APPEAL NO. 990744

This appeal arises pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act). On January 28, 1999, a hearing was held. He determined that appellant/cross- respondent's (claimant) date of maximum medical improvement (MMI) is May 15, 1997, and that her impairment rating (IR) is 16%. Claimant asserts that she needs to be evaluated by a psychiatrist, stating that the Texas Workers' Compensation Commission (Commission) failed by not sending her directly to be evaluated by a psychiatrist instead of returning her to the designated doctor. Claimant wants to be rated for depression. Respondent/cross-appellant (carrier) asserted that part of the 16% IR (lumbar spine) was not based on the compensable injury so the IR should be 10% as also found by the designated doctor, or 11% as found by another doctor. Both carrier and claimant replied to the other's appeal. Claimant included many documents in her reply which were also part of the record; one copy of part of a benefit review conference (BRC) report and a letter from carrier had not been made part of the record and will not be considered on appeal; claimant also provided factual assertions in her reply that were not part of her testimony; they too, will be disregarded on appeal. There was no new evidence presented in the claimant's reply that could warrant a remand to the fact finder for another determination. Claimant also faxed a medical report from Dr. R dated May 20, 1999, to the Appeals Panel with no showing that a copy had been provided to carrier. This document provided no new information as to the issues under consideration, was not considered, and does not require a remand to the fact finder for another determination.

DECISION

We affirm in part, and reverse and render in part.

Claimant worked for (employer) on _____, when, she testified, she lifted her large chair to place it behind her desk; she said she did not see a doctor for two days because she thought she had a crick in her neck. The record in this case contains no treatment records from 1995; it has some records of treatment for depression in 1996, with only one document from Dr. M, a neurosurgeon, in 1996 that addresses her injuries other than depression; he stressed the need for psychiatric treatment to aid in treatment of her spine; in that regard he did say that physical therapy had "markedly helped her pain" but this letter did not state whether he was addressing a cervical or lumbar injury.

Prior to the hearing under review, which considered only MMI and IR, there had been a hearing held on April 13, 1998, which was made part of the record in this case. The issues at the 1998 hearing included only IR and whether carrier timely controverted depression and a lumbar injury. The hearing officer at the hearing under review found that the 1998 hearing had not been appealed and therefore became final; no appeal was taken to this finding of fact, and the record under review provides no indication that the 1998 decision did not become final. The 1998 decision found that claimant "sustained an injury to her neck only from picking up [her] chair." Also found was that the carrier did not timely contest either a low back injury or depression. The hearing officer decided that the

designated doctor, Dr. K, had not evaluated claimant for depression; he ordered the Commission to direct Dr. K to:

> [E]valuate claimant for depression and assign an [IR], in conformity with the Guides [Guides to the Evaluation of Permanent Impairment, third edition, second printing, dated February 1989, published by the American Medical Association], which includes claimant's neck injury, her back injury, and her depression. If [Dr. K] fails or refuses to evaluate claimant for depression and assign an [IR], in conformity with the Guides, which includes claimant's neck injury, her back injury, and her depression, the [Commission] shall appoint another designated doctor who will evaluate claimant for depression and assign an [IR], in conformity with the Guides, which includes claimant's neck injury, her back injury, and her depression.

Prior to Dr. K's first report, there had been one IR; it was provided by Dr. D, who states in his report that claimant was referred to him by Dr. M (referred to previously). In March 1997, Dr. D provided an IR of 11%, based on five percent for loss of range of motion (ROM) of the cervical spine and six percent for Section IIC, Table 49 of the Guides (specific disorder of the cervical spine). Dr. D's "Impression" included reference to an "acute lumbar strain with resolution of symptoms."

Claimant disputed this IR. Dr. K was appointed as designated doctor. On May 15, 1997, Dr. K examined claimant. He stated that claimant had pain in her shoulder, neck and back when lifting a chair on _____. He said that the examination "is in regard to her neck per instructions from the [Commission] as a designated doctor." He noted her statement that she "is depressed." Her "symptoms" included low back pain. He said that records provided included documents from (hospital), Dr. R, Dr. B (who provided the psychiatric notes from 1996 included in this record), Dr. M, a pain clinic, and physical therapy. Dr. K said those records showed C5-6 and C6-7 disc protrusions with spondylosis "as well as lumbosacral sprain." He noted that he was provided MRIs of the neck and low back, noting the abnormalities in the cervical area just mentioned. He added, "the lumbar MRI study is not particularly remarkable except for some disc desiccation changes." He gave five percent for cervical ROM limitations and six percent for a specific disorder of the cervical spine, but he "combined" these to result in a "10%" IR. His date of MMI was May 15, 1997.

