APPEAL NO. 950223

On December 21, 1994, a contested case hearing was held in (city), Texas, with the record being closed on January 9, 1995. (hearing officer) presided as the hearing officer. The hearing was held under the provisions of the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq*. (1989 Act). The issue at the hearing was the impairment rating (IR) of the respondent (claimant). The appellant (carrier) disagrees with the hearing officer's decision that the claimant has a 15% IR as assigned by the designated doctor chosen by the Texas Workers' Compensation Commission (Commission). The claimant requests affirmance.

DECISION

Affirmed.

The parties presented only documentary evidence at the hearing. The parties agreed that (Dr. K) was a treating doctor. In September 1993 Dr. K reported that the claimant injured her neck and right wrist on (date of injury 1), when she lifted and threw a bag weighing 30 to 50 pounds into a dumpster at work. He placed her on conservative treatment and pain medication. He noted that examination of the claimant's cervical spine revealed tenderness and paravertebral muscular spasms. X-rays of the cervical spine done on September 24, 1993, were reported as normal except for a "straightened cervical curvature." X-rays of the right wrist done the same day were reported as normal. A CT scan of the cervical spine done on October 18, 1993, was reported as normal. An MRI study of the right wrist done on October 19, 1993, was also reported to be normal. At Dr. K's request, (Dr. W) performed a neurological evaluation of the claimant on October 19, 1993. Dr. W noted that the claimant was complaining of neck pain and that cervical spine movement revealed stiffness in all directions. Dr. W diagnosed a right wrist strain, a cervical strain, and tension headaches. In November 1993 Dr. W reported that the claimant had shown gradual improvement and was probably ready to start on a work conditioning program. In an undated Report of Medical Evaluation (TWCC-69), Dr. K reported that the claimant reached maximum medical improvement (MMI) on March 8, 1994, with a zero percent IR. The parties stipulated that the claimant reached MMI on March 8, 1994. Dr. K noted that he had last seen the claimant on January 21, 1994, at which time the claimant complained of soreness in the cervical region and a "popping of her neck all the time." He also noted that all diagnostic tests were normal and that the claimant had range of motion (ROM) testing performed on March 8, 1994. Attached to the TWCC-69 is a report from "K Clinic" (clinic) which stated that the claimant had been evaluated for impairment on March 8, 1994, and which gave ROM test results for the right wrist and neck. The report states that the claimant has zero percent impairment. An EMG/nerve conduction study of the neck and both upper extremities was reported to be normal on July 15, 1994.

The parties stipulated that (Dr. R), was chosen by the Commission to be the designated doctor. In a TWCC-69 dated July 21, 1994, Dr. R reported that the claimant reached MMI on March 8, 1994, with a 15% IR. He noted that the claimant presented with

complaints of neck pain "into both wrists and hands." He performed a physical examination, stated that the claimant had a moderate amount of paracervical muscle tightness, and diagnosed a resolving cervical sprain/strain grade III, and "rule out carpal tunnel syndrome." He reported that the claimant has 11% impairment for loss of cervical ROM and four percent impairment for a specific disorder of the lumbar spine under Table 49, Part IIB, of Chapter 3 of the Guides to the Evaluation of Permanent Impairment, third edition, second printing, dated February 1989, published by the American Medical Association (the Guides). His cervical ROM worksheet is attached to his report. On September 22, 1994, the benefit review officer (BRO) sent Dr. R a copy of Dr. K's IR report and she asked Dr. R to advise her regarding the reason for the difference in ROM findings between him and Dr. K, and to explain the basis for the four percent impairment for a specific disorder of the cervical spine. Dr. R responded to the BRO's request on October 7, 1994, and in regard to ROM he stated that he was not present at Dr. K's examination of the claimant and that during his examination of the claimant, the claimant "demonstrated within the technical guidelines as required by [the Guides]." He also stated that he did not feel that retesting for ROM is necessary. In regard to the four percent IR under Table 49, Dr. R stated:

your second question is in regards to the 4% impairment using Table 49, Section II-B. Please be advised that the [Guides], page 73, Table 49, Section II-B: Unoperated with medically documented injury and a minimum of six month [sic] of medically documented pain, muscle spasm or rigidity associated with none-to-minimal degenerative changes in structural tests. For the cervical region this allows for 4% WP [whole person] impairment. From [claimant's] date of injury to the date of MMI this percentage is factored into her total whole person impairment.

In response to questions on written deposition, Dr. R stated that he had examined the claimant, that he had reviewed her diagnostic tests, that he was aware of previous ROM testing of the claimant, that he does not have an opinion regarding the variation in ROM findings between himself and Dr. K, and that the Guides have a 10% or 5 degree rule in regard to cervical ROM. He also gave the following responses to the stated questions:

Q: Please identify any cervical disc lesion you observed in your evaluation of [claimant].

A: None.

