APPEAL NO. 950251

This appeal arises pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq*. (1989 Act). On September 26 and October 24, 1994, a contested case hearing was held in (city), Texas, with (hearing officer) presiding. She determined that the impairment rating (IR) of the respondent (claimant) was 17% as determined by the designated doctor, (Dr. F). Appellant (carrier) asserts that Dr. F originally found 12% and that opinion is correct. The appeals file contains no reply by claimant.

DECISION

We affirm.

Claimant was manager of a snack bar at (employer) when on (date of injury), she injured her back by twisting as she put supplies on a high shelf. The parties stipulated at the October 24th hearing that claimant injured her back compensably and reached maximum medical improvement (MMI) on June 23, 1993, by operation of law. It was also stipulated that Dr. F was the designated doctor and that claimant's current treating doctor is (Dr. M). The only issue at the hearing was the amount of IR of claimant. At the hearing, two IRs were before the hearing officer: Dr. F assigned a 12% IR; Dr. M assigned a 52% IR.

The hearing brought forth testimony that claimant had surgery for her back, after which infection developed resulting in three more surgical procedures to address the infection. Both Dr. M and Dr. F assigned 12% based on Table 49, Guides to the Evaluation of Permanent Impairment, third edition, second printing, dated February 1989, published by the American Medical Association (AMA Guides). In addition, Dr. M assigned 30% for neurological loss, pointing out that claimant can walk little and uses a wheelchair; the remainder of his IR was made up of range of motion limitations, which Dr. F did not assign based on invalidation. Claimant testified at the hearing that Dr. F moved her legs to obtain range of motion measurements in such a way that she was in great pain and was crying. Claimant's husband testified that he told Dr. F to stop the measurements.

Prior to the October 24th hearing, the hearing officer on September 26, 1994, wrote to Dr. F questioning the time that Dr. F believed MMI was reached. Dr. F replied by letter dated October 3rd that MMI was reached by operation of statute. Both these communications were made part of the record. As stated, two IRs of 12% and 52% were considered at the hearing on October 24th. Thereafter, the record contains Hearing Officer Exhibit No. 6, a letter from Hearing Officer Dean to the parties, which states that it encloses a copy of Dr. F's "November 2, 1994, report." No information as to why such a report was made is offered, but the parties were given time to comment regarding Dr. F's November 2nd report.

Hearing Officer Exhibit No. 7 is a TWCC-69 from Dr. F dated November 2, 1994, and recites that the IR is 17%. With this report is a letter dated November 2, 1994. That letter

says, "I am in receipt of your letter dated October 25, 1994 regarding clarification on [claimant's] impairment rating." Dr. F goes on to say that he does not believe that impairment due to spinal cord injury is applicable. He then adds that since his evaluation of claimant in April he had attended a seminar on IRs and learned that lumbar range of motion could be invalidated for flexion and extension without invalidating lateral movement. He therefore looked at his notations made when he examined claimant and added three percent for right lateral flexion and three percent for left lateral flexion, totalling 17% when combined with the 12% from Table 49.

The letter, to which Dr. F refers, is not contained in the record, nor does Dr. F set forth what clarification was requested; it is therefore not possible to determine the basis of the inquiry, other than what might be inferred from Dr. F's answers. While the absence of such a request in the record would necessitate a remand if appropriately appealed, the carrier's appeal only states that the designated doctor changed his IR after the hearing "in response to an inquiry" from the hearing officer without asserting any error in the request; carrier only appeals the use of the changed IR by the hearing officer stating that there was "insufficient basis" for the change. See Texas Workers' Compensation Commission Appeal No. 941299, decided November 9, 1994, which did not allow a revision based on an incorrect legal premise. We also note that carrier's appeal is consistent with carrier's reply to the hearing officer, apparently generated by Hearing Officer Exhibit No. 6, which only observes that carrier disputed the 17%, without objecting to the inquiry of the hearing officer dated October 25, 1994. (Claimant replied to that exhibit by saying that she accepted the 17%.)

The hearing officer is the sole judge of the weight and credibility of the evidence. *See* Section 410.165. Texas Workers' Compensation Commission Appeal No. 92441, decided October 8, 1992, allowed presumptive weight to be given to a revised designated doctor's opinion. Texas Workers' Compensation Commission Appeal No. 93705, decided September 27, 1993, provided that a hearing officer does not have to give any weight to a change made by a designated doctor that is not explained. In this instance the designated doctor explained the revision as based on his changed perception regarding invalidation after attending a seminar about IRs. Without any evidence to the contrary, that explanation may be accepted as indicative of an attempt to reach an accurate IR. There was sufficient evidence for the hearing officer to give presumptive weight to the revised IR of the designated doctor.

Finding that the decision and order of the hearing officer set forth at the end of her opinion is sufficiently supported by the evidence, we affirm. *See* In re King's Estate, 150 Tex. 662, 244 S.W.2d 660 (1951).

Joe Sebesta
Appeals Judge

CONCUR:

Thomas A. Knapp
Appeals Judge

Gary L. Kilgore
Appeals Judge