Dr. K then provided a report dated November 25, 1997, in which he recited that, at the request of the Commission, he examined claimant again on November 13, 1997, in regard to her back. He noted that the MRI of the lumbar spine does show disc desiccation (as he also stated in his May report) at L2-3, with mild disc bulging. Dr. K noted that claimant had a work-related injury "that she feels has resulted in continuing low back pain," adding that this pain is significant. He states that the MRI shows abnormalities "indicating pre-existent degenerative lumbar disc disease probably with some mild instability at the L2 level." Dr. K noted that he had stressed the need for "education, weight reduction, and a graduated exercise program," but added that based upon his discussion with claimant in November the "educational process has not taken place." He said that "her MRI

abnormalities are obviously pre-existing." He later provided an IR of seven percent "based on MRI abnormalities," adding, "one must understand that this MRI abnormality is pre-existing." The only thing that Dr. K mentioned in this report in regard to the injury of _____, as causative in relation to the low back was claimant's pain, "based upon her history."

Dr. K then wrote on December 9, 1997, that he had recently been asked by the Commission to clarify his two past examinations, more specifically, to combine the cervical and lumber IR. He replied that such combining resulted in a 16% IR, without commenting further about the efficacy of the IR. It is this letter upon which the determination of the hearing officer as to IR was based.

The next report of Dr. K is dated January 16, 1998, and is attached to a new Report of Medical Evaluation (TWCC-69) dated April 9, 1998. Dr. K refers to the reason for the report as a letter from the carrier's adjuster dated December 12, 1997 (just subsequent to Dr. K's December 7, 1998, letter combining the IRs). *See* Section 408.125(f) which restricts communication with a designated doctor. There was no issue or litigation at the hearing regarding such communication, and objection to admission of this report (along with objection to other reports) was only based on the fact that the 1998 hearing had already determined which injuries were to be rated (relevancy). All Dr. K's reports were admitted without error. Claimant's appeal does point out that the adjuster wrote to Dr. K. This report and the TWCC-69 of April 1998 basically repeat Dr. K's statement that the lumbar IR was based on objective findings that preexisted the compensable injury and, therefore, it is cumulative. While this report was considered, it was not necessary to the decision reached.

Finally, Dr. K in July 1998 (after the April 1998 hearing officer's decision that became final) wrote to the Commission saying that at the Commission's request, claimant "was to be reexamined by me . . . ." He stated that as he entered the examining room, "a young man was sitting in a chair with a video camera filming as I came through the door." He said he explained that his past examinations had been "careful and thorough." He then said that due to "her letter," the "video filming, and her obvious anger and abusive comments, I did not wish to stay in the room . . . ." He said he told her, after "several minutes" that he would "not stay and listen to this abuse." Dr. K said that claimant followed him into the hallway and "pursued me" until he entered his office and shut the door. He asked the Commission to "discontinue sending [claimant]" to him. No IR for psychological reasons resulted from that short meeting.

The record indicates that a BRC report was referred to which addressed the appointment of a second designated doctor, Dr. Ki, and an examination to be performed by Dr. Ki on September 15, 1998. The benefit review officer (BRO) noted that claimant appeared at that exam with her video camera and Dr. Ki terminated the exam. It was also stated that at a December 1998 BRC claimant said she would not attend an MMI and IR exam "without video taping the exam." The BRC report then said that a third designated doctor was not appointed.

