APPEAL NO. 94149

This appeal arises under the Texas Workers' Compensation Act of 1989 (1989 Act), TEX. LAB. CODE ANN. § 401.001 *et seq*. On January 5, 1994, a contested case hearing was held in (city), Texas, with (hearing officer) presiding. He determined that appellant (claimant) reached maximum medical improvement (MMI) on May 9, 1993, with a 13% impairment rating (IR), of which 38% was attributed to a prior compensable injury (contribution). Claimant asserts that the designated doctor, (Dr. H), did not conduct the examination consistent with Guides to the Evaluation of Permanent Impairment, third edition, second printing, dated February 1989, published by the American Medical Association (Guides); he also states that Dr. H was wrong in stating that surgery to claimant's elbow would lessen elbow impairment. Claimant adds that contribution should not be allowed because his past injury was covered by law prior to the 1989 Act and because Dr. H said that the old injury was non-contributory. (Several submissions were received by claimant in this appeal; only those received within the statutory time allowed were considered. *See* Sections 410.202(a) and 410.203(a)). Carrier replies that the hearing officer should be upheld.

DECISION

We affirm.

Claimant is a mechanic who worked for (employer) when he hurt his back lifting on (date of injury). Claimant had injured his back on September 30, 1989, for which he had lumbar disk surgery on April 17, 1990. A claim for the 1989 injury was filed under the law preceding the 1989 Act, and a settlement was reached. His treating doctor at present, (Dr. S), began seeing claimant in August 1991. He found MMI on April 14, 1993, with 29% impairment, noting that claimant had postoperative changes at L5-S1. His IR included amounts for the cervical area, lumbar area (including range of motion (ROM)), and elbow; Dr. S stated that the IR could vary depending on the outcome of elbow surgery if claimant decided to have it. Claimant introduced no other records from Dr. S. He did testify that he had elbow surgery on September 14, 1993; since then his elbow pain is better, and some of his ROM of the elbow is better--some is worse.

Claimant saw Dr. H on June 16, 1993, pursuant to a letter dated May 18, 1993, calling for Dr. H to do a medical examination of him. The notice specified that the exam was for IR only; it did not indicate that Dr. H was appointed as a designated doctor. (A letter from the Texas Workers' Compensation Commission (Commission) dated November 1, 1993, to Dr. H referred to having appointed him as designated doctor and asked whether pre-existing conditions made up any part of the IR he gave. While claimant took issue with the way Dr. H conducted the examination, he did not suggest that Dr. H was not acting as a designated doctor.) Dr. H assigned no IR for the cervical area based on the absence of objective findings from MRI, CT scan, and other testing. He invalidated a ROM rating in this area although his measured ratings did not vary more than +/- 10% or 5° (*See* page 71 of the Guides which calls for consistency in ROM observations; pain, fear, and inhibition are said to be some reasons why inconsistency occurs.), because, when claimant was not aware his

movement was being scrutinized, he exhibited at least a 50% ROM as compared to measured ranges of motion of 28°, 25°, 30°, and 30°. He allowed eight percent for the lumbar area based on MRI and CT scan; no ROM for the lumbar area was added because Dr. H invalidated ROM testing based on the difference between the ROM shown during the physical exam and that shown during the measured ROM testing. Dr. H then allowed five percent for the elbow based on ROM. A total impairment was said to be 14%, which Dr. H in his testimony at the hearing agreed was 13% based on the eight percent and five percent ratings.

The hearing officer called Dr. H and examined him by telephone at the hearing. The conversation was by speaker phone so that each party could hear the questions and responses. The hearing officer offered each party the opportunity to question Dr. H after he did, but neither chose to ask any questions. In answer to questions by the hearing officer, Dr. H said that he tested lumbar ROM with an inclinometer but invalidated it. He believed that claimant's subsequent elbow surgery would probably decrease the IR (based on ROM) he gave for the elbow. Dr. H added that epicondylitis of the elbow is not a specific disorder calling for a rating. When Dr. H was asked to compare the injury of 1989 to the present injury for purposes of contribution (which was an issue at the hearing), Dr. H considered that the 1989 injury had been estimated to incur an eight percent impairment while the IR he gave was 13%. He then opined that five of the 13% would be based on the 1989 injury. The hearing officer asked if he believed that 5/13 should be attributed to the earlier injury and Dr. H replied affirmatively.

