APPEAL NO. 950184

This appeal arises under the Texas Workers' Compensation Act of 1989 (1989 Act), TEX. LAB. CODE ANN. § 401.001 *et seq*. This case was remanded in Texas Workers' Compensation Commission Appeal No. 931085, decided January 4, 1994, for clarification from the designated doctor concerning an apparent discrepancy in his report related to lumbar range of motion (ROM). The issue considered in the remand hearing was claimant's correct impairment rating (IR) (the date of maximum medical improvement was resolved and approved by the Appeals Panel after the first decision as March 31, 1993).

A remand hearing was convened on February 2, 1994; however, most of the proceedings that appear in the record consist of correspondence after that date in which clarification was sought from the designated doctor. The original presiding hearing officer was (W); the hearing officer who considered the record and wrote the decision was (RL).

The hearing officer determined that the claimant had a 10% IR in accordance with the report of the designated doctor, (Dr. T), which was not overcome by the great weight of the contrary medical evidence.

The claimant had timely appealed the decision. He states that he continues to disagree with the 10% rating assigned by Dr. T. Claimant further attaches a copy of another TWCC-69 which he indicated had been improperly excluded from evidence by hearing officer (W) at the remand hearing. The carrier responds that the decision is correct, that the Appeals Panel should ascertain whether claimant timely filed his appeal, and that the additional evidence submitted by the claimant should not be considered.

DECISION

We affirm the determination of the hearing officer to give the report of Dr. T presumptive weight. However, as the report of Dr. T was amended by letter to assign an additional four percent IR to claimant for ROM, we reform the hearing officer's determination that claimant had a 10% IR, to conform to the entire report of Dr. T.

Briefly, claimant sustained an injury to his lumbar spine at the L5-S1 level on (date of injury), and had surgery on (date). He was examined by Dr. T who assigned a 10% IR relating to his specific injuries, but nothing for ROM limitations. Because the underlying schedules in Dr. T's report indicated that there were valid ROM percentages for lumbar lateral flexion, but Dr. T's attached narrative invalidated the entire lumbar ROM because of the straight leg raising test results, we remanded for an explanation of an apparent discrepancy.

Hearing officer (W) wrote to Dr. T concerning this and received a response dated February 20, 1994, in which Dr. T forcefully took issue with the need for the remand, and stated his firm opinion that the Guides to the Evaluation of Permanent Impairment, third

edition, second printing, dated February 1989, published by the American Medical Association (AMA Guides) provided that the entire lumbar ROM results should be invalidated if the results of the tightest straight leg raise measurement was not within 10% of the total sacral ROM. Dr. T's letter also acknowledged that a chart within his report stated that lumbar flexion would not be invalidated, but stated that this was erroneous and a software error. His letter questioned the validity of using ROM at all to assess permanent impairment.

Subsequently, the hearing was reassigned to Hearing Officer (L), who wrote Dr. T again on October 26, 1994. The hearing officer stated that "[t]here is apparently some dispute within the medical community regarding whether or not an invalid straight leg raise test precludes an assessment of an [IR] for [ROM] for a loss of lateral flexion, right and left. It is clear you believe an invalid straight leg raise test precludes such an assessment." The hearing officer then asked Dr. T to assume that such would not be precluded, and to re-evaluate his IR based upon such an assumption.

Dr. T responded November 7, 1994, and candidly acknowledged that there was not a uniform viewpoint within the medical community on this issue, and that the Commission should clarify its position. He stated that it was his understanding that whether to allow for lateral flexion ROM was left up to the designated doctor's discretion. Dr. T then stated that claimant would have received an additional four percent for ROM lateral flexion measurements, for a total of 14% whole body IR. Dr. T also opined that he felt use of Table 50 from the AMA Guides could be a viable alternative, and that it would yield an additional three percent.

Dr. T stated his belief that the best thing to do would be to allow him to re-examine claimant, and he offered to do this. He concludes his letter:

> I personally feel that [ROM] in the back is something that needs to be eliminated in the future. Since we are stuck with the AMA Guides at this point in time, I feel that to be absolutely fair to this patient, he should return for another measurement of [ROM] in the back. If this is too complicated to do, then in response to your letter, the patient would receive an additional 4% whole person impairment.

This letter, for whatever reason, is not shown as received by the field office of the Commission until November 28, 1994; a third hearing officer wrote to Dr. T on November 23, 1994, to seek a reply to Hearing Officer (L's) letter. Dr. T responded on December 1, 1994, by forwarding another copy of his November 7th letter, and offering again to re-examine the claimant. Although this letter was forwarded to the parties for any comment they wished to make, and the third hearing officer in this letter also stated that the record would close on December 16, 1994. Dr. T's offer to re-examine claimant was apparently not accepted.

We would note that Hearing Officer (W) convened a brief hearing attended by the parties on February 2, 1994, at which he stated that his interpretation of the Appeals Panel decision was that he could not take additional evidence from either party, but that once clarification was received from Dr. T, that either party could submit a response and additional evidence on the point of clarification. It appears that the deadline for such additional response was set as December 16, 1994, by the third hearing officer. There were, however, no additional documents that were tendered in response to this.

As to the additional evidence claimant attached to his appeal, it appears there was no specific ruling on this document made by Hearing Officer (W). Indeed, we cannot understand how there could have been, because the document claimant has forwarded is dated August 16, 1994. Moreover, it appears that the parties were each given until December 16, 1994, to respond or comment on Dr. T's letters. Neither party did. Under these circumstances, we cannot agree that there was error.

As we review the evidence in this case, we agree that the designated doctor's report is entitled to presumptive weight. It would have been the better practice for the Commission to have claimant re-examined as Dr. T suggested; this did not occur. However, Dr. T expressly provided for an amendment to his rating should the re-examination option not be taken. A fair reading of Dr. T's November 7, 1994, letter is that he reconsidered the ROM for lumbar flexion and, based upon measurements he had already made, assigned another four percent. Therefore, although we affirm the hearing officer's determination that Dr. T's report is entitled to presumptive weight, and not against the great weight of contrary medical evidence, we reform the percentage found by the hearing officer to that yielded by the clarification and amendment of Dr. T's original TWCC-69 report, or 14%. We will do this by reforming Finding of Fact No. 10 to read:

FINDING OF FACT

10. The designated doctor's ten percent (10%) impairment rating originally did not include an impairment factor for any loss of range of motion, but was amended by the doctor in his letter of November 7, 1994, to allow an additional 4% for lumbar flexion range of motion loss.

Then, the figure 14% should be substituted in Finding of Fact No. 11 for 10%, and likewise in Conclusion of Law No. 3, and the order; as reformed, carrier is ordered to pay 42 weeks of impairment income benefits beginning on April 1, 1993.

We affirm the hearing officer's decision and order as reformed to conform to the report of the designated doctor.

Susan M. Kelley
Appeals Judge

CONCUR:

Thomas A. Knapp
Appeals Judge

Gary L. Kilgore
Appeals Judge