While comments in a BRC are generally not relied upon as evidence, the record in this case shows that claimant in cross-examination agreed that she went to the last examination to be performed by Dr. K with a video camera, and Dr. K refused to examine her. She agreed that the Commission then asked her to go to a different designated doctor, Dr. Ki. Claimant agreed that when she went to Dr. Ki she again had her son and the video camera. Claimant was then asked, "and [Dr. Ki] refused to do the examination with the video camera present, correct?" Claimant replied, "correct." Claimant then agreed that a BRC was then held at which she was asked whether she would go back to another doctor. After some comments not on point to the question, claimant said "if I am sent to a psychiatrist for a psychiatric exam, I will not take a video camera." The carrier then asked if the comment in the BRC report was correct that said, "claimant indicated she would not submit to a[n] MMI and IR exam without videotaping the exam–," to which claimant replied, "right" apparently before the question was finished. The question continued, "–therefore–okay. That's a true statement?" Claimant replied, "that's what I meant." With this corroboration of the BRC report, a remand to obtain the letter appointing Dr. Ki and his response is not necessary.

Using the 1998 hearing officer's decision (unappealed) as a guide, the record shows that claimant was returned to Dr. K but that he failed to consider the psychological injury and did not determine, or request a consult from a psychiatrist to help him determine, whether such psychological injury was permanent and therefore subject to some IR if there were objective clinical or laboratory findings in regard to that injury. *See* Section 408.122(a). Clearly, Dr. K did not refuse to evaluate claimant; he scheduled an appointment and was prepared to evaluate her on July 23, 1998. Claimant, by her actions, attempted to dictate a condition to the examination that is not provided for in the 1989 Act (*compare to* Section 408.004(d) which allows a claimant to have a doctor of her choice observe an examination by a required medical examination conducted at the request of the carrier; *also see* Texas Workers' Compensation Commission Appeal No. 951522, decided October 20, 1995, which said a claimant has no right to have her doctor present at an examination by the designated doctor.) In effect, it was claimant's actions, not Dr. K's, that resulted in Dr. K's failure to consider the psychological injury in regard to IR.

Nevertheless, the Commission adhered to the further direction of the hearing officer in the 1998 decision, which called for appointment of another designated doctor to evaluate claimant "for depression and assign an IR in conformity with the Guides, which includes claimant's neck injury, her back injury, and her depression," by appointing Dr. Ki to evaluate claimant. (We note that the hearing officer did not merely say that claimant should be referred to a psychiatrist for the psychological injury IR but said that a new designated doctor should be appointed to address the neck, back, and depression "if [Dr. K] fails or refuses . . . .) As stated, the 1998 decision became final when there was no appeal.

After Dr. Ki refused to evaluate the claimant, the Commission, through the statements in the BRO's report, considered it not appropriate to appoint a third doctor, after claimant indicated that the video would be used for any exam other than just the psychiatric portion.

The hearing officer is the sole judge of the weight and credibility of the evidence. *See* Section 410.165. Claimant appeals the absence of any IR for her psychological injury in the 16% IR determined to be appropriate. Texas Workers' Compensation Commission Appeal No. 980996, decided June 22, 1998, expresses the general rule that a hearing officer's decision, based on a designated doctor's IR that does not consider all the injury, will be remanded to determine the extent of injury and then to have the designated doctor address the injuries in determining IR. In the case under review, the 1998 hearing officer's decision clearly shows that there are three injuries to be considered, a cervical injury, a lumbar injury (based on failure to timely dispute compensability) and a psychological injury (again based on failure to timely dispute compensability). After that decision, the designated doctor, Dr. K, was asked to provide an IR that included all the injury, including the psychological aspect. When no report was forthcoming which addressed the psychological component, the Commission appointed a new designated doctor, Dr. Ki. He provided no report addressing any IR for any injury. As stated, the circumstances indicate that neither doctor refused to provide such a report but that the claimant's conditions for conducting an examination were not accepted by either doctor. After examining the record, including claimant's testimony on cross-examination, we conclude that the Commission's determination not to appoint a third designated doctor was not arbitrary and was based on sufficient evidence concerning claimant's conduct; we therefore do not remand for appointment of a third designated doctor to provide an IR for claimant.

