APPEAL NO. 041557
FILED AUGUST 9, 2004

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 June 1, 2004. The hearing officer resolved the disputed issues by deciding that: (1) the compensable injury of _____, does not include carpal tunnel syndrome, radiculopathy, myalgia, myositis, the thoracic or lumbar spine, lower right arm, nervous muscular skeletal symptoms, depression, psychogenic complaints, diabetes, or a left shoulder injury, but it does include a right shoulder and neck injury; (2) that the respondent (claimant) reached maximum medical improvement (MMI) on July 14, 2001; and (3) that the claimant's impairment rating (IR) is 43%. The parties entered into a stipulation at the CCH to resolve the extent-of-injury issue. The appellant (self-insured) appealed, disputing the MMI and IR determinations. The claimant responded, urging affirmance.

DECISION

Affirmed.

The parties stipulated that the compensable injury of _____, includes a right shoulder and neck injury. The record indicates that Dr. H, the Texas Workers' Compensation Commission (Commission)-appointed designated doctor, first examined the claimant in December of 2000 and concluded that the claimant had not yet reached MMI. Dr. H examined the claimant again on August 9, 2001, and assessed a MMI date of July 14, 2001, with an IR of 46% using the Guides to the Evaluation of Permanent Impairment, third edition, second printing, dated February 1989, published by the American Medical Association (AMA Guides). The 46% IR was based on loss of range of motion (ROM) for the cervical, 26%; Section (II)(C) of Table 49 cervical, 6%; and loss of ROM for the right shoulder, 19%. The hearing officer correctly noted that when properly using the Combined Values Chart the ratings assessed would produce a 43% IR.

The carrier argues that Dr. H legally misconstrues the AMA Guides and factually admits to a lack of evidentiary support for his determinations because no verifiable lesion exists in the neck. Further, the carrier contends that the great weight of the other medical evidence clearly contradicts Dr. H.

Section (II)(C) of Table 49 provides for IRs for intervertebral disc or other soft tissue lesions which are "unoperated, with medically documented injury and a minimum of six months of medically documented pain, recurrent muscle spasm, or rigidity associated with moderate to severe degenerative changes on structural tests, including unoperated herniated nucleus pulposus, with or without radiculopathy." 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, and Texas Workers' Compensation Commission Appeal No. 002822, decided January 22, 2001. The Appeals Panel has cited with favor the following definition of "lesion" from Hanover Insurance Company v. Johnson, 397 S.W.2d 904, 905 (Tex. Civ. App.-Waco 1965, writ ref'd n.r.e.):

> It is held that strains, sprains, wrenches and twists due to unexpected or fortuitous events, even where there is no overexertion, and the employee is predisposed to such a lesion, are compensable.

Texas Workers' Compensation Commission Appeal No. 970182, decided March 17, 1997; Texas Workers' Compensation Commission Appeal No. 950223, decided March 30, 1995. Applying this definition, the claimant's neck injuries in the present case could be characterized by the designated doctor as involving lesions. The designated doctor found ratable lesions. We find no basis in the AMA Guides or our cases to find as a matter of law that the designated doctor could not determine that the claimant's neck conditions involved ratable lesions. The designated doctor, based upon his physical examination of the claimant and records review, apparently believed that the claimant did have cervical lesions. The designated doctor was specifically asked about his rationale for assessing impairment based on Section (II)(C) of Table 49 and he replied in part that specific disorders of the spine must be considered as part of the overall body IR and noted that the claimant had over six months of medically documented pain and soft tissue complaints related to the cervical spine, therefore requiring the inclusion of this specific degree of impairment.

Sections 408.122(c) and 408.125(e) provide that where there is a dispute as to the date of MMI and the IR, the report of the Commission-selected designated doctor is entitled to presumptive weight unless it is contrary to the great weight of the other medical evidence. Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 130.6(i) (Rule 130.6(i)) provides that the designated doctor's response to a request for clarification is also considered to have presumptive weight, as it is part of the designated doctor's opinion. *See also*, Texas Workers' Compensation Commission Appeal No. 013042-s, decided January 17, 2002. We have previously discussed the meaning of "the great weight of the other medical evidence" in numerous cases. We have 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 designated doctor's report. Texas Workers' Compensation Commission Appeal No. 92412, decided September 28, 1992. We have also held that no other doctor's report, including the report of the treating

doctor, is accorded the special, presumptive status accorded to the report of the designated doctor. Texas Workers' Compensation Commission Appeal No. 92366, decided September 10, 1992; Texas Workers' Compensation Commission Appeal No. 93825, decided October 15, 1993.

Whether the great weight of the other medical evidence was contrary to the opinion of the designated doctor was a factual question for the hearing officer to resolve. Texas Workers' Compensation Commission Appeal No. 93459, decided July 15, 1993. Section 410.165(a) provides that the hearing officer, as finder of fact, is the sole judge of the relevance and materiality of the evidence as well as of the weight and credibility that is to be given to the evidence. It was for the hearing officer, as trier of fact, to resolve the inconsistencies and conflicts in the evidence. Garza v. Commercial Insurance Company of Newark, New Jersey, 508 S.W.2d 701 (Tex. Civ. App.-Amarillo 1974, no writ). This is equally true regarding medical evidence. Texas Employers Insurance Association v. Campos, 666 S.W.2d 286 (Tex. App.-Houston [14th Dist.] 1984, no writ). When reviewing a hearing officer's decision for factual sufficiency of the evidence we should reverse such decision only if it is so against the great weight and preponderance of the evidence as to be clearly wrong and unjust. Cain v. Bain, 709 S.W.2d 175, 176 (Tex. 1986). In this case, we are satisfied that the hearing officer's MMI and IR determinations are sufficiently supported by the evidence. Accordingly, we cannot agree that the hearing officer erred in determining that the claimant reached MMI on July 14, 2001, with an IR of 43% in accordance with the opinion of Dr. H.

We affirm the decision and order of the hearing officer.

The true corporate name of the insurance carrier is **STATE OFFICE OF RISK MANAGEMENT (a self-insured governmental entity)** and the name and address of its registered agent for service of process is

For service in person the address is:

JONATHAN BOW, EXECUTIVE DIRECTOR
STATE OFFICE OF RISK MANAGEMENT
300 W. 15TH STREET
WILLIAM P. CLEMENTS, JR. STATE OFFICE BUILDING, 6TH FLOOR
AUSTIN, TEXAS 78701.

For service by mail the address is:

JONATHAN BOW, EXECUTIVE DIRECTOR
STATE OFFICE OF RISK MANAGEMENT
P.O. BOX 13777
AUSTIN, TEXAS 78711-3777.

_____
Margaret L. Turner
Appeals Judge

CONCUR:

_____
Judy L. S. Barnes
Appeals Judge

_____
Elaine M. Chaney
Appeals Judge