APPEAL NO. 950331

On January 31, 1995, a contested case hearing was held in (city), Texas, with (hearing officer) presiding 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 hearing officer determined that the appellant (claimant) reached maximum medical improvement (MMI) on January 27, 1994, with a 14% impairment rating (IR) as reported by the designated doctor, and that the claimant's average weekly wage (AWW) is $544.91. The claimant appeals the determination that he has a 14% IR. No response was received from the respondent (carrier). There has been no appeal of the AWW determination.

DECISION

Affirmed.

The parties stipulated that the claimant suffered a compensable injury on (date of injury). The claimant testified that he was carrying scaffolding when he fell and struck his back on a car and then fell to the ground. (Dr. L) examined the claimant at the request of the carrier on January 27, 1994, and he reported in a Report of Medical Evaluation (TWCC-69) that the claimant reached MMI on January 27, 1994, with an 11% IR, which is composed of four percent impairment for abnormal range of motion (ROM) of the lumbar spine, three percent impairment for a compression fracture of the spine, and four percent impairment for gluteus maximus weakness. The Texas Workers' Compensation Commission (Commission) selected (Dr. A) as the designated doctor and he reported in a TWCC-69 dated May 26, 1994, that the claimant reached MMI on January 27, 1994, with a 14% IR, which is composed of six percent impairment for abnormal lumbar lateral flexion ROM (flexion and extension ROM were determined to be invalid under the straight leg raising test), three percent impairment for abnormal thoracic ROM, and five percent impairment for a compression fracture of the spine. In a TWCC-69 dated July 18, 1994, the claimant's treating doctor, (Dr. E), did not provide a date of MMI, but did report that the claimant has a 24% IR, which is composed of two percent impairment for a compression fracture of the spine, five percent impairment for a disc lesion, three percent impairment for abnormal thoracic ROM, and 15% impairment for abnormal lumbar ROM.

The hearing officer found that the report of Dr. A, the designated doctor, was not contrary to the great weight of the other medical evidence, and concluded that the claimant's IR is 14%.

Section 408.125(e) provides that, 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. We have held that no other doctor's report, including the report of a treating doctor, is accorded the presumptive weight given to the designated doctor's report. Texas Worker's Compensation Commission Appeal No. 92366, decided

September 10, 1992. We have also held that it is not just equally balancing evidence or a preponderance of the evidence that can overcome the presumptive weight given to the designated doctor's report. Texas Workers' Compensation Commission Appeal No. 92412, decided September 28, 1992.

The claimant contends on appeal, as he did at the hearing, that Dr. A should have retested lumbar flexion and extension ROM. Dr. A's Figure 83c from the Guides to the Evaluation of Permanent Impairment, third edition, second printing, dated February 1989, published by the American Medical Association (the Guides) records lumbar ROM findings. This document indicates that three measurements of lumbar flexion and three measurements of lumbar extension were taken and that flexion and extension measurements met the ± 10% or 5° test for consistency. The Figure 83c document also reflects that three measurements were taken of straight leg raising on the right and three measurements were taken of straight leg raising on the left. Dr. A notes in his narrative report that no impairment was given for flexion and extension ROM because the claimant did not meet the straight leg raising criteria, that is, the tightest straight leg raising exceeded the sum of the sacral flexion and extension by more than 10°. Page 89 of the Guides provides in Section 3.3e that:

> A comparison of hip flexion to straight leg raising on the tightest side offers a validation measure independent of reproducibility. The test is invalid and must be repeated if the following validity criteria is *not* met:
>
> Tightest straight leg raising (SLR)-(hip flexion + hip extension) $\leq 10°$
>
> If repeat flexion measurements that are otherwise reproducible are consistently associated with an abnormal hip/SLR motion pattern, the measurements are not valid.

