

## APPEAL NO. 93087

A contested case hearing was held in (city) as, Texas, on November 13, 1992, (hearing officer) presiding, to determine the correct impairment rating for appellant (claimant) resulting from his compensable injury sustained on (date of injury). According presumptive weight to the report of the designated doctor selected by the Texas Workers' Compensation Commission (Commission) pursuant to the provisions of the Texas Workers' Compensation Act, TEX. REV. CIV. STAT. ANN. art. 8308-4.26(g) (Vernon Supp. 1993) (1989 Act), the hearing officer determined that claimant has a 4% impairment rating. Claimant's request for review, in essence, urges that the designated doctor's 4% impairment rating is erroneous for failing to consider claimant's loss of range of motion and strength. Respondent (carrier) first asserts that claimant's request for review was not timely filed and then urges our affirmance of the hearing officer's decision.

### DECISION

Finding the evidence sufficient to support the hearing officer's factual findings and legal conclusions, the decision is affirmed.

Claimant's request for review was accompanied by his affidavit stating he never received a copy of the hearing officer's decision in the mail, called the Commission on several occasions to inquire into the status of the decision, and was eventually provided a copy by the Commission on January 20, 1993 when he went to the Commission's field office. Claimant's appeal was mailed to the Commission that same day and was thus timely filed. Article 8308-6.41(a); Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE §143.3 (Rule 143.3). Carrier would have us disregard claimant's affidavit as "self-serving," and determine that claimant's appeal was not timely filed. We find claimant's affidavit no more "self-serving" than the unsworn statements of attorneys for appellants asserting in their requests for review the dates that Commission decisions were received by their clients. Carrier's assertion of claimant's untimely filing is without merit.

The compensability of claimant's neck injury, sustained on (date of injury) while lifting some boxes at work, was not in dispute. Claimant, the sole witness, testified that he was treated by (Dr. A). He said that at some later date, he was examined by (Dr. S) at the request of the carrier and that Dr. S reported that claimant had an impairment rating of 0%. Claimant said he disagreed with Dr. S's opinion as to his impairment rating because Dr. S was biased and because the American Medical Association Guides to the Evaluation of Permanent Impairment (AMA Guides) required at least a 4% rating. Claimant said he then requested the Commission to appoint a designated doctor. (Dr. O), selected as the designated doctor by the Commission, examined claimant and assigned him a 4% impairment rating. Claimant said that rating was incorrect because Dr. O did not include claimant's loss of range of motion (ROM). He maintained that Dr. O erred in stating that claimant had invalidated the ROM testing and in disregarding the results of the ROM testing and not assigning additional impairment. Claimant said he had been tested for loss of ROM twice on the same day. He explained that the wide variance between the results of the first

set of ROM tests, accomplished in the morning, and those accomplished some four hours later, was explained by the facts that he had taken medications in the morning and wore his TENS unit until just prior to the first round of tests. In the interim period between the tests, claimant said he underwent a physical examination by (Dr. B) which involved pulling, twisting, and prodding, all of which made him sore. Thus, by the time claimant underwent the second round of tests later that day, his medications had worn off, his TENS unit had been off, and he was sore from the Dr. B's examination. Claimant maintained the combination of those facts left him in more pain and less able to perform the ROM tests. He said his treating doctor agreed that these facts would have affected claimant's testing performance and introduced an unsigned November 19, 1992 letter from Dr. Allen, an orthopedic surgeon, stating claimant's not having taken pain medication and not wearing the TENS unit before the second set of tests "may have had some effect on the results of his tests," and suggesting reevaluation. Claimant denied assertions by Dr. B regarding his magnification of symptoms and exaggeration contending that only a psychiatrist was qualified to make such a determination.

The balance of the evidence on the disputed issue consisted of medical reports and the hearing officer determined that the designated doctor's report was not contrary to the great weight of the other medical evidence and gave it presumptive weight. We agree.

