APPEAL NO. 980018

This appeal arises pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act). A contested case hearing was held on November 24, 1997. With respect to the issues before her, the hearing officer determined that the appellant (claimant) reached maximum medical improvement (MMI) on December 6, 1996, with an impairment rating (IR) of zero percent as certified by the designated doctor selected by the Texas Workers' Compensation Commission (Commission). In his appeal, the claimant essentially argues that the great weight of the other medical evidence is contrary to the designated doctor's IR and asks that we adopt the 11% IR of his treating doctor. In its response, the respondent (self-insured) urges affirmance. Neither party appealed the determination that the claimant reached MMI on December 6, 1996, and that determination has become final under Section 410.165.

DECISION

Affirmed.

It is undisputed that the claimant sustained a compensable injury on _____, when he slipped and fell at work. The claimant testified that he injured his back, shoulders and right hand in the fall. The claimant's initial treating doctor was (Dr. G). On June 24, 1996, a lumbar MRI was performed on the claimant. It was interpreted as revealing degenerative disc disease from L2-S1. In addition, the MRI report stated that "[a] very early posterior subligamentous disc herniation could also be present" at L5-S1.

On August 30, 1996, (Dr. N) examined the claimant at the request of the self-insured. In a Report of Medical Evaluation (TWCC-69) dated September 11, 1996, Dr. N certified that the claimant reached MMI on August 30, 1996, with an IR of zero percent. In the narrative report accompanying his TWCC-69, Dr. N noted that the claimant had degenerative disc disease at all lumbar levels, with no evidence of focal herniation. The claimant's range of motion (ROM) testing revealed that he had four percent lumbar flexion impairment; however, Dr. N noted that "[t]he limitation of motion with regard to the back is, in my opinion, attributable to voluntary restriction." Dr. N concluded his report by stating that his examination did not reveal any objective findings; thus, he concluded that the claimant's IR was zero percent. On September 24, 1996, Dr. G indicated that he agreed with Dr. N's certification of MMI and IR.

The claimant disputed Dr. N's certification and the Commission selected (Dr. K) to serve as the designated doctor. Dr. K examined the claimant on December 6, 1996. Dr. K completed a TWCC-69 on December 17, 1996, certifying that the claimant reached MMI on December 6, 1996, with an IR of zero percent. In his narrative report, Dr. K stated that the examination "revealed no localizing objective signs," noting that the claimant's MRI "does not report any focal disc herniation or nerve root compression." Dr. K also noted "[a] considerable degree of symptom magnification with inappropriate response, verbalization and abnormal pain response . . . ." Dr. K's ROM testing demonstrated that the claimant

had a four percent impairment for loss of lumbar flexion ROM; however, he did not assign a rating for loss of ROM because he concluded that it was attributable to "voluntary restriction."

At some point, the claimant changed treating doctors to (Dr. R). In a letter dated January 27, 1997, Dr. R stated his disagreement with Dr. K's certification. Dr. R noted that the June 24, 1996, MRI had shown a herniation at L5-S1; thus, he concluded that the claimant should have been assigned a seven percent rating 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). In addition, Dr. R opined that Dr. K had improperly invalidated the claimant's four percent lumbar flexion ROM impairment. Dr. R concluded that if the AMA Guides were applied correctly, the claimant would have an 11% IR. On February 28, 1997, a Commission benefit review officer (BRO) sent Dr. R's letter criticizing Dr. K's certification to Dr. K for review and comment as to whether it changed his opinion. In a letter dated April 29, 1997, Dr. K, responded in relevant part, as follows:

> I have reviewed the chart of [claimant], as well as the notes from [Dr. R]. It is my opinion that [MMI] was achieved on the date I examined [claimant]. It is also my opinion that the restriction of motion that I marked on the chart was voluntary and not truly functional.
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> I did not feel that a disc herniation was present, subligamentous or otherwise. I maintain my original assessment.

In a "To Whom it May Concern" letter of September 2, 1997, Dr. R assigned an 11% IR, which was comprised of seven percent for a specific disorder of the lumbar spine and four percent for loss of lumbar flexion ROM.

Under the 1989 Act, a report of a designated doctor is to be given presumptive weight, unless the great weight of other medical evidence is contrary thereto. Sections 408.122(b) and 408.125(e). We have consistently noted the unique position that a designated doctor's report occupies under the 1989 Act. *See* Texas Workers' Compensation Commission Appeal No. 92495, decided October 28, 1992, and Texas Workers' Compensation Commission Appeal No. 92412, decided September 28, 1992. Further, we have stated that "it is not just equally balancing evidence or a preponderance of the evidence that can outweigh [a designated doctor's] report but only the `great weight' of the other medical evidence that can overcome it." *Id.*

The correct IR is a question of fact. The hearing officer is the sole judge of the relevance, materiality, weight and credibility of the evidence offered. Section 410.165(a). As the finder of fact, the hearing officer is required to resolve the conflicts in the evidence, including the medical evidence. Texas Employers Ins. Co. v. Campos, 666 S.W.2d 286 (Tex. App.-Houston [14th Dist.] 1984, no writ). In this instance, as noted above, the difference between the opinions of Dr. K and Dr. R is attributable to the fact that Dr. R

assigned a rating for a loss of lumbar ROM and for a specific disorder of the lumbar spine, while Dr. K assigned a zero percent IR. Dr. K explained that he was not assigning a rating under Table 49 because of the lack of objective findings and that he was not assigning a rating for loss of lumbar ROM because he believed that the deficits were the result of voluntary restrictions. We have previously noted that a designated doctor may invalidate ROM based on observation and clinical experience. Texas Workers' Compensation Commission Appeal No. 970499, decided May 1, 1997; Texas Workers' Compensation Commission Appeal No. 960311, decided March 27, 1996. The decision to include or not to include a rating for a component and the decision of whether or not measured ROM deficits result from the compensable injury represent medical differences of opinion. The statute gives presumptive weight to the designated doctor's reconciliation of such differences. We conclude that the evidence was sufficient to support the hearing officer's determination that Dr. R's opinion did not rise to the level of the great weight of the medical evidence contrary to Dr. K's report; therefore, the hearing officer properly accorded Dr. K's report presumptive weight, adopting the zero percent as the claimant's correct whole body IR.

Given the limited nature of the claimant's challenge to Dr. K's certification at the hearing and on appeal, we affirm.

Elaine M. Chaney
Appeals Judge

CONCUR:

Gary L. Kilgore
Appeals Judge

Tommy W. Lueders
Appeals Judge