APPEAL NO. 950277

This appeal arises under the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq*. (1989 Act). A contested case hearing (CCH) was held in (city), Texas, with (Hearing Officer B) presiding as hearing officer. Although the hearing officer's written decision does not recite the date of the remand hearing, on the tape record the hearing officer recites it occurred on "January 24, 1994," obviously meaning 1995. This Appeals Panel had reversed the original hearing officer, (Hearing Officer A) in Texas Workers' Compensation Commission Appeal No. 94914, decided August 19, 1994, regarding a (date of injury 1), injury. Hearing Officer A had determined that a designated doctor's report had been overcome by the great weight of other medical evidence to the contrary (Section 408.125(e)) without stating how that was so. We reversed Hearing Officer A and remanded the case for the hearing officer to detail the evidence if the great weight of the other medical evidence was contrary to the report of the designated doctor.

Apparently, based on the self-insured's (herein referred to as carrier) and claimant's appellate request and response, and attachments thereto, claimant filed a motion to recuse Hearing Officer A from this case, and a companion case dealing with claimant's injury of (date of injury 2). Carrier responded to claimant's motion to recuse, and recites "[n]o written order was ever received . . . regarding the Commission's [Texas Workers' Compensation Commission] ruling on these Motions." Nonetheless, Hearing Officer B was assigned to hear the remand, stating that Hearing Officer A had been "challenged for cause." When Hearing Officer B asked if anyone objected to his appointment, apparently carrier made what appears to be a general objection to the appointment of Hearing Officer B, to which Hearing Officer B replied that "the decision was made by (chief hearing officer), who is the Chief Hearing Officer, who rules on all requests for recusal." No other ruling or response was made to the comment or objection and the hearing on remand proceeded. In failing to further object to Hearing Officer B's explanation regarding the chief hearing officer's (implied) ruling on the request for recusal and appointment of Hearing Officer B, carrier failed to preserve its objection as to the replacement of Hearing Officer A by the chief hearing officer.

The issue as stated and agreed upon was: "What is Claimant's impairment rating (IR)?"

No evidence was taken and no witnesses were called. Hearing Officer B took official notice of the "entire record of the prior proceeding, (which) includes the recorded tapes, the documentary evidence offered into evidence, the Appeals Panel decisions and the hearing officer's decisions" without objection. Based on that information, Hearing Officer B determined that:

FINDINGS OF FACT

4.Dr. Webb [Dr. W], the designated doctor, assigned a 13% [IR].

5.[Dr. W's] 13% [IR] is not contrary to the great weight of the other medical evidence.

CONCLUSIONS OF LAW

2.Claimant's [IR] is 13%.

Carrier filed a combined "Carrier's Appeal of Remand 94913 and Remand 94914" as well as combined "Carrier's Response to Claimant's Request for Review." Carrier assigns error by the Commission in assigning a new hearing officer and that Hearing Officer B failed to "follow through with the specific instruction of the Appeals Panel. . . ." Claimant filed a timely response to carrier's appeal which "supports the decision of the Commission in assigning a new hearing officer . . ." specifying why Hearing Officer A should have been disqualified. Claimant also agreed that Dr. W was the designated doctor and his report has presumptive weight. As part of this pleading, claimant submits a Request for Review that Hearing Officer B exceeded his authority in ruling on contribution (addressed in remand of Texas Workers' Compensation Commission Appeal No. 94913, decided August 19, 1994, and the subject of a separate decision). Carrier files a "Carrier's Response to Claimant's Request for Review" contending claimant's appeal is untimely and attaching affidavits in support of that contention.

DECISION

The decision and order of Hearing Officer B, regarding the IR of claimant for his injury of (date of injury 1), is affirmed.

Claimant's request for review is not applicable to this decision and, consequently, we will address it and carrier's response to claimant's appeal in the companion decision Texas Workers' Compensation Commission Appeal No. 950278, decided April 4, 1995.