Dr. A's initial medical report (TWCC-61) for claimant's January 7, 1992 visit reflected the (date of injury), injury date, diagnosed chronic cervical strain syndrome, and recommended conservative management with physical therapy (PT), muscle relaxants, and possibly a TENS unit. Dr. A's Specific and Subsequent Medical Report (TWCC-64), reflecting claimant's visit on September 11, 1992, noted he had made no improvement, continued conservative treatment, and referred claimant to (Dr. H). Dr. H, a neurosurgeon, examined claimant on October 12, 1992, and reviewed his EMG and nerve conduction studies of November 14, 1991, and two MRI scans of November 1991 and March 2, 1992, respectively. Dr. H's diagnosis was chronic cervical myoligamentous strain syndrome and right lower cervical radiculopathy. He recommended a definitive cervical myelogram and post-myelogram CAT scans and said that if these test were negative, claimant could be released to a work hardening program. Dr. A's report of claimant's November 4, 1992 visit noted his continued pain in the neck with range of motion, slight weakness in the right arm grip strength, and stated he should continue care with Dr. H. A November 5, 1992 report from Dr. H reviewed claimant's myelogram and post-myelogram CAT scan of October 28, 1992, noted claimant has "very slight bulging of the C5-6 disk centrally and to the right," no impingement on the spinal cord or nerve root, recommended against surgery and further testing, indicated claimant could be treated with an anti-inflammatory agent and mild analgesic, and further recommended a work hardening program and a return to work.

According to Dr. S's Report of Medical Evaluation (TWCC-69), accompanied by a narrative report of March 25, 1992, claimant reached maximum medical improvement (MMI)

on March 24, 1992, with a 0% whole body impairment rating. Dr. S obtained x-rays and also reviewed Claimant's EMG and nerve conduction studies and MRI scans. Dr. S also reviewed Dr. A's records, as well as those of a (Dr. M) with whom claimant said he stopped treating because Dr. M told claimant there was nothing wrong with him and would not do anything for him. Dr. S stated he did not demonstrate any positive objective clinical abnormalities and that claimant could return to work with no restrictions.

In his report of the physical examination, Dr. S also noted that claimant performed the ROM of the neck himself within the range of comfort, and that the ROM of his cervical spine shows "marked variability of response and variability of reaction [and] agonistic and antagonistic muscle groups contracting at the same time."

Dr. O's TWCC-69 stated that claimant reached MMI on March 1, 1992, with a 4% whole body impairment rating. In his July 13, 1992 narrative accompanying the TWCC-69, Dr. O stated that MRIs of claimant's cervical spine showed a mild disc bulge and minimal degenerative changes which he considered "very mild" and for which he assigned a 4% impairment rating. In applying the AMA Guides, Dr. O stated he is instructed to add in the loss of ROM but said claimant "invalidated" the ROM studies and "gave such minimal efforts they could not be calculated." Dr. O noted that claimant demonstrated more ROM when tested by the technician. Dr. O also stated that he repeated the cervical tests and claimant "did not come close to arriving at earlier responses," and "just simply invalidated all of these studies." Dr. O stated that this was true of the thoracic area testing as well, that cross-validation could not be obtained, and that on physical examination claimant "invalidated both sensory and strength studies."

Also attached to Dr. O's TWCC-69 was the report of Dr. B's examination. Both Drs. O and B were from the Dallas Impairment and Disability Evaluation Center. According to Dr. B's quite extensive report, the effort put forth by claimant was "questionable" and his ROM of the cervical spine was "practically nil." Dr. B summarized that "[t]he physical examination today revealed a degree of tenderness which was characterized by symptom magnification and inappropriate overreaction."

In Texas Workers' Compensation Commission Appeal No. 92335, decided August 28, 1992, we had occasion to discuss the assignment of impairment ratings and ROM assessments in the context of the AMA Guides. Noting that the AMA Guides address both the protocols for measurements and the evaluative processes, we stated:

"[s]pecifically with regard to ROM of the spine, the Guides set forth the recommended tests and procedures and provide for calculating variability between these tests to see whether the measurements fall within reproducibility guidelines; if they do not, the test is determined to be invalid . . . . Thus the AMA Guides contain safeguards to validate the tests and make them more reliable."

The hearing officer is the sole judge not only of the relevance and materiality of the evidence but also of its weight and credibility. Article 8308-6.34(e). Where, as here, there is sufficient evidence to support the hearing officer's determinations, we do not substitute our judgment. Texas Workers' Compensation Commission Appeal No. 93042, decided March 5, 1993. We find no basis to disturb the hearing officer's determination, based upon the presumptive weight accorded the designated doctor's report, that claimant has a 4% impairment rating. Claimant's assertion that the designated doctor erred in failing to assign additional impairment based on his loss of ROM is without merit.

The decision of the hearing officer is affirmed.

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Philip F. O'Neill  
Appeals Judge

CONCUR:

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Stark O. Sanders, Jr.  
Chief Appeals Judge

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Susan M. Kelley  
Appeals Judge