APPEAL NO. 931074

This appeal is brought pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act) (formerly V.A.C.S., Article 8308-1.01, *et seq*.). A contested case hearing was held on October 11, 1993, in (city), Texas, with (hearing officer) presiding as hearing officer. The single issue at the hearing was which of two dates was the correct date of maximum medical improvement (MMI). The hearing officer determined MMI had been reached on September 21, 1992. The appellant (claimant) appeals arguing both an evidentiary point and that the designated doctor selected by the Texas Workers' Compensation Commission (Commission) determined the date of MMI to be January 15, 1993. The respondent (carrier) urges that the designated doctor was selected only to determine impairment, not MMI, and that the decision of the hearing officer was not against the great weight and preponderance of the evidence. The claimant was assisted at the hearing and in this appeal by (Mr. H), a union representative.

DECISION

We affirm.

The record developed at the hearing was very sparse and does not aid appellate review. However, there was no dispute that the claimant injured his mid and lower back in the course and scope of his employment on (date of injury). He was initially treated by (Dr. SP), whom the claimant and carrier describe as his treating physician. There was no medical evidence introduced to establish a diagnosis or course of treatment prescribed by Dr. SP. The claimant was then referred to (Dr. T) for a spine evaluation. It is not clear from the record who made the referral, but claimant insisted that Dr. T was not his treating physician.[1] On September 21, 1992, Dr. T completed a Report of Medical Evaluation (TWCC-69) in which he certified an MMI date of September 21, 1992 with an 11% whole body impairment rating (IR). In a letter of September 29, 1992, to Dr. SP, admitted as Claimant's Exhibit No. 2, the carrier writes:

> . . . it appears that you are treating physician for [claimant]. Please review the TWCC 69 [from Dr. T] and send me another indicating if you agree with the date of MMI & % impairment.

By means of a Payment of Compensation or Notice of Refused/Disputed Claim (TWCC-21), dated November 11, 1992, and admitted as Claimant's Exhibit No. 1, the carrier stated:

> To date the carrier has not received any confirmation from [Dr. SP] on agreement or disagreement w/[Dr. T]. The carrier is requesting the TWCC to designated a Dr. to settle the issue of MMI and % of Imp.

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[1]The statement of evidence by the hearing officer records that Dr. T evaluated the claimant on several occasions at Dr. SP's request. At the hearing, the claimant describes Dr. T as "carrier's doctor." We found no evidence of a course of treatment by Dr. T.

According to the claimant, Dr. SP never expressed agreement or disagreement with Dr. T's TWCC-69.

By letter of December 16, 1992, a Commission Disability Determination Officer (DDO) advised the claimant that because of a dispute, the Commission selected (Dr. ST) as designated doctor to determine the percentage of impairment only. There is nothing to explain why the disputed issue changed from MMI and IR to IR only. The letter of appointment of Dr. ST was sent directly to the claimant who apparently did nothing to challenge or question why Dr. ST was selected only to certify IR.[2] In any case, in a TWCC-69 of January 15, 1993, admitted as Claimant's Exhibit No. 3, Dr. ST certified a 12% IR and left the line in Block 16 of the TWCC-69 for stating a date of MMI blank. The only reference to MMI in the report of Dr. ST accompanying the TWCC-69 states:

> Based on my review of the records and his current functional status, it is my medical opinion based on a reasonable degree of medical certainty that [claimant] has reached maximum medical improvement.

No actual date of MMI appears in the report.

Based solely on the documentary evidence submitted at the hearing (there was no testimony from either party), the hearing officer found, and the claimant now appeals[3], the following findings of fact:

FINDINGS OF FACT

4.Carrier disputed the impairment rating and requested a designated doctor to determine the impairment rating.

5.[Dr. ST] was selected by the Commission to examine Claimant and render an opinion concerning his impairment rating only.

7.[Dr. ST] is the designated doctor for the purpose of impairment only and did not offer an opinion as to the date Claimant reached maximum medical improvement.

The claimant's first assertion of error is that since the evidence introduced by both parties at the hearing "was part of the TWCC file and was presented at the Benefit Review

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[2]At the hearing, Mr. H conceded that the claimant received the notice of the appointment of Dr. ST as designated doctor to determine only IR, but unfortunately did not give it proper attention and relied on the carrier's protest and letter to Dr. SP in concluding that Dr. ST would certify both MMI and IR.

[3]Though not expressly stated by the claimant in his request for review, we assume for purposes of this decision that the claimant also appeals the hearing officer's conclusion of law that "Claimant reached maximum medical improvement on September 21, 1992."

Conference . . . all documents in the TWCC file on [claimant] should have been considered, not just the (3) three documents submitted by the Claimant and the (2) two documents submitted by the Carrier." (Emphasis in original).

In his opening statement, Mr. H announced that the claimant would "refer" to "all" the documents given to the Benefit Review Officer. The hearing officer then advised Mr. H, for the second time, that anything he wished the hearing officer to consider would have to be introduced and admitted into evidence at the hearing and made a part of the record. The claimant did not testify, and Mr. H moved only for the admission of the three documents mentioned above. He did not specifically ask the hearing officer to consider any other documents, nor did he identify any portion of the Commission file in this case that he wanted the hearing officer to consider.

