APPEAL NO. 94308

This appeal is brought pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act). On February 8, 1994, a contested case hearing (CCH) was held in (city), Texas, (hearing officer) presiding as hearing officer. The issues presented for resolution were:

1.What is CLAIMANT'S correct maximum medical improvement date?

2.What is CLAIMANT'S correct impairment rating?

The hearing officer determined that the claimant's correct impairment rating (IR) is seven percent with a maximum medical improvement (MMI) date of July 20, 1993, as determined by the designated doctor.

Appellant, claimant herein, contends that the IR was improperly calculated and he was not allowed to show how the calculation was incorrect. Claimant states that he is "not satisfied with the decision." Respondent, carrier herein, responds that the decision is supported by the evidence and requests that we affirm the decision.

DECISION

The decision and order of the hearing officer are affirmed.

Claimant testified through a translator, that he injured his back on (date of injury), at his place of employment. Claimant testified he was treated at a local medical clinic and either saw (Dr. B) at the clinic or shortly thereafter. Dr. B referred claimant to (Dr. M) who apparently first saw claimant on September 14, 1992. Dr. M became claimant's treating doctor and saw claimant a number of times. In a report dated November 12, 1992, Dr. M diagnosed claimant as having:

Spinal stenosis, L4-L5 secondary to bulging disc. Minimal spinal stenosis, L3-L4.

In a Report of Medical Evaluation (TWCC-69) dated May 17, 1993, Dr. M certified MMI on May 12, 1993, with a seven percent whole body IR. Attached to the TWCC-69 is a September 14, 1992, report giving a diagnosis of "Degenerative disc disease, L-4 and L5. Herniated nucleus pulposus, L4. Spinal stenosis L4-L5." The TWCC-69 indicated on its face that Dr. M had considered range of motion (ROM) and had used the "AMA Guides to Evaluation of Permanent Impairment, Third edition" (AMA Guides). Claimant's attorney, at the time (claimant was not represented in the CCH and in this appeal) by letter dated June 23, 1993, disputed Dr. M's IR and MMI date.

By letter dated June 30, 1993, the Texas Workers' Compensation Commission (Commission) appointed (Dr. O) as a Commission selected designated doctor to determine MMI and impairment. Claimant on July 20, 1993, requested a change of treating doctors stating he was not satisfied with Dr. M's treatment and requesting a change to (Dr. H). Dr.

H, in an Initial Medical Report (TWCC-61), diagnosed claimant as having a "thoracic sprain, lumbar discogenic syndrome."

In the meantime, claimant was examined by Dr. O, the designated doctor, who, by TWCC-69 and four and a half page narrative, both dated July 20, 1993, certified MMI on July 20, 1993, and assessed a seven percent IR. Dr. O's narrative report contains a history, results of Dr. O's examination, review of available medical reports and notations of ROM measurements. Dr. O noted in his narrative that "Motion of the back in the standing position, barely a few degrees of motion; however, the patient was able to sit well and have the raising leg test in the sitting position." Dr. O indicated his seven percent IR "is based on the specific disorders of the lumbar spine, Table 49, page 73 2c."

A benefit review conference (BRC) on December 13, 1993, recorded claimant's position to be that claimant is treating with Dr. H and that he has not yet reached MMI. At the CCH, claimant testified that Dr. O only took one set of measurements of ROM. Both claimant and carrier offered into evidence Dr. O's TWCC-69 and narrative of July 20, 1993. Carrier had no objection to claimant's exhibit until it was noted by the hearing officer that an additional page had been added to Dr. O's report, which used the various measurements in ROM to arrive at a "Total impairment due to ROM = 17%," added the 17% to "impairments to disorders of spine = 7% Table 49, page 91" to arrive at a "Total [IR] = 23% Using combined values chart." Commentary below the computation was that Dr. O's seven percent IR:

> WHICH IS WRONG WITH HIS OWN MEASUREMENT, AND ACCORDING TO THE AMA "GUIDES TABLES."
>
> THIS IS ENOUGH EVIDENCE TO ANNUL [DR. O'S] REPORT. [Emphasis in the original.]

Claimant refused to testify as to whom had performed the calculations. The ombudsman urged that Dr. O's report should be "annulled" because Dr. O had not performed the ROM measurements six times before invalidating the ROM measurements. The hearing officer refused to exclude the additional sheet appended to Dr. O's report as urged by carrier, stating he would accord it appropriate weight. Subsequently, the hearing officer in the discussion portion of his decision stated that since claimant " . . . refused to authenticate the one page document. Therefore, since the one page letter is not a medical document and it was not authenticated, no weight or credibility will be given to it." The hearing officer gave presumptive weight to the designated doctor's rating, found the other medical evidence was not contrary to the designated doctor's report and determined the correct IR to be seven percent with an MMI date of July 20, 1993.

Claimant's appeal was that he ". . . brought evidence to show that % was calculated wrong, and was not able to present because I would not advise judge who helped and showed me how to calculate. I am not satisfied with the decision."

First, we would note that the report of a Commission appointed designated doctor is given presumptive weight. Sections 408.122(b) and 408.125(e). The amount of evidence needed to overcome the presumption, a "great weight," is more than a preponderance, which would be only greater than 50%. *See* Texas Workers' Compensation Commission Appeal No. 92412, decided September 28, 1992. Medical evidence, not lay testimony, is the evidence required to overcome the designated doctor's report. Texas Workers' Compensation Commission Appeal No. 92164, decided June 5, 1992. *See also* Texas Workers' Compensation Commission Appeal No. 93872, decided November 15, 1993.

Claimant appears to be arguing that using the designated doctor's calculations, Dr. O would have to repeat those calculations six times before ROM could be invalidated. This case does not seem to be purely a situation where ROM is invalidated because the doctor was unable to obtain consistent ROM measurements. Dr. O is inferentially saying that claimant was able to perform some motions, which he at other times indicated were too painful to perform. We note that there may be cases where a valid ROM cannot be obtained and in those cases it may be appropriate to assign zero impairment for invalidated ROM testing. We do not believe, that as a matter of law, the AMA Guides mandate that an IR involving ROM can never be rendered until, if ever, a valid ROM can be determined. *See* Texas Workers' Compensation Commission Appeal No. 92494, decided October 29, 1992, and Texas Workers' Compensation Commission Appeal No. 93681, decided September 20, 1993. In Appeal No. 92494, *supra*, the Appeals Panel reversed a hearing officer's decision returning a report to the designated doctor for retests "until valid results are obtained" when the doctor noted "obvious symptom magnification . . . and multiple inconsistences." In this case, Dr. O obviously noted some limitation of motion but refused to assign an IR on these limitations because he did not believe that claimant actually had that limitation, as evidenced when claimant was performing other tests. This then becomes a matter of medical judgement. Dr. O's failure to assign the ROM impairment that claimant thought appropriate, based on his calculations, does not "annul" the designated doctor's report.

Upon review of the record submitted, we find no reversible error and we will not disturb the hearing officer's factual determinations unless they are so against the great weight and preponderance of the evidence as to be manifestly unjust. In re King's Estate, 150 Tex. 662, 244 S.W.2d 660 (1951); Pool v. Ford Motor Co., 715 S.W.2d 629, 635 (Tex. 1986). We do not so find and consequently, the decision and order of the hearing officer are affirmed.

Thomas A. Knapp
Appeals Judge

CONCUR:

Philip F. O'Neill
Appeals Judge

Gary L. Kilgore
Appeals Judge