Claimant asserts that Dr. H did not use an inclinometer in the lumbar area. Dr. H says that he did when questioned by the hearing officer. Claimant took exception to Dr. H's sequence of examinations saying that he should have performed the "initial exam before performing other objective tests." The Guides do not indicate that a doctor must first test for ROM before doing his physical examination--if ROM testing is the "initial exam" the claimant addresses. Claimant also says Dr. H "made a presumption by said invalidation that appellant was purposely falsifying his efforts." Neither the Report of Medical Evaluation completed by Dr. H nor his telephone testimony states that Dr. H believed claimant purposely falsified his testing. Dr. H observed inconsistency, but attempted to give no explanation why claimant's actions varied significantly. Claimant also states that his surgery to the elbow conducted after the designated doctor's examination should result in added impairment. While not medical evidence, claimant's own testimony does not indicate that the elbow, after surgery, is impaired to a greater extent. With statutory MMI occurring in May 1993, Dr. H's examination in June 1993 was within a reasonable time, although subsequent to the date of MMI. An IR is to be given at the time the claimant reaches MMI. *See* Section 408.123(a) which provides that an IR be given by the doctor who certified MMI without providing for any delay between the two. *Also see* Section 408.121(a) which provides that impairment income benefits begin the day after an employee reaches MMI. In this case the designated doctor, through his telephone testimony at the hearing, considered the elbow surgery that occurred after MMI. He thought it would not increase the IR. Claimant provided no records from that surgery or any evidence from a doctor to indicate the results of elbow surgery would increase the IR. *See* Texas Workers'

Compensation Commission Appeal No. 94022, decided February 16, 1994, which used an IR that was accurate at the time of MMI, even though surgery had been recommended but not yet performed. *Compare* to Texas Workers' Compensation Commission Appeal No. 93856, decided November 4, 1993, in which surgery was performed past the date of statutory MMI because of Commission delay in approving it. The evidence did not warrant a finding that the designated doctor's opinion as to IR had been overcome by the great weight of other medical evidence.

The hearing officer is the sole judge of the weight and credibility of the evidence. *See* Section 410.165. He could believe Dr. H when he answered the hearing officer's question by saying that he had used an inclinometer in the lumbar area. The hearing officer admitted Dr. H's report as his own exhibit and then called Dr. H by telephone during the hearing to examine him regarding allegations that he did not use the inclinometer; the hearing officer additionally queried Dr. H as to the question of contribution from one injury to the other. When the hearing officer offered the other parties the opportunity to ask questions of Dr. H, claimant did not choose to do so although he could have asked about the sequence of the examination, whether Dr. H thought claimant was falsifying his efforts, and what Dr. H specifically observed that caused him to invalidate ROM testing. Dr. H's report, his correspondence to the Commission dated November 18, 1993, addressing contribution, and his telephone testimony sufficiently support the hearing officer's finding of fact that the designated doctor conducted his examination consistently with the Guides.

Claimant also disputes that any contribution should be allowed since his prior injury occurred under a different workers' compensation law. Texas Workers' Compensation Commission Appeal No. 92549, decided November 24, 1992, concluded that a compensable injury under the law prior to the 1989 Act qualified for contribution in regard to a compensable injury under the 1989 Act. The hearing officer did not err in considering contribution from a pre-1989 Act compensable injury in regard to the injury in question at this hearing. Claimant adds that Dr. H said the old injury was "non-contributory." Dr. H's report does not indicate that, and his letter to the commission dated November 18, 1993, contradicts this assertion; in that letter, Dr. H speaks of "aggravation" of claimant's prior condition.

The Appeals Panel will not reverse a decision of the hearing officer based on factual determinations unless the decision is against the great weight and preponderance of the evidence. *See* In re King's Estate, 150 Tex. 662, 244 S.W.2d 660 (1951). In this instance the decision and order are not against the great weight and preponderance of the evidence and are affirmed.

Joe Sebesta
Appeals Judge

CONCUR:

Robert W. Potts
Appeals Judge

Gary L. Kilgore
Appeals Judge