APPEAL NO. 950278

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. 94913, decided August 19, 1994, regarding a (date of injury 2), 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 a hearing officer to detail the evidence why the great weight of the other medical evidence was contrary to the report of the designated doctor if that was the opinion of the hearing officer.

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 1). Carrier responded to that request but 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 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 appointment of Hearing Officer B, carrier failed to preserve its objection as to the replacement of Hearing Officer A by the chief hearing officer.

We emphasize that the only 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 made certain determinations that while the claimant had a nine percent IR according to the designated doctor (Dr. W), which was not contrary to the great weight of the other medical evidence, carrier is nonetheless entitled to "100% contribution" because the (date of injury 2), injury "did not cause cause an added permanent impairment to Claimant's back."

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. 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 2), is affirmed. So much of Hearing Officer's B decision and order which deals with contribution, an issue not before Hearing Officer B, has become final as not having been timely appealed. Section 410.169.

Carrier, in its response to claimant's appeal, contends that claimant's appeal on the issue of contribution was not timely filed. Claimant does not state when he received the decision of Hearing Officer B; therefore, the provisions of Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 102.5(h) (Rule 102,.5(h)) are invoked. Rule 102.5(h) provides that the "deemed receipt" date is five days after the date the decision was mailed. Commission records show the decision was mailed on February 8, 1995, and, therefore, the deemed receipt date is February 13, 1995. Section 410.202 provides that an appeal shall be filed with the Appeals Panel "not later than the 15th day after the date on which the decision of the hearing officer is received. . . ." If the deemed receipt date is February 13, 1995, 15 days from that date would be Thursday, February 28, 1995, which would be the statutory date by which an appeal must be filed. Claimant's response and appeal is dated and postmarked March 10, 1995. In that the "Request for Review" portion of claimant's pleading was filed (mailed) beyond the statutory 15 days accorded in Section 410.202 and Rule 143.3(c) (being after February 28, 1995), claimant's pleading is timely as a response to carrier's appeal but is untimely as a request for review.

Briefly, on the merits, claimant, a bus driver, had sustained a compensable injury to his back on (date of injury 1) (the injury in the companion case Texas Workers' Compensation Commission Appeal No. 950277, decided April 4, 1995). Claimant was off work some period of time, returning to work in May 12, 1992. On (date of injury 2), claimant testified that he sustained another injury to his back pulling on the stuck driver's seat. That injury was not disputed. Claimant's treating doctor apparently referred claimant to Dr. Milani (Dr. M) for claimant's (month year) injury. Dr. M, in a Report of Medical Evaluation (TWCC-69) dated September 25, 1992, and narrative dated September 1, 1992, certified MMI (MMI is not an issue in this case on remand) and assessed a five percent IR. Dr. M's

narrative indicated the assessment was based on degenerative L4-5 and L5-S1 disks. (Dr. B), another referral doctor, on an undated TWCC-69 and a narrative dated September 11, 1992, certified MMI with a 24% IR. Dr. B made a clinical finding of mild right carpal tunnel syndrome (CTS), history of cervical and lumbar strains "status post assault 1991." Carrier apparently disputed Dr. B's 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 that indicated MMI had been reached and assessed a five percent IR.

A benefit review officer (BRO) wrote Dr. P by letter dated March 5, 1993, referred to an examination ". . . for dates of injury (date of injury 1), and (date of injury 2)," asking whether range of motion (ROM) tests had been done, and if so, documentation of those tests. The BRO also requested "a separate TWCC-69 for each injury. Please complete one for the (date of injury 2) injury." The BRO did not request information regarding any possible CTS problems claimant may have had. Dr. P responded by letter of March 8, 1993, stating that he was "unaware that a second workers' compensation claim had been filed on (date of injury 2)." Dr. P then responded to the BRO's inquiry thusly:

> 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 [ROM] was measured by double inclinometry technique as specified in the AMA Guides 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. Enclosed is a TWCC 69 form for the (date of injury 2) injury.

The accompanying TWCC-69 stated "[n]o additional impairment given for (date of injury 2) over that determined for (date of injury 1) injury" with zero percent IR.

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" with 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 evidence, stated:

After sorting through 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 2), injury, Claimant reached [MMI] on September 1, 1992 with a zero percent (0%) [IR].

Hearing Officer A commented on claimant's testimony that "[c]laimant's history of workers' compensation claims for his back, including a claim against this Employer for another back injury after (date of injury 2), his demeanor and ability to answer questions diminishes his credibility."

