APPEAL NO. 000845

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 April 6, 2000. The hearing officer determined that the respondent's (claimant) impairment rating (IR) is 24% based on the amended report of the designated doctor, Dr. WB, which he found not to be contrary to the great weight of the other medical evidence. The appellant (self-insured) asserts on appeal that claimant's IR should be either the five percent determined by Dr. S, who examined claimant soon after the injury, or the 13% determined by carrier "peer review" doctors, Dr. W and Dr. KB. Claimant urges in response that the designated doctor's 24% IR is correct.

DECISION

Affirmed.

The parties stipulated that Dr. WB is the designated doctor selected by the Texas Workers' Compensation Commission (Commission). Curiously, there is no stipulation, finding of fact, or other mention of claimant's date of maximum medical improvement (MMI) in the hearing officer's decision. However, neither party takes issue with the date of MMI. The disputed issue concerned only the IR.

Claimant testified that his neck and back were injured at work for the self-insured employer on _____, when a load of paper goods fell off two pallets and struck him; that he was treated with therapy and work hardening but did not require surgery; and that since May 1999 he has been working for another employer driving trucks. Claimant also maintained that the 24% IR assigned by the designated doctor is the correct IR.

The Report of Medical Evaluation (TWCC-69) of Dr. S dated December 23, 1998, certifies that claimant reached MMI on "12/16/98" with an IR of "5%." The report of Dr. S to the self-insured dated December 17, 1998, states the history of the injury related by claimant; the results of Dr. S's clinical examination; and the impression as status post cervical contusion and possible strain which has healed with no residual effects on exam, status post lumbar contusion with possible strain which has healed with minimal residual paralumbar muscle tightness, and no evidence of cervical or lumbar radiculopathy on exam and no underlying mechanical dysfunction. Dr. S further stated that he reviewed the cervical and lumbar MRIs with an independent radiologist who concurred that there is no significant disc herniation in the cervical spine or lumbar spine and no neurologic compromise. Dr. S went on to explain why he did not assign ratings for abnormal range of motion (ROM), said he found no neurologic deficits, and assigned a five percent IR under Table 49, Section II, subsection B, Guides to the Evaluation of Permanent Impairment, third edition, second printing, dated February 1989, published by the American Medical Association (AMA Guides), for minimal residual paralumbar muscle tightness.

In his TWCC-69 dated March 31, 1999, Dr. WB assigned an IR of 34%. In his narrative report of March 25, 1999, he stated that the 34% consisted of nine percent and seventeen percent, respectively, for abnormal cervical and lumbar and six percent and seven percent, respectively, for specific disorders of the cervical and lumbar spinal regions pursuant to Table 49 of the AMA Guides. Dr. A wrote on April 5, 2000, that he treated claimant and that he agrees with Dr. WB's IR.

In his TWCC-69 dated July 19, 1999, Dr. WB assigned an IR of 24%. Dr. WB wrote on July 16, 1999, and again on October 26, 1999, that he revised the 34% IR to 24% after having it called to his attention by a peer review report obtained by the self-insured that claimant had not had six months of documented pain, muscle spasm or rigidity, as required by Table 49, Section II, subsection C. However, Dr. WB maintained that with regard to his rating of claimant's lumbar ROM, which is questioned by Dr. W and Dr. KB, claimant "produced a very valid SLR [straight leg raise] with very consistent ROM values and for this reason, the impairment regarding lumbar flexion-extension is being included in the final rating of 24%."

In an unsigned report of January 27, 2000, Dr. KB responded to questions about the April 3, 1999, report of Dr. W (both doctors being with the same organization) which critiqued Dr. WB's IR of 34% and assigned claimant an IR of 13%. Dr. KB states with regard to Dr. WB's revised IR of 24% that she agrees with Dr. WB's deletion of ratings under Table 49 and also agrees with his nine percent rating for cervical ROM. However, regarding Dr. WB's rating of 17% for lumbar ROM, Dr. KB, citing page 89, Section 3.3e of the AMA Guides, repeated the statement of Dr. W in his April 3, 1999, report that the measurements were not valid with regard to flexion and extension "because the total range of sacral motion was not within 10 degrees of the tightest [SLR] sign" and, thus, that no impairment should be assigned for lumbar flexion and extension. Dr. W does assign a four percent rating for loss of lumbar lateral extension, bilaterally, in determining that claimant's IR is 13%. However, as noted, Dr. WB stated that claimant's SLR testing was consistent with ROM values. We further note that TWCC Advisory 93-04, dated March 9, 1993, states that "[a]n evaluation or certification under the 'Guides' and the 1989 Act must include a physical examination and evaluation by the doctor."

With regard to the determination of an injured employee's IR, Section 408.125(e) provides that the report of the designated doctor selected by the Commission shall have presumptive weight and the Commission shall base the IR on that report unless the great weight of the other medical evidence is to the contrary. The Appeals Panel has frequently noted the important and unique position occupied by the designated doctor under the 1989 Act. *See, e.g.,* Texas Workers' Compensation Commission Appeal No. 92412, decided September 28, 1992. We have just as frequently stated that a "great weight" determination amounts to more than a mere balancing or preponderance of the evidence (Appeal No. 92412) and that a designated doctor's report should not be rejected "absent a substantial basis to do so." Texas Workers' Compensation Commission Appeal No. 93039, decided March 1, 1993.

The hearing officer is the sole judge of the weight and credibility of the evidence (Section 410.165(a)) and resolves the conflicts and inconsistencies in the evidence (Garza v. Commercial Insurance Company of Newark, New Jersey, 508 S.W.2d 701 (Tex. Civ. App.-Amarillo 1974, no writ)). The Appeals Panel will not disturb the challenged factual determinations of a hearing officer unless they are so against the great weight and preponderance of the evidence as to be clearly wrong or manifestly unjust and we do not find them so in this case. Cain v. Bain, 709 S.W.2d 175, 176 (Tex. 1986); In re King's Estate, 150 Tex. 662, 244 S.W.2d 660 (1951).

The decision and order of the hearing officer are affirmed.

Philip F. O'Neill
Appeals Judge

CONCUR:

Elaine M. Chaney
Appeals Judge

Dorian E. Ramirez
Appeals Judge