APPEAL NO. 002822

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 November 14, 2000. With regard to the two contested issues before him, the hearing officer determined: (1) the appellant (claimant) had an impairment rating (IR) of 12%; and (2) the claimant was not eligible for supplemental income benefits (SIBs) for the 1st quarter.

The claimant appealed, contending that the hearing officer erred by not giving presumptive weight to the IR assessed by the designated doctor and that the claimant was entitled to 1st quarter SIBs. The claimant requests that we reverse the hearing officer's decision and render a decision in his favor. The respondent (carrier) urges affirmance.

DECISION

Reversed and rendered.

At issue in this case is the IR given by the Texas Workers' Compensation Commission (Commission)-appointed designated doctor. The claimant sustained a compensable injury on _____, when a tire exploded while he was filling it with air. According to medical reports, the claimant was thrown backwards when the tire exploded and hit his head on a tree stump. The claimant said that he injured his left arm, left shoulder, neck, and head in the accident. The parties agreed that the claimant reached statutory maximum medical improvement (MMI) on June 8, 1999. The record indicates that Dr. S, the designated doctor, first examined the claimant in February 1999 and concluded that the claimant had not yet reached MMI. Dr. S noted in his assessment that the claimant's "primary problem remains cervical strain with ligamentous injury." Dr. S further noted in his assessment that a cervical strain with ligamentous injury "would not appear on imaging studies and would not be anticipated to show up on the studies that were completed including EMG." In fact, the medical records contained in the record indicate that all imaging scans revealed no abnormalities. However, Dr. S does note in his report dated July 26, 1999, that a cervical spine x-ray performed on November 17, 1997, "demonstrated moderately severe spastic torticollis convex to the left, consistent with muscular spasm."

In March of 1999, Dr. H, the carrier's physician, examined the claimant and issued a report. Dr. H diagnosed the claimant as having post concussive headaches and a cervical strain. Dr. H concluded that the claimant had a 15% impairment based, in part, on cervical range of motion (ROM) studies that Dr. S. had previously performed. Dr. H summarized:

> Patient has an overall impairment rating at this time of 10%. Additionally, he has a mild impairment rating of class II in my opinion based on his cognitive abnormalities which were documentable on [another physician's]

> psychological testing. Although there is no rating available for this mild impairment I feel it is a result of the injury. I would rate him at approximately 5% total impairment based on this clinically giving him a combined values scores of 15% total impairment.

Dr. S, continuing to act as the designated doctor, was then asked to again examine the claimant to rate his impairment. He examined the claimant on July 26, 1999, and certified that the claimant had an IR of 18% under Table 49(II)(B), and Tables 10 and 12-14 of Chapter 3 of the Guides to the Evaluation of Permanent Impairment, third edition, second printing, dated February 1989, published by the American Medical Association (AMA Guides). The 18% IR was based on loss of ROM, specific diagnosis of the spine, and sensory and pain complaint. Dr. S's IR worksheets are attached to his report.

Subsequently, the carrier obtained three peer review reports. Two reports, dated August 20, 1999, and October 27, 1999, were submitted by Dr. B. Dr. T submitted one report, dated January 28, 2000. Both reviewing doctors disputed the IR assigned by Dr. S for the soft tissue lesion of the intervertebral discs because no abnormalities were revealed in the MRI scans. Dr. B additionally disputed the designated doctor's IR of the upper extremities due to the fact that were no verifiable nerve injuries.

The claimant was again examined by Dr. H in February 2000. Dr. H, who had previously assigned the claimant an IR of 15% in March 1999, assigned the claimant an IR of 12% in February 2000, based on "his cervical spine dysfunction." Dr. H further explained in his report that the claimant "has been downgraded from his March 18, 1999, evaluation due to his cognitive function being negated."

Dr. S, in response to requests for clarification from the Commission and in response to the peer review reports, submitted three reports. All three reports affirmed his initial IR of 18%. Dr. S stated in his November 29, 1999, report, "one cannot state the presence or absence of injury based purely on an MRI result." Dr. S further noted that "ligamentous strain and tear are also commonly not seen on MRIs, particularly if subtle, although subtle injuries of both types can be absolutely devastating in terms of symptomology."

The hearing officer determined that the designated doctor's assessment included ratings for specific spinal disorders which were not objectively identified and shoulder injuries not shown to be part of the compensable injury. Additionally, the hearing officer found that the great weight of the medical evidence was contrary to the designated doctor's report and that Dr. H's second IR assessment of 12% was consistent with the great weight of the medical evidence and, consequently, the claimant was not eligible for 1st quarter SIBs. We do not agree.