Briefly, as background, claimant was a bus driver, who sustained a compensable injury on (date of injury 1), in a fight with a bus passenger. The injury consisted of "multiple bodily trauma," cervical strain/sprain and a right shoulder injury. Claimant returned to work from this injury on May 12, 1992. Claimant's treating doctor referred claimant to (Dr. B), who, on an undated Report of Medical Evaluation (TWCC-69) and narrative report dated September 11, 1992, certified maximum medical improvement (MMI) (MMI is not at issue in the remand) with a 24% IR. Carrier apparently disputed the IR and (Dr. P) was appointed as a Commission-selected designated doctor to determine "percentage of impairment only." By TWCC-69 and narrative report dated December 23, 1992, Dr. P checked the box indicating MMI had been reached and assessed a five percent IR. Claimant had sustained another compensable injury on (date), the subject of the companion case, and a benefit review officer (BRO) wrote Dr. P, by letter dated March 5, 1993, asking for "a separate

TWCC-69 for each injury" and inquiring about range of motion (ROM) testing. Dr. P responded:

> The [IR] that I gave him on 12/23/92 is conclusive and no additional impairment over that determined for the (date of injury 1) injury is applicable. The patient's lumbar [ROM] was measured by double inclinometry technique as specified in the AMA Guidelines to the Evaluation of Permanent Impairment Third Edition, Second Printing. The measures were invalidated by co-efficient to variation and straight leg raising discrepancies. The lumbar [ROM] measurements were also invalid in [Dr. B's] [IR] of September 11, 1992.

The Commission, apparently finding Dr. P's response inadequate, in two letters both dated June 15, 1993, appointed (Dr. W) as a Commission-selected designated doctor to determine MMI and IR for both the (month year) and (month year) injuries. In a letter to the Commission dated June 2, 1993, carrier objected to the appointment of a second designated doctor. Dr. W, in a TWCC-69 and narrative dated June 28, 1993, certified MMI on "9/11/92" with a 13% IR and a handwritten notation "[date of injury 1]." In another TWCC-69, also dated June 28, 1993, Dr. W certified MMI on "9/1/92," a nine percent IR with a handwritten notation "[date of injury 2] see report." Both TWCC-69s in the block "Date of Injury" have "[date of injury 1]."

Hearing Officer A, in his summary of the evidence, stated:

> After sorting though the evidence in both cases and applying the appropriate evidentiary tests, including those necessary to overcome presumptions, the great weight of credible medical evidence established the following:
>
> For the (date of injury 1), injury, Claimant reached [MMI] on September 11, 1992, with a five percent (5%) [IR].

Hearing Officer A further determined that "[t]he great weight of credible medical evidence" was that claimant had a five percent IR which was the IR found by the first designated doctor (Dr. P) whose responses had been determined to be inadequate. At the same time, Hearing Officer A determined that "it was necessary . . . to appoint [Dr. W] as the second designated doctor." Claimant appealed these determinations in Appeal 94914.

With the medical evidence in this posture, the Appeals Panel merely commented in Appeal No. 94914, that we were at a loss to understand why Dr. P had been replaced as the designated doctor but as "[n]either party . . . has raised this point on appeal . . . we need not address it or rule on the hearing officer's determination on this point." However, the hearing officer had not accepted the second designated doctor's (Dr. W) report and determined the IR to be that assessed by Dr. P, the rejected designated doctor, without

explanation or without detailing the evidence regarding why he (Hearing Officer A) believed the great weight of the other medical evidence was contrary to that of the second designated doctor, Dr. W. We note that Hearing Officer B, on the record, correctly interpreted our decision and stated that Dr. W's report was entitled to "great weight," presumably meaning presumptive weight (Section 408.125(e)), and that Dr. P's report, while not entitled to "great weight" (again, apparently meaning presumptive weight), was entitled to the weight of any other doctor's report and could be used in weighing whether the designated doctor's report (Dr. W) was contrary to the great weight of other medical evidence to the contrary. Hearing Officer B said all the evidence was in and he would "put it on the scale and see how it comes out." We note Hearing Officer B took no further evidence (and we do not imply that he was required to do so) and stated that Dr. W, the designated doctor, had assessed a 13% IR, Dr. B had assessed a 24% IR, and Dr. P had assessed a five percent IR. Hearing Officer B stated that Dr. P's rating was lower because he gave a zero percent IR for the cervical spine as well as "a zero rating for [ROM] because [ROM] testing for the lumbar spine was invalidated." Hearing Officer B concluded that this was essentially a "matter of professional judgment" and gave Dr. W's 13% IR presumptive weight.

