

10. [Dr. H's] September 10, 1997 findings on [IR] are not against the great weight of other medical evidence.

The claimant disputes those findings and argues that Dr. K "recommended spinal surgery and began the process of getting said surgery approved at least six (6) months before statutory MMI" and also "that the Claimant was considering surgery well before the statutory MMI date." The claimant does not cite the report or records where that information can be found. As previously noted, in May 1998, Dr. K agreed with Dr. H on the 7% impairment from Table 49 and the only disagreement at that time was regarding the ROM and whether it should have been invalidated. Dr. K's report of May 8, 1998, two months before statutory MMI, says absolutely nothing about surgery and only argues about the ROM rating. In the narrative accompanying Dr. H's December 1997 report, Dr. H notes that the claimant "was debating whether or not to have surgery." Much of the testimony and argument at the CCH was whether the testing was properly done; whether a 100E SLR was possible; whether the Patrick's test would invalidate ROM testing; and whether it was proper for a doctor to invalidate otherwise valid ROM testing by clinical observation. The claimant testified that initially, when surgery was mentioned (there was no evidence when that was), he did not want the surgery.

We have considered situations where a claimant has surgery after the designated doctor certifies MMI and assigns an IR. In those cases, we have drawn a distinction between the situation where the designated doctor certifies MMI prior to the date of statutory MMI and those cases where a claimant's MMI date is established by operation of law and have noted that where a claimant is determined to be at MMI by statute, a distinguishing factor is whether the surgery is "under active consideration" at the time of statutory MMI. Texas Workers' Compensation Commission Appeal No. 950861, decided July 12, 1995; Texas Workers' Compensation Commission Appeal No. 950496, decided May 15, 1995; Texas Workers' Compensation Commission Appeal No. 941243, decided October 26, 1994. In this instance, the claimant was initially considered to be at MMI by Dr. G in July 1997 and by Dr. K in September 1997, well before the claimant reached statutory MMI in July 1998. There is some evidence that the claimant had been recommended for surgery prior to statutory MMI; had declined the surgery; and then, at or around the time of statutory MMI, had changed his mind. The second opinion process was begun in August 1998 and the claimant had spinal surgery on October 27, 1998. The evidence is unclear whether surgery was actively being considered when the claimant reached statutory MMI.

In any event, Dr. H was sent the discogram and medical records of the surgery and, upon inquiry by the Commission, declined to change his IR. The question before us then becomes whether the hearing officer erred in not requiring the designated doctor to consider the post statutory MMI surgery. We cannot agree that the hearing officer erred in giving presumptive weight to the designated doctor's 10% IR or that the designated doctor was required to consider the post statutory MMI surgery. The fact that another fact finder may have reached a different conclusion on the same facts does not require us to disturb the hearing officer's decision here.

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 E. Lang
Appeals Panel
Manager/Judge

DISSENTING OPINION:

I respectfully dissent.

In a report dated December 2, 1997, Dr. H, the designated doctor, reported that when he saw the claimant he was debating whether or not to have surgery; that the claimant reached maximum medical improvement (MMI) on September 10, 1997; and that the claimant's IR is 10%. In a report dated July 20, 1998, Dr. H stated that the claimant told him that Dr. K, the treating doctor, had scheduled an MRI and a discogram and that his, Dr. H's, personal conversation with Dr. K verified that Dr. K wished to pursue a discogram. The parties stipulated that the claimant reached MMI by operation of law on July 26, 1998. The Recommendation for Spinal Surgery (TWCC-63) was signed by Dr. K, the claimant's treating doctor on August 12, 1998.

In a letter to Dr. H dated August 10, 1999, a Texas Workers' Compensation Commission benefit review officer wrote:

> Please review the attached discogram report, dated 7-16-98, which indicates an abnormal L5-S1 with posterior herniation on the right side with buttock discordant pain. The claimant has had surgery for this condition.
>
> In light of this, could you please advise whether this changes your opinion regarding the referenced Claimant's IMPAIRMENT RATING [IR] or if further examination is needed.

In a letter dated August 16, 1999, Dr. H responded "[a]s [claimant] was operated upon after he had reached MMI, in my opinion the [IR] of 10% should not be changed."

The hearing officer made the following findings of fact:

8. There was insufficient evidence to support that spinal surgery was scheduled at the time of [Dr. H's] initial certification of MMI on September 10, 1997 with a 10% impairment.

9. [Dr. H's] initial findings of 10% [IR] are valid and entitled to presumptive weight.

I agree with the statement in the majority opinion that the question is whether surgery is "under active consideration at at he time of statutory MMI. I will not repeat the citations. In my opinion, neither the hearing officer nor the designated doctor applied that standard. I would reverse and remand for the hearing officer to properly advise Dr. H of the law related to a designated doctor amending a report after surgery, to receive a response from the designated doctor, and to make determinations to award the claimant an IR.

Tommy W. Lueders
Appeals Judge