APPEAL NO. 990363

This appeal arises pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act). On January 21, 1999, a contested case hearing (CCH) was held. She (hearing officer) determined that: (1) the compensable injury of the respondent (claimant) is not a producing cause of claimant's cervical spondylosis and thoracic spine spondylosis; (2) appellant (carrier) did not timely contest the compensability of the cervical and thoracic spondylosis but that there was no carrier waiver because there was no cervical/thoracic injury; and (3) claimant's impairment rating (IR) is 20%. Carrier appealed only the determination regarding the IR. The parties did not appeal the determinations regarding producing cause or carrier waiver. The appeals file does not contain a response from claimant.

DECISION

We reverse and remand.

Carrier contends the hearing officer erred in determining that claimant's IR is 20%. Carrier agrees that the hearing officer properly subtracted any impairment for the cervical and thoracic spine, since the hearing officer found that the injury did not involve claimant's cervical or thoracic spine. Carrier complains, however, that the designated doctor, Dr. B, "mistakenly compounded impairment for what he perceived to be weakness in each of the different nerve roots, and upon adding those together, stated the claimant had a [90%] impairment of the lower extremity." Carrier asserts that electro-diagnostic studies do not support any weakness in the various nerves rate by the designated doctor and states that a herniation at L5-S1 cannot affect those nerves.

The report of a Commission-selected designated doctor is given presumptive weight with regard to maximum medical improvement status and IR. Sections 408.122(b) and 408.125(e). The amount of evidence needed to overcome the presumption is the "great weight" of the other medical evidence. *See* Texas Workers' Compensation Commission Appeal No. 92412, decided September 28, 1992.

The 1989 Act provides that the hearing officer is the sole judge of the weight and credibility of the evidence. Section 410.165(a). Where there is a conflict in the evidence, the hearing officer resolves the conflicts and determines what facts have been established. As an appeals body, we will not substitute our judgment for that of the hearing officer when the determination is not so against the great weight and preponderance of the evidence as to be clearly wrong or manifestly unjust. Cain v. Bain, 709 S.W.2d 175, 176 (Tex. 1986); Texas Workers' Compensation Commission Appeal No. 950456, decided May 9, 1995.

In his May 11, 1998, Report of Medical Evaluation (TWCC-69), the designated doctor certified that claimant's IR is 25%. The designated doctor's IR included 13% impairment for specific disorders of the lumbar, thoracic, and cervical spine (seven percent was for the lumbar spine) and 14% impairment for loss of strength, which combined to a

25% IR. The hearing officer determined that the IR should not include the four percent impairment for the cervical spine or the two percent impairment for the thoracic spine and reduced the IR to 20%. The hearing officer apparently combined the seven percent impairment for specific disorders of the lumbar spine with the 14% neurological impairment to arrive that the 20% IR she found. Carrier did not dispute the seven percent impairment for specific disorders. Carrier disputed only the 14% neurological/muscle strength impairment found by the designated doctor.

To arrive at the 14% impairment for loss of muscle strength, it appears that the designated doctor used Table 47 to find a percentage of impairment for the lower extremity due to loss of muscle strength regarding five muscles in the lower extremity. The designated doctor stated that he found a "90% lower extremity impairment." It appears that the designated doctor arrived at the 90% by combining the percentage of impairment for loss of function due to loss of strength for each of five muscles under Table 47. He then multiplied the 90% by the 20% from Table 11a(2), and arrived at what he said was an "18% lower extremity impairment," which equaled a seven percent whole person impairment under Table 42. He then combined seven percent impairment for the left lower extremity with seven percent impairment for the right lower extremity and found 14% total impairment for loss of muscle strength.