Hearing Officer A, in his determinations regarding the (month year) injury, found in pertinent part:

FINDINGS OF FACT

3.The great weight of credible medical evidence is that Claimant reached [MMI] on September 1, 1992, with a zero percent (0%) [IR].

4.Based on confusion as to whether the first designated doctor had properly used the current AMA Guidelines, it was necessary for the Texas Workers' Compensation Commission to appoint [Dr. W] as the second designated doctor.

CONCLUSIONS OF LAW

2.Claimant reached [MMI] on September 1, 1992, with a zero percent (0%) [IR].

3.The Texas Workers' Compensation Commission had good cause to appoint [Dr. W] as the second designated doctor.

4.Because Claimant's [IR] is zero percent (0%) no contribution can be ordered.

Claimant appealed that decision on the limited ground that the hearing officer (Hearing Officer A in the initial case) had found good cause to appoint a second designated doctor (Dr. W) yet ". . . determines that the decision of the second designated doctor does not have presumptive weight because it is against the great weight of the other credible medical evidence" without specifying how the "designated doctor's decision" is against the great weight of other medical evidence to the contrary, citing several Appeals Panel decisions. Carrier responded by saying: "[t]he hearing officer sets forth in detail in his report the nature of the evidence and the reliance upon the exhibits and the testimony elicited from the claimant upon which the hearing officer arrived at his opinion."

The Appeals Panel, in Appeal No. 94913, regarding the (date of injury 2), injury, commented 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, Hearing Officer A 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. At this point, we emphasize that our remand only set forth that when a hearing officer rules that the great weight of other evidence is contrary to a designated doctor's report, it must be explained and it was not in the nature of a *hearing de novo*. 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. 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 the hearing officer took no further evidence (and we do not imply that he was required to do so) and stated that Dr. W, the designated doctor, "assigned a 9% [IR]." Hearing Officer B further commented, in his statement of the evidence:

> [Dr. P] assigned Claimant a 5% IR for a prior compensable lower back injury Claimant sustained on (date of injury 1). [Dr. P] determined there was no additional impairment based on the (date of injury 2), compensable injury. The difference in the rating is that [Dr. P's] rating did not include a loss of range of motion (ROM). Loss of ROM was not included because the ROM test was invalid.
>
> An original issue was whether Carrier is entitled to contribution. It is clear [Dr. P] determined Claimant's (date of injury 2), injury to his back did not add to the permanent impairment he sustained due to a (date of injury 1), injury to his back. The result is Carrier is entitled to a 100% contribution for the impairment benefits due to Claimant for the (date of injury 2), injury.

Hearing Officer B then made the following determinations:

FINDINGS OF FACT

4.[Dr. W], the designated doctor, assigned a 9% [IR].

5.[Dr. W's] 9% [IR] is not contrary to the great weight of the other medical evidence.

6.Claimant sustained a prior compensable injury to the same part of his back on (date of injury 1), with a 9% [sic, Dr. W's IR for the (date of injury 1), injury was 13%] [IR].

7.The injury to the Claimant's back that is the subject of this claim did not cause an added permanent impairment to Claimant's back.

CONCLUSIONS OF LAW

2.Claimant's [IR] is 9%.

3.Carrier is entitled to 100% contribution.

Again, we note that contribution was not an issue on the case on remand. The remand dealt only with the IR due to the (date of injury 1), injury and whether the designated doctor's (Dr. W) report had been overcome by the great weight of medical evidence to the contrary. Hearing Officer B *sua sponte* raised an issue not properly before him in the remand of this case. As the Appeals Panel has noted, a hearing officer may correct or clarify an issue, but should not create issues not joined by the parties, or in this case, not remanded for further action. Texas Workers' Compensation Commission Appeal No. 94213, decided April 5, 1994, Texas Workers' Compensation Commission Appeal No. 93958, decided December 3, 1993. However, as we have noted, claimant did not timely appeal this issue and consequently it has become final pursuant to Section 410.169.

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 before us. 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, and thereby failing 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 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] 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 any 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. 94913. 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 is 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. 94913 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, after weighing and detailing all the medical evidence, 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.

We affirm the hearing officer's decision that claimant's IR for his (date of injury 2), injury is nine percent. Although we would find that the issue of contribution was not properly before Hearing Officer B, that issue was not timely appealed and therefore Hearing Officer B's determination that carrier is entitled to 100% contribution (from the (date of injury 1), injury) and carrier is required to make no further impairment income benefit payments on this claim, has become final.

Thomas A. Knapp
Appeals Judge

CONCUR:

Joe Sebesta
Appeals Judge

Tommy W. Lueders
Appeals Judge