APPEAL NO. 001992

This appeal arises pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act). A contested case hearing (CCH) was held on August 3, 2000. With regard to the only issue before him, the hearing officer determined that the appellant (claimant) had a 14% impairment rating (IR) as assessed by the designated doctor whose report was not contrary to the great weight of the other medical evidence.

The claimant appeals, contending that the compensable injury includes a neck injury and that the designated doctor failed to assess an IR for that injury. The claimant requests that we reverse the hearing officer's decision and render a decision in his favor. The respondent (self-insured) responds, urging affirmance.

DECISION

Affirmed.

There was no live testimony. The medical reports indicate that the claimant, a detention officer in one of the self-insured's facilities, sustained low back and neck injuries during a "man-handling" training session when he fell on his back on _____. The claimant's treating doctor is Dr. P. On October 15, 1998, the claimant had lumbar spine surgery, a lumbar laminectomy and a discectomy at L4-5. The parties stipulated that the claimant sustained a compensable neck and low back injury and that he reached maximum medical improvement (MMI) on June 18, 1999. A cervical MRI of July 20, 2000, shows "spondylatic changes at C5-C6, possibly associated with small central disc protrusion."

On a Report of Medical Evaluation (TWCC-69) and narrative dated June 18, 1999, Dr. P certified MMI on that date with an 18% IR based on a 4% diagnosis-based cervical impairment from Table 49, Section II B, of the Guides to the Evaluation of Permanent Impairment, third edition, second printing, dated February 1989, published by the American Medical Association (AMA Guides); 5% cervical impairment for loss of range of motion (ROM) (for a total cervical impairment of 9%); and a 10% diagnosis-related lumbar impairment from Table 49, Section II E (with 0% loss of lumbar ROM). The self-insured disputed that assessment and Dr. Z was appointed as the Texas Workers' Compensation Commission (Commission)-selected designated doctor. On a TWCC-69 and narrative, both dated September 1, 1999, Dr. Z certified MMI and assessed a 14% IR based on a 10% lumbar impairment for a surgically treated disc from Table 49, Section II E, and 4% impairment for lumbar loss of ROM. No sensory loss was noted. Dr. Z specifically noted that the neck was "soft and supple" and the "cervical spine measurements were, for all practical purposes, normal."

The claimant contends that he should have received an IR for his cervical injury and, in a letter dated May 5, 2000, the Commission wrote Dr. Z, enclosing a letter from Dr. P (that letter is not in evidence), and asked for Dr. Z's review and reply. Dr. Z replied by letter

dated May 12, 2000, commenting that "the [IR] and disability determination are two separate issues." Dr. Z went on to state:

> I have examined this patient quite carefully and feel that 14% is the rating that I would assess him based on the findings as outlined in my summary and report. If this issue must be brought to dispute resolution, I will be glad at a separate time to reexamine this patient. However, it is unlikely, given the nature of the examination, that he had, that I would find, anything less or more in his favor. I hope this answers your question. I know that the disability does tend to bias the [IR]. However, the [IR] is based solely on objective findings and the tables in the [AMA Guides].

The hearing officer cited both Dr. P's and Dr. Z's reports, and commented that even if the claimant, at one time, had cervical "lesions, residuals and [subjective] pain" in August 1999, the "muscle spasms and limited [ROM] were no longer in evidence" when he was examined by the designated doctor and that "the designated doctor did not find a permanent neck impairment to rate. [Emphasis in the original.]" The claimant contends that he had a neck injury and that Dr. Z did not x-ray his neck or ask him if he was taking pain medication for his neck, and asks us to consider a letter dated May 28, 1998, from Dr. P which apparently was not offered or admitted at the CCH. We do not normally consider evidence offered for the first time on appeal, particularly when that evidence appears to have been available but was not offered at the CCH.

Section 408.125(e) provides that the designated doctor's report has presumptive weight and requires that the Commission "shall base the [IR] on that report unless the great weight of the other medical evidence is to the contrary." The hearing officer found that Dr. P's reports were not sufficient to overcome the presumptive weight of Dr. Z's opinion. That decision is supported by the evidence. *See* Texas Workers' Compensation Commission Appeal No. 92412, decided September 28, 1992, and decisions where that case is cited for the standard of what is necessary to overcome the designated doctor's opinion on MMI and IR.

Upon review of the record submitted, we find no reversible error and we will not disturb the hearing officer's determinations unless they are so against the great weight and preponderance of the evidence as to be clearly wrong or unjust. In re King's Estate, 150 Tex. 662, 244 S.W.2d 660 (1951). We do not so find and, consequently, the decision and order of the hearing officer are affirmed.

Thomas A. Knapp
Appeals Judge

CONCUR:

Elaine M. Chaney
Appeals Judge

Tommy W. Lueders
Appeals Judge