Here, lumbar flexion and extension measurements met the ± 10% or 5° consistency requirement set forth on page 71 of the Guides, but, according to Dr. A, such measurements were consistently associated with an abnormal hip/SLR motion pattern in that the claimant did not meet the straight leg raising validity criteria. As stated by Dr. A in his narrative report, "[i]t was found that the ratios of straight leg raising to sacral [ROM] were invalid in accordance with Figure 83c, page 77." This case is analogous to the facts of Texas Workers' Compensation Commission Appeal No. 94004, decided February 11, 1994, where the lumbar ROM measurements reported by the designated doctor met the consistency requirements provided for in the Guides, but the claimant did not meet the straight leg raising validity criteria after three straight leg raising measurements on each side, and the claimant contended that the designated doctor should perform additional testing. The designated doctor was of the opinion that the claimant should not be retested because, although he had met consistency requirements, he had not met the straight leg raising validity criteria. In Appeal No. 94004, *supra*, we affirmed the hearing officer's decision which based the IR on

the report of the designated doctor without further ROM testing. *Compare* Texas Workers' Compensation Commission Appeal No. 950292, decided April 10, 1995, where the Appeals Panel remanded a case for further ROM testing where the claimant did not meet the ± 10% or 5° consistency criteria but the designated doctor gave ROM impairment; and Texas Workers' Compensation Commission Appeal No. 950248, decided April 5, 1995, where it was not clear how many tests or measurements the designated doctor had conducted on the first examination, he invalidated lumbar flexion and extension ROM based on the straight leg raising validity criteria, the hearing officer had the designated doctor retest ROM, and we affirmed the hearing officer's decision which based the IR on the second report of the designated doctor which found lumbar flexion and extension ROM met the straight leg raising validity criteria. However, in the instant case, it is clear that straight leg raising was measured three times on each side and that the lumbar flexion and extension measurements met consistency requirements, but not the straight leg raising validity test.

In accordance with our decision in Appeal No. 94004, *supra*, we conclude that the hearing officer did not err in according presumptive weight to the report of the designated doctor and in finding that the great weight of the other medical evidence is not contrary to his report. The hearing officer is the sole judge of the weight and credibility of the evidence. Section 410.165(a). 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, which we do not find to be the situation in this case. *See* Texas Workers' Compensation Appeal No. 950084, decided February 28, 1995.

The claimant testified at the hearing and asserts on appeal that Dr. A had an assistant perform ROM testing. We have noted that a designated doctor can properly rely on testing completed by another person provided his IR recommendation is "ultimately based on his own professional opinion." Texas Workers' Compensation Commission Appeal No. 93870, decided November 10, 1993; Texas Workers' Compensation Commission Appeal No. 93382, decided June 24, 1993. A review of Dr. A's report indicates that he examined the claimant and reviewed the ROM testing and adopted it in calculating the claimant's IR, which, our review indicates, was the product of Dr. A's professional judgment.

The claimant mentions in his appeal that on August 29, 1994, he had surgery to install a spinal cord stimulator. At the hearing held on January 31, 1995, the claimant did not contend that he should have a higher IR than the 14% IR assigned by Dr. A based on such surgery and we do not consider such matter for the first time on appeal. Texas Workers' Compensation Commission Appeal No. 91100, decided January 22, 1992. The claimant also attached a number of documents to his appeal, some of which were in evidence and some of which were not offered at the hearing, but which are dated prior to the hearing. Section 410.203(a)(1) provides that the Appeals Panel shall consider the record developed at the contested case hearing. Consequently, those documents which are attached to the appeal, but which were not in evidence, will not be considered on appeal. *See* Texas Workers' Compensation Commission Appeal No. 92400, decided September 18, 1992.

We observe that those documents attached to the appeal which were not offered at the hearing do not meet the criteria for newly discovered evidence. Appeal No. 92400, *supra*.

The hearing officer's decision and order are affirmed.

Robert W. Potts
Appeals Judge

CONCUR:

Philip F. O'Neill
Appeals Judge

Tommy W. Lueders
Appeals Judge