APPEAL NO. 950253

This appeal is brought 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 January 26, 1995, in (city), Texas, with (hearing officer) presiding as hearing officer. Addressing the single disputed issue, she determined that the appellant's (claimant herein) correct impairment rating (IR) was 11% as certified by (Dr. T), M.D., a designated doctor selected by the Texas Workers' Compensation Commission (Commission). The claimant appeals arguing that the pertinent determinations of the hearing officer are against the great weight and preponderance of the evidence. The respondent (carrier herein) replies that the decision and order are supported by sufficient evidence and should be affirmed.

DECISION

Finding error of law, we reverse and remand.

The claimant worked as a salesman. It is undisputed that on (date of injury), he sustained a compensable injury when he slipped on some ice as he was getting out of his car while on a business trip. On November 15, 1993, Dr. T examined the claimant and certified that the claimant had an 11% IR consisting of five percent for the cervical region and six percent for loss of range of motion (ROM) of the right shoulder. The claimant was then examined by (Dr. S), D.C., who certified an IR of 39%, which included 18% for loss of ROM and 11% due to a specific disorder of the lumbar spine. In an accompanying letter of July 29, 1994, Dr. S pointed out that 98% of this 39% rating was "apportioned to this current injury," resulting in a 38% IR. Among other criticisms of Dr. T's report, Dr. S suggested that the claimant should have been retested by Dr. T for loss of ROM of the cervical spine, tested for loss of ROM of the thoracic spine and should have been given an IR for the lumbar spine, the condition of which was aggravated by the fall on (date of injury).

A benefit review officer (BRO) attempted to resolve this difference of opinion between Dr. T and Dr. S by letter to Dr. T of September 29, 1994, which asks him to comment on:

1.The diagnosis and resulting rating for the lumbar spine;

2.Any need to repeat the range-of-motion testing; and,

3. The "enclosed matter from [Dr. F].[1]"

In a letter of October 13, 1994, Dr. T responded to this letter and advised that the claimant had a 13% IR for his lumbar spine based on specific disorders extant before the accident of

[1] The reference to Dr. F apparently should have been to Dr. S. Dr. S worked for Dr. F's clinic and used letterhead with Dr. F's name printed at the top. There is no evidence that Dr. F was otherwise in any way involved in this case.

(date). He invalidated ROM testing of the lumbar spine. More importantly for purposes of this discussion, Dr. T stated he did not certify an IR for the lumbar spine because "[t]here is nothing in the chart to show that the patient had any change in specific disorders of the spine from the injury that he had in (month year)." He also stated that the "thoracic region should not be rated" and questioned the figures presented by Dr. S to support his ROM measurements. Dr. T followed this letter with a second, lengthy letter of January 5, 1995, to the BRO. In this letter, Dr. T recounts that he again reviewed the claimant's chart and records. He reiterated that Dr. S's cervical ROM is invalid "even though he states it is valid." He found "very little documentation in the medical records that this patient had any increase in problems in the low back until many months after his injury." He thought it would be very difficult to establish a causal relationship between the accident and the claimant's low back condition and did not consider the lumbar spine to be part of the original injury. He did not consider increased low back pain absent an "increase in some type of diagnostic pathology" to be rateable. Independent of these considerations of whether the lumbar spine was part of the compensable injury, Dr. T also questions the "large [ROM] loss" given by Dr. S.

The report of the benefit review conference (BRC) which was held on November 29, 1994, states the unresolved issue is, "What is the [IR]?" The claimant's position at the BRC was that Dr. T's report must be "overturned" because he failed to evaluate the lumbar spine. The carrier's position was reported as simply that Dr. T's report "should be adopted." At the hearing, the claimant's attorney, who was also present at the BRC, asked for a continuance in order to obtain a lateral bending series of x-rays of the lumbar spine, something he represented as not having been done, but necessary to determine if the claimant's lumbar condition had been disturbed or otherwise changed presumably as a result of the (date), accident. The following colloquy then took place:

MS. HEARING OFFICER: Well, but what you appear to be raising...is an argument going to the extent of injury.

[CLAIMANT'S ATTORNEY]: Yes, ma'am.

MS. HEARING OFFICER: And this is an injury with an injury date of (month) of (year). . . If, aside from the designated doctor, [claimant] should have reached statutory [MMI], [IR] must be give at that point, so I do not have certified as an issue coming from the [BRC] extent of injury. The issue that has been raised before me is what is the claimant's [IR].