If the designated doctor is chosen by the Commission, the report of the designated doctor shall have presumptive weight and the Commission shall base the IR on that report unless the great weight of the other medical evidence is to the contrary, and if the great weight of the medical evidence contradicts the IR contained in the report of the designated doctor chosen by the Commission, the Commission shall adopt the IR of one of the other

doctors. Section 408.125(e). No other doctor's report, including that of a treating doctor, is entitled to presumptive weight, and to overcome the presumptive weight accorded to the report of the designated doctor requires more than a preponderance of the evidence, it requires the "great weight" of the other medical evidence to be contrary to the report. Texas Workers' Compensation Commission Appeal No. 92412, decided September 28, 1992.

In regard to the 4% impairment Dr. S assigned for a specific disorder of the cervical spine under Table 49(II)(B), the carrier states, "[Dr. S] violated the specific letter of the [1989] Act in awarding an IR for conditions that cannot be confirmed objectively." The carrier points out that Dr. S acknowledged that all diagnostic tests were normal. What the carrier fails to address is the fact that Dr. S diagnosed a cervical strain with ligamentous injury, based on his physical examination of the claimant, and that several of the other doctors who examined the claimant also diagnosed the claimant as having a cervical strain. The medical records reflect continuing cervical pain since the injury and cervical muscular spasms were noted.

We observe that Table 49(II), provides for impairments due to "[i]ntervertebral disc or other soft tissue lesions," and that Table 49(II)(B) provides for 4% impairment for the cervical spine for "[u]noperated with medically documented injury and a minimum of six months of medically documented pain, recurrent muscle spasm or rigidity associated with none-to-minimal degenerative changes on structural tests."

Section 408.122(a) provides, in part, that a claimant may not recover impairment income benefits unless evidence of impairment based on an objective clinical or laboratory finding exists. Section 401.011(33) defines "objective clinical or laboratory finding" as a medical finding of impairment resulting from a compensable injury, based on competent objective medical evidence, that is independently confirmable by a doctor, including a designated doctor, without reliance on the subjective symptoms perceived by the employee. Section 401.011(32) defines "objective" as independently verifiable or confirmable results that are based on recognized laboratory or diagnostic tests, or signs confirmable by physical examination.

We have held that the absence of lesions on an MRI does not prevent a doctor from rating lesions if, based on his physical examination of a claimant and records review, he believes lesions are present. Texas Workers' Compensation Commission Appeal No. 972481, decided January 7, 1998 (Unpublished). Thus, we have affirmed decisions on IR where a sprain or strain has been rated as a specific disorder of the spine, and have recognized that such may be considered as soft tissue lesions. In the instant case, the designated doctor made a diagnosis of cervical strain with ligamentous injury and determined that the claimant had an 18% IR. In evaluating the impairment, Dr. S gave consideration to "spine range of motion, intervertebral disc and soft tissue, and arm sensory function." Dr. S assigned a 4% IR for a specific disorder of the lumbar spine under Table 49(II)(B), related to the lesion and, subsequently, clarified his reasoning for rating the lesion despite a normal MRI scan. He further clarified that he did not give the claimant injury points for upper extremity complaints, but rather, considered the upper extremity

symptoms complaints made by the claimant in evaluating his injuries. In fact, the impairment worksheet prepared by Dr. S indicates that the upper extremity ratings for pain and sensory deficits are related to "C6 nerve root."

The record indicates that the IR given to the claimant by Dr. S was consistent with the AMA Guides and that the opinions of the other doctors represent only a difference in medical opinion. We have held that a difference in medical opinion is not a sufficient basis for discarding a designated doctor's report. Texas Workers' Compensation Commission Appeal No. 950166, decided March 14, 1995. We conclude that the hearing officer's finding that the IR assessed by Dr. S is contrary to the great weight of the other medical evidence is not supported by sufficient evidence and that the report of the designated doctor should be accorded presumptive weight. We reverse the hearing officer's decision that the claimant has a 12% IR and we render a new decision that the claimant's IR is 18%, as assigned by the designated doctor.

The record reflects, and the hearing officer's findings of fact indicate, that but for the 12% IR adopted by the hearing officer, the claimant otherwise would have qualified for 1st quarter SIBs. Therefore, we reverse the hearing officer's decision that the claimant is not eligible for 1st quarter SIBs, render a new decision that the claimant is entitled to SIBs for the first quarter, and order the carrier to pay such benefits.

Robert W. Potts
Appeals Judge

CONCUR:

Gary L. Kilgore
Appeals Judge

Philip F. O'Neill
Appeals Judge