

## APPEAL NO. 000535

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 February 1, 2000. With regard to the sole issue before her, the hearing officer determined that the appellant's (claimant) impairment rating (IR) is five percent. The claimant appeals, urging that the hearing officer=s decision is against the great weight and preponderance of the evidence and that the claimant=s correct IR is eight percent. The respondent (carrier) replies that there is legally sufficient evidence to support the hearing officer=s decision and it should be affirmed.

### DECISION

Affirmed.

The parties stipulated that on \_\_\_\_\_, the claimant sustained compensable injuries that include his low back and neck, and that the date of maximum medical improvement is December 15, 1998. A lumbar MRI performed on January 28, 1998, revealed a posterior disc herniation at L4-5, a mild posterior disc bulge at L5-S1, and grade 1 spondylolisthesis of L5 over S1. On December 16, 1998, the claimant=s treating doctor, Dr. R, assessed a 14% IR based on a seven percent impairment from Table 49, Section II, subsection C, Guides to the Evaluation of Permanent Impairment, third edition, second printing, dated February 1989, published by the American Medical Association (AMA Guides), an eight percent impairment from Table 49, Section III, subsection A, and a zero percent impairment for range of motion (ROM). In February 1999, the claimant began treating with Dr. HO. Dr. HO diagnosed the claimant with lumbar disc displacement, lumbar neuritis, and myalgia.

On June 8, 1999, the designated doctor, Dr. HU, assessed a five percent IR based on a five percent impairment from Table 49, Section II, subsection B of the AMA Guides, a zero percent impairment for ROM, and a zero percent impairment for neurological deficits. Dr. HU reviewed the claimant=s medical records and noted that the claimant=s MRI scan revealed a grade 1 spondylolisthesis with minimal bulging disc at L4-5. On August 10, 1999, Dr. HO expressed his disagreement with the IR assessed by Dr. HU, stating that Dr. HU failed to include the claimant=s spondylolisthesis and sensory deficits. Dr. HO assessed a 17% IR based on an eight percent impairment from Table 49, Section III, subsection A of the AMA Guides, a five percent impairment from Table 49, Section II, subsection B of the AMA Guides, and a five percent impairment for neurological deficits. The Texas Workers' Compensation Commission (Commission) forwarded Dr. HO=s August 10, 1999, letter to Dr. HU and he replied that he chose the most appropriate section from Table 49 to determine an impairment value for specific disorders of the spine; that it is inappropriate to combine values from Section II and Section III of Table 49; that Table 49, Section II, subsection B for the claimant=s disc bulge at L4-5 was most appropriate; that the claimant did not exhibit any neurological deficits; and that he would not change his assessment of a five percent IR.

At the hearing, the claimant argued that his IR is 17% per Dr. HO. On appeal, the claimant argues that he has an eight percent IR per Table 49, Section III, subsection A of the AMA Guides based on spondylolisthesis, and that the designated doctor's failure to rate the spondylolisthesis was a failure to rate the entire injury. The claimant appeals the hearing officer's findings that Dr. R improperly combined impairment values for the claimant's lumbar disc herniation with his spondylolisthesis; that Dr. HO improperly combined impairment values for the claimant's lumbar disc herniation with his spondylolisthesis; and that there was not a great weight of medical evidence to overcome the presumptive weight of the opinion of the designated doctor that the claimant's IR is five percent.

Section 408.125(e) provides that the report of the designated doctor selected by the Commission is entitled to presumptive weight and that the Commission shall base the IR on such report unless it is contrary to the great weight of the other medical evidence. We have held that it is not just equally balancing the evidence or a preponderance of the evidence that can overcome the presumptive weight given to the report of the designated doctor. Texas Workers' Compensation Commission Appeal No. 92412, decided September 28, 1992.

In Texas Workers' Compensation Commission Appeal No. 94601, decided June 28, 1994, we held that Table 49 of the AMA Guides does not permit a rating for herniation under Section II to be added to a rating for spondylolisthesis under Section III within the same region of the spine, even if the proposed ratings are for different levels within that region. Both Drs. R and HO incorrectly added a rating for a herniation under Table 49, Section II, subsection B with a rating for spondylolisthesis under Table 49, Section III, subsection A because both involved the same region of the spine. The designated doctor evaluated the claimant's condition and found Table 49, Section II, subsection B more appropriate to rate the claimant's specific disorder than Table 49, Section III, subsection A. Which section of Table 49 should be used represents a difference of medical opinion. Dr. HU did not fail to rate the entire injury; he evaluated the compensable lumbar and cervical injury and assigned an IR for those body parts. By giving presumptive weight to the designated doctor's report under Section 408.125(e), the legislature has established a procedure where the designated doctor's resolution of such differences is to be accepted. No doctor has certified an eight percent IR. The determination of the hearing officer that the claimant has a five percent IR is not so against the great weight and preponderance of the evidence as to be clearly wrong and unjust. In re King's Estate, 150 Tex. 662, 244 S.W.2d 660 (1951); Pool v. Ford Motor Company, 715 S.W.2d 629, 635 (Tex. 1986).

The decision and order of the hearing officer are affirmed.

Dorian E. Ramirez  
Appeals Judge

CONCUR:

Thomas A. Knapp  
Appeals Judge

Elaine M. Chaney  
Appeals Judge