APPEAL NO. 950170

This appeal is brought pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq*. (1989 Act). A contested case hearing was held in (city), Texas, on November 29, 1994, with (hearing officer) presiding as hearing officer. With respect to the only issue before her, the hearing officer determined that the appellant's (claimant) impairment rating (IR) is zero percent as assigned by the Texas Workers' Compensation Commission (Commission)-selected designated doctor. The claimant appealed urging that the hearing officer erred in giving presumptive weight to the report of (Dr. J), the designated doctor, and in determining that the great weight of the other medical evidence is not contrary to the report of Dr. J. The claimant requests that we reverse the decision of the hearing officer and render a decision that her IR is 10% as assigned by (Dr. SW), her treating doctor. The respondent (carrier) urges that the claimant did not timely file her appeal and that the decision of the hearing officer is supported by sufficient evidence. The carrier requests that we affirm the decision of the hearing officer. The claimant replied that she did timely file her appeal.

DECISION

We affirm.

We first address the issue of the timeliness of the appeal. In her appeal, the claimant states that the envelope in which she received the decision and order of the hearing officer is postmarked January 11, 1995, and was received on January 18, 1995, and that she filed her appeal on January 30, 1995. The records of the Commission show that the decision and order was mailed on January 11, 1995, and that the claimant's appeal was postmarked on January 31, 1995, and was received by the Commission on February 2, 1995. The carrier also alleges that a copy of the appeal was not served on it. The claimant provided a copy of a "DOMESTIC RETURN RECEIPT" signed by the carrier's (city) Representative on February 2, 1995. In Texas Workers' Compensation Commission Appeal No. 92120, decided April 27, 1992, we held that where the other requirements of taking an appeal from a contested case hearing were met the fact that the appellant did not serve a copy of the appeal on the other party as required by Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 143.3 (Rule 143.3) did not deprive the Appeals Panel of jurisdiction to decide the appeal. Even if the claimant had not timely served a copy of her appeal on the carrier, the Appeals Panel would have jurisdiction because the claimant timely filed her appeal.

The claimant and the carrier stipulated that the claimant sustained a compensable injury to her back on (date of injury), and that she reached maximum medical improvement (MMI) on June 2, 1994, as certified by Dr. J. In a puzzling statement in the part of her appeal in which she argues that the 10% IR assigned by her treating doctor should be adopted, the claimant wrote "[i]f the Appeals Panel were to appoint another designated doctor at this time, because of the passage of time since MMI, such newly designated doctor's findings would not be a true reflection of what my condition was at the time I

reached [MMI]." Section 401.011(23) defines impairment as "any anatomic or functional abnormality or loss existing after [MMI] that results from a compensable injury and is reasonably presumed to be permanent."

The claimant was seen by (Dr. P), the company doctor, who had x-rays taken, diagnosed severe lumbosacral strain, and prescribed medication. The claimant said that she did not improve and went to the Texas Orthopedic and Trauma Associates (Associates) on September 30, 1993, where she was seen by (Dr. RW). Dr. RW diagnosed severe lumbosacral strain syndrome. On October 11, 1993, the claimant was seen by Dr. SW at the Associates, who became her treating doctor. On October 11, 1993, Dr. SW noted that the claimant is five feet four inches tall and weighs 221 pounds and diagnosed sciatica and low back spasm and pain. In a report of a CAT scan dated October 14, 1993, (Dr. F) reported that "there is no evidence of disc herniation, spinal stenosis or foraminal stenosis." In a report of an MRI dated October 20, 1993, (Dr. L) reported that "there is no evidence for disc bulge or herniation, bony canal or foraminal stenosis." On November 22, 1993, Dr. RW noted that the claimant continued to complain of severe low back pain and that she had an EMG performed but that he did not have the results. On December 20, 1993, Dr. RW reported that the claimant continues to experience lumbosacral vertebral column pains and that he did not have a complete and final interpretation of the EMG. In a report of an EMG and nerve conduction studies dated November 5, 1993, (Dr. AJ) concluded "[a]bnormal study. The above electrodiagnostic study performed today is consistent with bilateral lumbosacral nerve root irritation, possible root involvement of L-5/S-1 at this time" and reported that his impression is possible bilateral carpal tunnel syndrome and lumbar sprain. On January 13, 1994, Dr. RW reported that the claimant had increased sciatica pain and that an EMG is consistent with a herniated disc. The claimant received physical therapy three times a week at the (Center) and uses a TENS unit. At the request of the carrier, the claimant was examined by (Dr. A) on March 7, 1994. Dr. A reported that the claimant reported pain but there was no objective evidence of injury and certified that the claimant reached MMI on March 7, 1994, with a zero percent IR. In a Specific and Subsequent Medical Report (TWCC-64) dated April 28, 1994, Dr. RW reported that the claimant had lumbar sprain and strain. In a Report of Medical Evaluation (TWCC-69) dated June 10, 1994, Dr. J, the designated doctor, reported that the claimant reached MMI on June 2, 1994, with a zero percent IR. The narrative report attached to the TWCC-69 reveals that Dr. J reviewed the medical records of the claimant and examined the claimant. In the narrative report Dr. J wrote:

> There is a final note available to me dated May 6, 1994 by Dr. [RW] who seems to continue insisting on a diagnosis of herniated nucleus pulposus even in face of a normal CAT scan, MRI and discogram.

* * * * *

She has had multiple tests, none of which have revealed any pathology other than some rather mild evidence stated by Dr. [AJ] on EMG and nerve conduction study.

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[Claimant's] examination demonstrates only subjective complaints with no objective findings of a residual injury or radiculopathy.

In my opinion, she has reached [MMI] and could return to her working activities. I find no objective indication or permanent physical impairment.

On July 10, 1994, Dr. SW responded to Dr. J's report. He stated that he agreed that the claimant had reached MMI, that the claimant had been working for quite a while, that she had been in a work conditioning program just to make sure she could get back to full duty, but that he did not agree with the zero percent IR and assigned a 10% IR. He assigned five percent 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 (AMA Guides) for "intervertebral disc or other soft tissue lesions; Item B--Unoperated 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" and five percent for loss of range of motion. The claimant testified that she still has pain as a result of her injury on (date of injury).

Disputes involving medical evidence are not uncommon. The 1989 Act sets forth a mechanism to help resolve conflicts concerning MMI and IR by according presumptive weight to the report of a doctor referred to as the designated doctor. Texas Workers' Compensation Commission Appeal No. 92495, decided October 28, 1992. If the Commission selects the designated doctor as was done in this case, the Commission shall base its determination of the claimant's IR on the report of the designated doctor unless the great weight of the other medical evidence is to the contrary. Section 408.125(e). 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 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 hearing officer determined that the report of the designated doctor is entitled to presumptive weight and that the great weight of the other medical evidence is not contrary to the report of the designated doctor. Only were we to conclude,

which we do not in this case, that the determinations of the hearing officer are so against the great weight and preponderance of the evidence as to be clearly wrong or unjust would there be a sound basis to disturb her determinations. In re King's Estate, 150 Tex. 662, 244 S.W.2d 660 (1951). Accordingly, we affirm the decision and order of the hearing officer.

Tommy W. Lueders
Appeals Judge

CONCUR:

Philip F. O'Neill
Appeals Judge

Thomas A. Knapp
Appeals Judge