Q: What objective confirmation of the presence of a cervical disc lesion have you identified? Please answer by listing the diagnostic report and its date.

A: None.

(Dr. C) reviewed the claimant's medical records and reports at the request of the carrier and in a report dated September 19, 1994, he stated that additional ROM testing is warranted, and that, with regard to the difference in the ROM impairment found by Drs. K and R, "unless an organic basis has been diagnosed, then I find it difficult to find a legitimate reason for the decreased [ROM]."

The carrier disagrees with the following findings of fact and conclusions of law on the basis that Dr. R's report on IR is contrary to the great weight of the other medical evidence and on the basis that Dr. R did not comply with the Guides in assigning an IR:

FINDINGS OF FACT

5. The TWCC-69, Report of Medical Evaluation, of [Dr. R] certifying a 15% IR is in accordance with the AMA Guides and is not against the great weight of other medical evidence.

6. The assignment of an IR pursuant to Table 49 IIB is supported by diagnostic testing and medical records in this case and is not against the great weight of other medical evidence.

7. The assignment of an IR based upon cervical [ROM] testing performed by the designated doctor is in accordance with the AMA Guides and is not against the great weight of other medical evidence.

CONCLUSIONS OF LAW

2. The findings of the designated doctor are entitled to presumptive weight.

3. The Claimant reached MMI on March 8, 1994, with a 15% IR.

We note that the carrier's appeal states that the "Point Of Error" is that the hearing officer correctly determined that the claimant failed to prove that she suffered a compensable injury on (date of injury 2). The carrier apparently has the case under consideration confused with some other case, because the compensability of the claimant's injury was not in issue and the hearing officer made no finding on compensability. However, in the body of the appeal the carrier disputes the above-cited findings of fact and conclusions of law and argues that we should render a decision that the claimant has a zero percent IR.

If the designated doctor is chosen by the Commission, the report of the designated doctor 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, and if the great weight of the medical evidence contradicts the IR contained in the report of the designated doctor chosen by the Commission, the Commission shall adopt the IR of one of the other doctors. Section 408.125(e). No other doctor's report, including that of a treating doctor,

is entitled to presumptive weight, and to overcome the presumptive weight accorded to the report of the designated doctor requires more than a preponderance of the evidence, it requires the "great weight" of the other medical evidence to be contrary to the report. Texas Workers' Compensation Commission Appeal No. 92412, decided September 28, 1992.

In regard to Dr. R's assignment of 11% impairment for loss of cervical ROM, the carrier states that Dr. R's ROM findings are "completely at odds with the other testing in this case and should be discounted," and that his assignment of 11% impairment "is not based on an objective laboratory or clinical finding confirmable by another doctor." The only reports of IR in evidence which are based on physical examination of the claimant are those of Dr. K and Dr. R. Dr. K assigned no impairment for cervical ROM while Dr. R assigned 11% impairment for cervical ROM. While Dr. C believes that further ROM testing is warranted, he did not examine the claimant. The hearing officer is the sole judge of the weight and credibility of the evidence. Section 410.165(a). She determined that the impairment assigned by Dr. R was not against the great weight of the other medical evidence. Simply because Dr. K had different findings than did Dr. R on ROM testing does not mean that the carrier established that the great weight of the medical evidence is contrary to the report of Dr. R. *See* Texas Workers' Compensation Commission Appeal No. 941451, decided December 12, 1994. Since the impairment due to abnormal ROM assigned by Dr. R was based on his physical examination of the claimant, which included actual physical measurement of restricted ROM of the cervical spine, and was not based on subjective symptoms perceived by the claimant, his findings were "objective" medical findings under Sections 401.011(32) and 401.011(33). *See* Texas Workers' Compensation Commission Appeal No. 941332, decided November 17, 1994. We note that the carrier misstates Section 408.122(a). That section does not provide that a designated doctor's findings of impairment must be confirmable by another doctor.

In regard to the four percent impairment Dr. R assigned for a specific disorder of the cervical spine under Table 49, the carrier states "[a]bsent the presence of an intervertebral disc or other soft tissue lesion, Table 49 IIB is inapplicable on its face." The carrier points out that Dr. R acknowledged that the claimant does not have a "disc lesion" and that diagnostic tests were normal. What the carrier fails to address is the fact that Dr. R diagnosed a cervical sprain/strain, and that Dr. W diagnosed a cervical strain. In Hanover Insurance Company v. Johnson, 397 S.W.2d 904, 905 (Tex. Civ. App.-Waco 1966, writ ref'd n.r.e.), the court stated:

> It is held that strains, sprains, wrenches and twists due to unexpected, undesigned or fortuitous events, even where there is no overexertion, and the employee is predisposed to such a lesion, are compensable.