The record reflects that: (1) February 1998, the treating doctor, Dr. R, found "no apparent motor deficit" in muscle testing of the lower extremities; (2) the treating doctor found that there was "normal sensation" in the lower extremities; (3) the treating doctor noted that claimant's station and gait were normal; (4) no doctor noted atrophy in claimant's lower extremities; (5) in January 1998, Dr. W examined claimant and found no obvious signs of weakness or atrophy; (6) Dr. W said there is no major sensory loss except minimally on the left, particularly in the S1 dermatome; (7) Dr. W stated that claimant's herniated disc at L5-S1 is the cause of claimant's S1 radiculopathy "but at this point the patient clinically does not have any neurological deficit and pain"; (8) Dr. W said that as of January 1998, claimant's radiculopathy seemed to have resolved and the degree of denervation was very minor; and (9) the treating doctor certified that claimant's IR is nine percent, which includes seven percent impairment for lumbar specific disorders and two percent for loss of lumbosacral range of motion (ROM).

We remand this case for t[1]he hearing officer to seek further clarification from the designated doctor regarding the impairment for loss of muscle strength. The Commission apparently had forwarded a copy of a letter from Dr. C, carrier's independent medical examination doctor, to the designated doctor. In his September 24, 1998, letter, the designated doctor quoted from Dr. C's June 16, 1998, letter and stated that the spinal nerve root is not the only cause of muscle weakness and said that such weakness may be caused by trigger points, facet syndrome, scar tissue, and "several other mechanical entities." However, the designated doctor did not rate these other "entities" but instead included impairment for loss of muscle strength caused by peripheral nerve damage pursuant to Table 47 and did not explain why he did not apply Table 45 regarding any impairment for loss of muscle strength caused by impairment to the S1 nerve roots.

[1]Dr. C questioned the designated doctor's methodology but did not offer an alternate computation.

On remand, the hearing officer should inform the designated doctor that: (1) Table 45 of the AMA Guides provides values for the spinal nerve roots that are most frequently involved in the permanent impairment of the lower extremity; (2) the September 1997 MRI report indicates that the nerve roots involved from claimant's injury are the S1 nerve roots; (3) it appears that the designated doctor attempted to rate loss of strength regarding peripheral nerves in muscle groups not enervated by the S1 nerve roots; (4) an example of how loss of function due to loss of strength after a spinal nerve root impairment is rated is set forth on page 40 of the AMA Guides; (5) under that example, a spinal nerve root (C5) was impaired and Tables 11 and 12 for "Unilateral Spinal Nerve Root Impairment Affecting the Upper Extremity" were used to calculate the appropriate percentage of impairment; (6) the corresponding table for "Unilateral Spinal Nerve Root Impairment Affecting the *Lower* Extremity" is Table 45.

At pages 40 and 69, the AMA Guides indicate that lower extremity loss of function due to loss of strength after a spinal nerve root impairment is to be rated using Tables 11 and 45, as generally described in the example on page 40. The hearing officer should inquire of the designated doctor whether AMA Guides indicate that, because it is a *spinal* injury and not an injury to the lower extremity, the focus should be on rating the spinal nerve root impaired rather than compiling a rating regarding the peripheral nerves regarding each muscle in the lower extremity. The hearing officer should inform the designated doctor that: (1) the AMA Guides state on page 68 that Table 47 relates to the peripheral nerve roots; (2) the injury in this case was not to the lower extremity itself; and (3) the medical evidence from Dr. C indicates that any loss of function due to loss of strength in claimant's lower extremity in this case is due to the S1 nerve roots.

We reverse the hearing officer's determination giving weight to the current report of the designated doctor and we remand this case for the hearing officer to seek clarification from the designated doctor, and for further proceedings consistent with this decision. We reverse only that part of the hearing officer's decision and order that concerns claimant's

IR. Pending resolution of the remand, a final decision has not been made in this case. However, since reversal and remand necessitate the issuance of a new decision and order by the hearing officer, a party who wishes to appeal from such new decision must file a request for review not later than 15 days after the date on which such new decision is received from the Texas Workers' Compensation Commission's Division of Hearings, pursuant to Section 410.202. *See* Texas Workers' Compensation Commission Appeal No. 92642, decided January 20, 1993.

Judy Stephens
Appeals Judge

CONCUR:

Susan M. Kelley
Appeals Judge

Thomas A. Knapp
Appeals Judge