Carrier has appealed on a number of grounds, the first of which is that the Commission "erred in assigning a new Hearing Officer" and that "the parties were not given written notification of the new assignment. . . ." Claimant, in his response, alleged that Hearing Officer A "had a biased opinion regarding the claimant's credibility. . . ." Whether Hearing Officer A was biased or not, is not an issue before us and we certainly have no evidence (claimant's allegations do not constitute evidence) regarding that matter. Hearing Officer B recited that Hearing Officer A had been "challenged for cause" and that the chief hearing officer had decided to replace Hearing Officer A with Hearing Officer B. Upon receiving this explanation carrier made no further objection nor questioned the chief hearing officer's authority to replace a hearing officer on a motion to recuse, thereby it failed to preserve its general objection for appeal. Consequently, while we may agree that a hearing should have been held on the motion to recuse (*See*, Rule 142.2(2)), that issue was not preserved for us on appeal.

Second, carrier contends that:

> The Appeals Panel specifically requested the Hearing Officer who had heard the cases to set forth the evidence upon which he relied to rely on the medical opinion of [Dr. P]. To assign a new officer who was not present at the initial hearing and did not hear how the evidence as [sic-was] presented at that hearing, other than listening to the audio tape, is error.

Contrary to carrier's contention, the Appeals Panel did not specify that a particular hearing officer was required to hear the remand. Rather, we stated:

[W]e are unable to clearly discern how the hearing officer arrived at his conclusion that the great weight of the other medical evidence was contrary to the report of the designated doctor. We reverse that portion of the decision of the hearing officer which did not conform to the designated doctor's report and remand for further development of the evidence, as appropriate, and for consideration not inconsistent with this decision.

The portion of the decision to which we referred stated:

[W]hen a hearing officer determines that the great weight of the other medical evidence is contrary to the report of the designated doctor, he should, in his decision, detail the evidence relevant to the issue in consideration, clearly state why the great weight of the other medical evidence is contrary to the report of the designated doctor, and state in what regard the contrary evidence greatly outweighs the designated doctor's report. [Citations omitted.]

As can be seen by the portion of the decision quoted, we did not specify that Hearing Officer A was required to hear the case on remand, rather we are saying a hearing officer who determines the great weight of other medical evidence is contrary to the report of the designated doctor must "detail the evidence" why that is so. Nor is it error for a substitute hearing officer to render a decision in a case he had not heard as long as credibility of witnesses is not an issue. In Texas Workers' Compensation Commission Appeal No. 941569, decided January 5, 1995, the Appeals Panel stated:

> If there is no testimony or issue involving credibility of witnesses, we have allowed a decision by a substitute hearing officer to stand. Texas Workers' Compensation Commission Appeal No. 941512, decided December 23, 1994.

In the instant case, Hearing Officer B was only required to evaluate the medical reports of Dr. B, Dr. P, Dr. W and other medical evidence in the case to determine whether the great weight of other medical evidence was contrary to the report of Dr. W. There is no evidence that Hearing Officer B did not thoroughly and adequately review all the medical evidence in reaching his decision. Consequently, we do not find carrier's contention meritorious.

Carrier further contends that Hearing Officer B "erred for the same reason the Appeals Panel previously remanded these cases." Carrier alleges Hearing Officer B "did not follow through with the specific instruction . . . and clarify the decision regarding why or why not [Dr. P's] medical opinion should be followed." Carrier misinterprets our decision in Appeal No. 94914. As we have previously noted, once Dr. P had been replaced as a designated doctor by Dr. W, his opinion no longer had presumptive weight. Hearing Officer B was not required to justify why he did not adopt Dr. P's report, nor was the hearing officer

required to detail the evidence why he was accepting the report of the designated doctor, Dr. W. As we have previously stated, only if a hearing officer determines the great weight of other medical evidence was contrary to the designated doctor is a hearing officer required to do an analysis and detail such other medical evidence. Further, our remand in Appeal No. 94914 is not to be interpreted to mean that the hearing officer who heard the remand was required to find that the great weight of the other medical evidence was contrary to that of Dr. W. Even had Hearing Officer A heard the case on remand, he was free to do an analysis of the medical evidence and conclude, that the designated doctor's (Dr. W) report had not been outweighed by other medical evidence to the contrary. It was only if he found that Dr. W's report had been outweighed by the great weight of other medical evidence that he would have been required to do an analysis and weighing process in his decision.

Upon review of the record submitted, we find no reversible error and we will not disturb the hearing officer's determinations unless they are so against the great weight and preponderance of the evidence as to be manifestly unjust. In re King's Estate, 150 Tex. 662, 244 S.W.2d 660 (1951). We do not so find and consequently the decision and order of the hearing officer are affirmed.

Thomas A. Knapp
Appeals Judge

CONCUR:

Joe Sebesta
Appeals Judge

Tommy W. Lueders
Appeals Judge