We observe that Table 49, Part II, provides for impairments due to "Intervertebral disc or other soft tissue lesions," and that Part IIB provides for four percent impairment for the cervical spine for "Unoperated with medically documented injury and a minimum of six

months of medically documented pain, recurrent muscle spasm or rigidity associated with none-to-minimal degenerative changes on structural tests."

In Texas Workers' Compensation Commission Appeal No. 941479, decided December 16, 1994, we affirmed a hearing officer's decision that the claimant in that case had a one percent IR for impairment of the lumbar spine as found by the designated doctor. However, in affirming the hearing officer's decision we impliedly recognized that an unresolved lumbar strain could be a soft tissue lesion under Table 49 when we stated:

> He [designated doctor] determined that claimant had "0% impairment for Specific Disorders of the Lumbar Spine (Table 49, page 73)" but he assessed "ROM impairment of 1% pursuant to Tables 56-57. [Designated doctor] apparently determined that claimant's strain had resolved and that, under Table 49, claimant had "0%" impairment from an "unoperated soft tissue lesion with no residuals." However, he nonetheless felt she had abnormal lateral ROM which he assessed at one percent.

We note that in Texas Workers' Compensation Commission Appeal No. 93695, decided September 22, 1993, we reversed and remanded the hearing officer's decision which adopted the IR of the designated doctor because the designated doctor had not rated the injury in full. The part of the injury not rated was spondylolysis. However, we made no comment on the fact that the designated doctor had assigned five percent impairment under Table 49, Part IIB, for a "muscle ligamentous strain" and for "low back pain." In addition, in Texas Workers' Compensation Commission Appeal No. 93410, decided July 8, 1993, the designated doctor assigned five percent impairment for a lumbar sprain, which he referred to as "unoperated disorders of the spine," and three percent impairment for loss of ROM. We reversed and remanded the hearing officer's decision which adopted the eight percent IR of the designated doctor because of evidence that the designated doctor had not examined the claimant. On remand, evidence was developed that the designated doctor had examined the claimant and the hearing officer adopted his IR. The decision was affirmed on appeal. Thus, we have affirmed decisions on IR where a sprain or strain has been rated as a specific disorder of the spine, and have recognized that such may be considered as soft tissue lesions. In the instant case the designated doctor found that the claimant had a cervical sprain/strain and assigned the claimant four percent impairment for a specific disorder of the lumbar spine under Table 49, Part IIB. While the designated doctor described the sprain/strain as "resolving," he did not report that it had resolved or would, in fact, completely resolve. The carrier does not specifically question the diagnosis of the designated doctor, nor does it specifically question the use of the word "resolving" in regard to the permanency of the impairment. The carrier's appeal is focused on the absence of a "disc lesion." *Compare* Texas Workers' Compensation Commission Appeal No. 941729, decided February 10, 1995, where the designated doctor stated that the claimant's stress syndrome would resolve.

We do not find the decision cited by the carrier, Texas Workers' Compensation Commission Appeal No. 94570, decided June 15, 1994, to be controlling as to the facts of this case, because that decision dealt with a bulging disc. In Appeal No. 94570, *supra*, we affirmed a hearing officer's decision that the claimant had a zero percent IR as reported by the designated doctor notwithstanding that the claimant had bulging discs. We stated "[t]o be the basis of an [IR] under Table 49, the bulging must rise to the level of pathology or lesion caused by the compensable injury." The designated doctor in Appeal No. 94570, found that the claimant's bulging discs were "normal." In the instant case, the designated doctor determined that the claimant's cervical sprain/strain was ratable under Table 49, Part IIB and, having reviewed the evidence, we cannot conclude that the hearing officer erred in finding that the designated doctor's report on IR was not contrary to the great weight of the other medical evidence. Although that portion of the hearing officer's Finding of Fact No. 7 which finds that the four percent rating under Table 49 is supported by diagnostic tests is in error, physical examination by Dr. W revealed a cervical strain, which finding was confirmed by Dr. R, the designated doctor, on physical examination of the claimant when he diagnosed a cervical sprain/strain.

As the finder of fact the hearing officer resolves conflicts in the evidence, including the medical evidence, and determines what facts have been established from the conflicting evidence. Texas Workers' Compensation Commission Appeal No. 950084, decided February 28, 1995. An appellate level body is not a fact finder and does not normally pass upon the credibility of witnesses or substitute its own judgment for that of the trier of fact. Appeal No. 950084, *supra*. When reviewing a hearing officer's decision to determine the factual sufficiency of the evidence, we should set aside the decision only if it is so contrary to the overwhelming weight of the evidence as to be clearly wrong and unjust. Appeal No. 950084, *supra*. We conclude that the hearing officer's decision is supported by sufficient evidence and is not so contrary to the overwhelming weight of the evidence as to be clearly wrong and unjust.

The hearing officer's decision and order are affirmed.

Robert W. Potts
Appeals Judge

CONCUR:

Philip F. O'Neill
Appeals Judge

Gary L. Kilgore
Appeals Judge