APPEAL NO. 032505
FILED OCTOBER 29, 2003

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 22, 2003. The hearing officer resolved the disputed issue by deciding that the appellant's (claimant) impairment rating (IR) is 10%. The claimant appealed, disputing the determination, and arguing that the designated doctor did not have the information necessary to assess an IR. The respondent (carrier) responded, urging affirmance and objecting to any new evidence contained in the claimant's request for review.

DECISION

Affirmed.

The parties stipulated that the claimant sustained a compensable injury on _____, and reached maximum medical improvement (MMI) on October 29, 2002. It is undisputed that the claimant's compensable injury was to his neck and low back. Additionally, the parties stipulated that the claimant's treating doctor, Dr. V, certified that the claimant reached MMI on October 29, 2002, with an IR of 25% and that the Texas Workers' Compensation Commission-selected designated doctor, Dr. M, certified that the claimant reached MMI on October 29, 2002 with an IR of 10%. The record reflects that the claimant underwent cervical surgery on June 12, 2002, a diskectomy and fusion at C4-5 and C5-6.

The carrier noted in its response that it did not receive a copy of the records attached which were referenced in the appeal. All of the attachments to the claimant's request for review were admitted into evidence at the CCH and no new documentary evidence was attached. The carrier additionally objects to the claimant's arguments on appeal, contending that the claimant is attempting to "interject testimony through his appeal." We note that no testimony was given at the CCH. To the extent that the claimant's arguments can be construed to add evidence not in the record of the CCH, his remarks will not be considered on appeal because such remarks do not meet the standard required for considering evidence for the first time on appeal. In determining whether the hearing officer's decision is sufficiently supported by the evidence, we will generally not consider evidence that was not submitted into the record at the hearing. Texas Workers' Compensation Commission Appeal No. 92255, decided July 27, 1992. To determine whether evidence offered for the first time on appeal requires that the case be remanded for further consideration, we consider whether it came to the appellant's knowledge after the hearing, whether it is cumulative, whether it was through lack of diligence that it was not offered at the hearing, and whether it is so material that it would probably produce a different result. Texas Workers' Compensation Commission Appeal No. 93111, decided March 29, 1993; Black v. Wills, 758 S.W.2d 809 (Tex. App.-Dallas 1988, no writ). We do not find that to be the case with the

remarks, which can be construed to be testimony, in the claimant's request for review and, consequently, we decline to consider such remarks on appeal.

The hearing officer did not err in giving presumptive weight to the designated doctor's report, and in determining the claimant's IR in accordance with that report. The difference in the ratings of Dr. V and the designated doctor is attributable to the fact that the designated doctor placed the claimant in Diagnosis-Related Estimate (DRE) Cervicothoracic Category II and assigned her 5% for the cervical injury and 5% for Lumbosacral Category II for the claimant's lumbar injury resulting in a whole body impairment rating of 10%, while Dr. V placed the claimant in DRE Cervicothoracic Category IV and assigned a 25% IR. We note that although Dr. V discussed two methods of evaluating impairment, his Report of Medical Evaluation (TWCC-69) assigned the impairment calculated using the DRE category rather than impairment based on range of motion. As noted by the hearing officer, the difference in the impairment ratings assigned was dependent on whether and to what extent the claimant had radiculopathy. The hearing officer noted that the doctor who performed the October 21, 2002, EMG/NCV did not conclude that it showed evidence of radiculopathy. We cannot agree that Dr. V's report constitutes the great weight of the other medical evidence contrary to the designated doctor's report. Rather, this is a case where there is a difference of medical opinion between the designated doctor and Dr. V as to whether the claimant is properly rated under DRE Category II or Category IV. We have long held that by giving presumptive weight to the designated doctor, the 1989 Act provides a mechanism for accepting the designated doctor's resolution of such differences. Texas Workers' Compensation Commission Appeal No. 001659, decided August 25, 2000; Texas Workers' Compensation Commission Appeal No. 001526, decided August 23, 2000. We have held that a "great weight" determination requires more than a mere balancing or preponderance of the evidence; that no other doctor's report, including the treating doctor's report, is accorded the special presumptive status; and that the designated doctor's report should not be rejected absent a substantial basis for doing so. Texas Workers' Compensation Commission Appeal No. 960897, decided June 28, 1996.

The hearing officer weighed the credibility and inconsistencies in the evidence and the hearing officer's determination on the issues is not against the great weight of the evidence as to be clearly wrong or manifestly unjust. In re King's Estate, 150 Tex. 662, 244 S.W.2d 660 (1951).

We affirm the decision and order of the hearing officer.

The true corporate name of the insurance carrier is **PACIFIC EMPLOYERS INSURANCE COMPANY** and the name and address of its registered agent for service of process is

ROBIN MOUNTAIN
ACE USA
6600 E. CAMPUS CIRCLE DRIVE, SUITE 200
IRVING, TEXAS 75063.

_____
Margaret L. Turner
Appeals Judge

CONCUR:

_____
Elaine M. Chaney
Appeals Judge

_____
Robert W. Potts
Appeals Judge