The carrier on appeal questions the assignment of any IR for the lumbar spine. Texas Workers' Compensation Commission Appeal No. 941052, decided September 19, 1994, indicated that an injury, found to be compensable through a failure to dispute compensability, may be the basis for disability determinations, certification of MMI, and assignment of IR, just as if the injury had been found to be compensable on the merits. However, it pointed out that to have IR there must be a showing of "permanent" impairment from the compensable injury. *See* Section 401.011(24). *Also see* Section 408.122(a) which requires impairment income benefits to be based on objective clinical or laboratory findings. Appeal No. 941052 said that where an aggravation injury has resolved and no permanent impairment resulted therefrom as found by the designated doctor and accepted by the hearing officer, then there is no basis to award any IR. It compared this result to that in Texas Workers' Compensation Commission Appeal No. 94392, decided May 13, 1994, where IR was allowed because the designated doctor could not separate the effects of a preexisting injury from the compensable injury.

In Texas Workers' Compensation Commission Appeal No. 950903, decided July 13, 1995, the designated doctor discussed that claimant's cervical problems but provided no IR based on normal studies. The Appeals Panel stated that a compensable injury and no IR regarding that injury are "not necessarily at odds." In Texas Workers' Compensation Commission Appeal No. 960528, decided April 24, 1996, the Appeals Panel reversed and rendered that the IR was zero percent after the hearing officer had found IR based on age and build with none attributed to the compensable injury. In Texas Workers' Compensation Commission Appeal No. 961885, decided November 6, 1996, the Appeals Panel again reversed an IR determination of 20% and rendered that the IR was zero percent. In that case, the designated doctor said the IR was 20% but also said it was all from an earlier

injury; that doctor also said there was "no objective evidence consistent with an acute spine injury"–the compensable injury did not cause permanent impairment. Texas Workers' Compensation Commission Appeal No. 972065, decided November 7, 1997, affirmed no IR for depression when the designated doctor said that the depression would improve with appropriate care but also said that with back pain that claimant will have "persistent depression." Most recently, Texas Workers' Compensation Commission Appeal No. 982980, decided February 4, 1999, considered a case in which a designated doctor stated that the compensable injury "resolved" in 90 days so he gave a zero percent IR, noting degenerative changes amounted to a seven percent IR, but those changes were not due to the injury in issue. The hearing officer found the great weight of other medical evidence contrary to the designated doctor and did assign an IR. The Appeals Panel found the hearing officer's decision to be against the great weight of the evidence and reversed it, rendering that the IR was zero percent.

These cases are consistent with Section 401.011(24) which says that an IR results from permanent impairment resulting from a compensable injury. As such, the determination that the IR is 16% is against the great weight and preponderance of the evidence. Dr. K, in his November 1997 report (issued upon being told to rate the lumbar area) stated that he would assign a seven percent IR for the lumbar area based on "MRI abnormalities" but added immediately, "this MRI abnormality is pre-existing." The abnormality referred to was "pre-existing degenerative lumbar disc disease," also said to be minor protrusions of the disc at the L2-3 level. The only medical report of claimant's that addresses the MRI of the lumbar area is a report of Dr. R dated January 18, 1999, which said:

> the MRI scan of the lumbosacral spine was unremarkable.

Previously, as stated, Dr. D, who did an IR report on referral from Dr. M in 1997, said that there had been a resolution of symptoms of claimant's acute lumbar strain.

Applying the 1989 Act and prior interpretations found in Appeals Panel decisions to the medical findings as to objective evidence relative to the lumbar injury, the designated doctor's report dated December 9, 1997, and his report of November 25, 1997, are against the great weight and preponderance of the evidence. The lumbar IR of seven percent is against the great weight and preponderance of the evidence; the IR for the lumbar spine shown by objective medical evidence from the compensable injury is zero percent, as also indicated by Dr. K. The May 22, 1997, report of the designated doctor is entitled to presumptive weight and the great weight of other medical evidence is not to the contrary.

We note that Dr. K's IR of 10% in the May 22, 1997, report is based on an error in combining six percent and five percent to get 10%; combining six percent and five percent, according to the Combined Values Chart on page 246 of the Guides, amounts to 11%.

The decision and order of the hearing officer are affirmed in regard to the date of MMI being May 15, 1997. That part of the decision and order which provides for an IR of

16% is reversed and a new IR of 11% is hereby rendered, with impairment income benefits to be paid based on that IR.

_____
Joe Sebesta
Appeals Judge

CONCUR:

_____
Tommy W. Lueders
Appeals Judge

_____
Dorian E. Ramirez
Appeals Judge