

APPEAL NO. 010954  
FILED JUNE 13, 2001

This appeal arises pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act). Following contested case hearings held on December 14, 2000, and April 10, 2001, the hearing officer resolved the disputed issues by determining that the appellant (claimant) reached maximum medical improvement (MMI) on October 8, 1998, with an impairment rating (IR) of 0%, based on the report of Dr. W, the doctor selected by the respondent (self-insured). The claimant has appealed and asserts that her MMI date should be the date of statutory MMI determined by her treating doctor, Dr. S, and that her IR should be the 22% determined by Dr. S. In the alternative, the claimant contends that her IR should be the 12% determined by the designated doctor, Dr. G, in his second report. The self-insured states in response that while it feels that the first report of Dr. G certifying to an MMI date of October 8, 1998, with a 0% IR, was entitled to presumptive weight, it agrees with the report of Dr. W as adopted by the hearing officer.

DECISION

Affirmed.

The claimant testified that on \_\_\_\_\_, while employed at a school as a custodian, she and a coworker were carrying a table with a sewing machine on it when she tripped on stairs and fell backwards onto her buttocks. She said that the next day she commenced treatment with Dr. S and continues to see him every five to six weeks.

The parties stipulated that the claimant sustained a compensable cervical, thoracic, and lumbar spine injury on \_\_\_\_\_. No diagnostic testing of the cervical spine is in evidence. The only diagnostic test of the thoracic spine in evidence is the September 23, 1997, MRI report showing disc dessication throughout this region. As for the lumbar spine, the September 23, 1997, MRI report shows mild bulging at L4-5; and the nerve conduction study was "unremarkable," according to the September 30, 1997, report. A June 8, 1999, myelogram report stated that mild thecal sac indentation at L4-5 suggested bulging, and the corresponding CT scan report noted bulges at L4-5 and L5-S1.

Dr. W's October 13, 1998, report states that the claimant "sustained at most a strain in her cervical, thoracic, and lumbar areas"; that she has been overtreated and could have returned to work within three months of her injury; and that no further treatment is necessary and she can return to work without restrictions.

Dr. S's narrative report of October 13, 1999, states that the claimant reached "statutory" MMI on October 11, 1999, with a 22% IR and that the 22% IR consists of ratings for range of motion (ROM) loss in the thoracic and lumbar spinal regions; ratings under Table 49 of the Guides to the Evaluation of Permanent Impairment, third edition, second printing, dated February 1989, published by the American Medical Association for the thoracic and lumbar spinal regions; and a rating for lumbar spine neurological deficit. Dr.

S assigned no rating for the cervical spine. Dr. S testified that he has treated the claimant's spinal injuries conservatively with physical therapy, pain medications, and injections since September 3, 1997, and that he sees her every five to six weeks. While asserting that the claimant did not invalidate his testing for ROM loss, Dr. S acknowledged that different examiners may get different results when measuring for ROM and he did not take issue with Dr. W and Dr. G having invalidated the claimant's ROM measurements. He felt that even if Dr. W and Dr. G invalidated the claimant's ROM testing, they should have awarded her some impairment, pursuant to Table 49, for her specific spinal disorders in all three spinal regions, apparently because of her documented pain.

In his Report of Medical Evaluation (TWCC-69) dated January 29, 1999, Dr. G certified that the claimant reached MMI on October 8, 1998, with an IR of 0%. In his accompanying narrative report, Dr. G stated that he found no paraspinal muscle spasm; that the claimant was not then having pain and indicated that when she has pain she controls it with Advil; and that he believes that the claimant sustained "at most soft tissue injuries of the back, which typically would resolve in six (6) to eight (8) weeks." He also noted some "positive Waddells." Attached to Dr. G's report is an "ARCON AIRS - [IR] Report" reflecting cervical and lumbar spine ROM measurements and stating a 10% rating for loss of cervical and lumbar ROM, a report which Dr. G obviously did not adopt. On June 7, 1999, a Texas Workers' Compensation Commission (Commission) dispute resolution officer wrote Dr. G requesting clarification of his report, stating that he had documented not only a 10% rating for ROM loss but also a 10% rating under Table 49. Dr. G responded on June 10, 1999, stating that he did not assign a rating under Table 49 and that the claimant's ROM was voluntarily restricted. He did not change his 0% IR. On January 19, 2000, a Commission benefit review officer wrote Dr. G sending September 1999 reports of a discogram and an EMG and asking if these reports changed his opinions. Dr. G responded on January 31, 2000, stating that his opinions were unchanged and that the claimant had "at most a soft tissue injury." Following the hearing on December 14, 2000, the hearing officer wrote Dr. G advising that the injury included all three regions of the spine and that, while his report mentioned thoracic spine testing, he made no findings on that region. The hearing officer asked Dr. G if the thoracic spine was tested and, further, if the claimant should be assigned a rating under Table 49 in view of six months of documented pain. Dr. G responded on April 9, 2001, stating that the claimant's thoracic spine ROM was retested on February 9, 2001, and yielded a rating of 1% and that, based on Table 49, the claimant would qualify for ratings of 4% for the cervical spine; 2% for the thoracic spine; and 5% for the lumbar spine for a total IR of 12%. Neither the hearing officer's letter nor Dr. G's response mentioned the MMI date.

In her report, the hearing officer explains that she did not give presumptive weight, pursuant to Section 408.125(e), to Dr. G's first report because he admittedly had not evaluated the claimant's thoracic spine for ROM loss. The hearing officer further explains that she did not give presumptive weight to Dr. G's amended report because "there was little [explanation]" from Dr. G for including Table 49 ratings at that juncture, aside from the hearing officer's letter requesting clarification, and, thus, the amended report was "not made for a proper purpose." The hearing officer's letter was the third Commission request

to Dr. G for clarification about the IR. None of these Commission contacts dealt with the MMI date. The hearing officer goes on to explain that, because she cannot give presumptive weight to either of Dr. G's reports, she adopts the report of Dr. W which, of course, contains the same MMI date as both of Dr. G's reports and the same IR as Dr. G's initial report.

The hearing officer is the sole judge of the weight and credibility of the evidence (Section 410.165(a)) and, as the trier of fact, resolves the conflicts and inconsistencies in the evidence including the medical evidence (Texas Employers Insurance Association v. Campos, 666 S.W.2d 286 (Tex. App.-Houston [14th Dist.] 1984, no writ)). We are satisfied that the hearing officer's determinations of the claimant's MMI date and IR are not so against the great weight and preponderance of the evidence as to be clearly wrong or manifestly unjust. Cain v. Bain, 709 S.W.2d 175, 176 (Tex. 1986); In re King's Estate, 150 Tex. 662, 244 S.W.2d 660 (1951).

The decision and order of the hearing officer are affirmed.

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Philip F. O'Neill  
Appeals Judge

CONCUR:

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Robert E. Lang  
Appeals Panel  
Manager/Judge

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Robert W. Potts  
Appeals Judge