[CLAIMANT'S ATTORNEY]: Yes, ma'am.

MS. HEARING OFFICER: And at this point in the proceeding I do not find that is good cause for grounds for a continuance.

[CLAIMANT'S ATTORNEY]: . . . The center of this controversy is: Is the lumbar spine properly included in the [IR] . . . .

* * * * *

[CARRIER'S ATTORNEY]: What [claimant's attorney's] arguing is really the heart of the case.

The claimant requests review of the following Findings of Fact and Conclusions of Law of the hearing officer:

FINDINGS OF FACT

5. The great weight of the other medical evidence presented did not establish that claimant suffered an aggravation of his pre-existing back condition in his (date of injury) work related injury.

6. Designated doctor [Dr. T's] assessed 11% [IR] is not against the great weight and preponderance of the other medical evidence.

CONCLUSIONS OF LAW

3.Claimant has an 11% [IR] as assessed by [Dr. T].

Section 408.125(e) provides that the report of a designated doctor selected by the Commission 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." An "impairment" is "any anatomic or functional abnormality or loss existing after [MMI] that results from a compensable injury and is reasonably presumed to be permanent." Section 401.011(23). An "impairment rating" means the "percentage of permanent impairment of the whole body resulting from a compensable injury." Section 401.011(24). The Appeals Panel has held that a designated doctor selected to assign an IR must rate only the compensable injury reasonably believed to be permanent, and, in so doing, must determine in his medical judgment what the compensable injury is, though of course any dispute about the extent of the compensable injury is resolved by the Commission. Texas Workers' Compensation Commission Appeal No. 931098, decided January 18, 1994. We have also held that the presumptive weight that attaches to the report of a designated doctor under the 1989 Act applies only to a determination of MMI and the assignment of an IR, and not to a determination of the extent of a compensable injury. Texas Workers' Compensation Commission Appeal No. 93788, decided October 19, 1993.

In the case now appealed, the existence and extent of permanent injuries arising out of the (date of injury), accident was obviously a threshold issue to the determination of an IR. As such, the hearing officer could decide this issue notwithstanding that it was not an issue expressly reported out of the BRC. *See* Texas Workers' Compensation Commission Appeal No. 94499, decided June 3, 1994. A fair reading of the report of the BRC suggests

that this question was part of the framed issue. It was therefore unfortunate that claimant's attorney waited until the beginning of the CCH to request further tests on the question of extent of injury to the lumbar spine, particularly when he was present at the BRC and had the opportunity to redefine or add issues as appropriate. *See* Texas Workers' Compensation Commission Appeal No. 93970, decided December 9, 1993, disapproving the practice of waiting until a CCH to raise complaints which could have been raised earlier.

In his appeal of Finding of Fact No. 5, the claimant recounts the evidence on the extent of the claimant's injury and asserts that the hearing officer made what claimant calls an "improper inference" from this evidence in reaching her finding of fact. Recognizing the firm principle that the hearing officer is the sole judge of the weight to be given the evidence, we nonetheless find that the hearing officer committed reversible error in Finding of Fact No. 5 by assigning presumptive weight to Dr. T's opinion about the extent of the compensable injury. This had the effect of forcing the claimant to establish favorable facts, not by a preponderance of the evidence, *see* Sanders v. Harder, 227 S.W.2d 206 (Tex. 1950), but by the significantly higher standard of great weight of the other medical evidence. *See* Texas Workers' Compensation Commission Appeal No. 92412, decided September 28, 1992. For this reason, we reverse the decision and order of the hearing officer that the claimant's correct IR is 11% and remand the case back to the hearing officer to determine, from the evidence already presented, whether the claimant established by a preponderance of the evidence that his compensable injury included his lumbar spine. Once this threshold finding is made, the hearing officer should address the disputed issue of the claimant's correct IR.

A final decision has not been made in this case. However, since reversal and remand necessitate the issuance of a new decision and order by the hearing officer, a party who wishes to appeal from such new decision must file a request for review not later than 15 days after the date on which such new decision is received from the Texas Workers' Compensation Commission's division of hearings, pursuant to Section 410.202. *See* Texas Workers' Compensation Commission Appeal No. 92642, decided January 20, 1993.

Alan C. Ernst
Appeals Judge

CONCUR:

Lynda H. Nesenholtz
Appeals Judge

Tommy W. Lueders
Appeals Judge