In its response to this issue, carrier argues that since the claimant did not offer the entire case file into evidence, no issue of admissibility was ever raised at the hearing and the case file never became part of the record. Therefore, carrier argues that this issue is not properly appealable and, in any case, the Appeals Panel is limited by Section 410.203(a)(1) to a consideration of the record "developed at the contested case hearing."

The only way documents may become part of the record of a contested case hearing and thus evidence for the hearing officer to consider and ultimately for the Appeals Panel to review, is "through having been admitted at the hearing." Texas Workers' Compensation Commission Appeal No. 92400, decided September 18, 1992. The documents now alluded to by the claimant on appeal were by his own admission in existence at the time of the hearing and in no sense can be considered newly discovered evidence. *See* Texas Workers' Compensation Commission Appeal No. 92417, decided September 17, 1992. He was invited on more than one occasion by the hearing officer to identify the documents and offer them into evidence. He never did so. Thus the hearing officer correctly considered and made part of the record only those documents offered at the hearing, and was not required to take notice of, or respond to generalized references to, the claimant's "TWCC file." *See* Texas Workers' Compensation Commission Appeal No. 93103, decided March 22, 1993. Although as the carrier observes we need not address this assertion of error on appeal since it was not first presented to the hearing officer for a decision, *see* Texas Workers' Compensation Commission Appeal No. 91100, decided January 22, 1992, we nonetheless determine it to be without merit.

The claimant next argues on appeal, first, that the carrier did in fact contest both MMI and IR as reflected in the letter of September 29, 1992, to Dr. SP and on the TWCC-21 of November 6, 1992. Secondly, he argues that the Commission erred in selecting Dr. ST only to certify impairment rating, a mistake (according to his position) that the claimant should not now pay for. Thirdly, according to the claimant, Dr. ST did, despite the instructions from the Commission, certify an MMI date of January 15, 1993, the date of her examination.[4]

[4]The claimant's contention that the DDO violated Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE §§ 130.1 (Rule 130.1) and 130.4(f) and (g) (Rule 130.4(f) and (g)) in connection with Dr. SP's refusal to express agreement

The Appeals Panel has stated that the "threshold issue of the existence of MMI cannot be neatly severed from assessment of an `impairment rating,'" and that these issues are "somewhat intertwined." Texas Workers' Compensation Commission Appeal No. 92394, decided September 17, 1992. We have also held that IR and MMI become final together and that "the report of a doctor who assigned an impairment rating without first determining that a claimant had reached MMI would be found to be faulty, or at a minimum, premature." Texas Workers' Compensation Commission Appeal No. 93377, decided July 1, 1993. In other words, MMI must be reached before an IR can be certified. Texas Workers' Compensation Commission Appeal No. 92670, decided February 1, 1993.

The claimant argues that the Commission made a mistake in appointing Dr. ST only to look at IR. However, claimant, who admittedly received the appointing letter approximately one month before the scheduled examination, did nothing to question why or to indicate disagreement that only IR was to be reviewed and evaluated. Under these circumstances, his reliance on MMI still being an issue for Dr. ST to certify was misplaced. In any event, because, as our review of the cases above indicates, an evaluation of IR necessarily requires a determination that MMI has occurred, the form of the appointment letter in this case at most may have conveyed the impression that IR and MMI are unrelated. However, Dr. ST was not misled because she specifically found MMI to have been reached. (Following her instructions from the Commission, she simply did not indicate the date when she considered MMI to have occurred.) Having given the statutorily mandated presumption of validity to Dr. ST's assignment of IR (a matter no longer contested by either party), the hearing officer then had only to determine, as a matter of fact, from the sparse evidence admitted at the hearing when claimant first reached MMI. *See* Texas Workers' Compensation Commission Appeal No. 93783, decided October 19, 1993. On the issue of the date of MMI, Dr. ST's determination carried no presumptive weight. *See* Texas Workers' Compensation Commission Appeal No. 93958, decided December 3, 1993. From the evidence presented and from the way this issue was framed, both at the hearing and at the Benefit Review Conference, the only findings available to the hearing officer were an MMI date of either September 21, 1992, or January 15, 1993, the date of Dr. ST's examination.

The hearing officer as the finder of fact is the sole judge of the relevance and materiality of the evidence and of its weight and credibility and the inferences to be drawn therefrom. Section 410.165. An appeals level body is not a fact finder, and does not normally substitute its own judgment for that of the trier of fact, even if the evidence would support a different result. National Union Fire Insurance Company of Pittsburgh, Pennsylvania v. Soto, 819 S.W.2d 619, 620 (Tex. App.-El Paso 1991, writ denied). When reviewing a hearing officer's decision we will reverse such decision only if it is so contrary to the overwhelming weight of the evidence as to be clearly wrong and unjust. Cain v. Bain, 709 S.W.2d 175, 176 (Tex. 1986); Pool v. Ford Motor Company, 715 S.W.2d 629 (Tex. 1986). Here the hearing officer considered the evidence offered and admitted and determined the date MMI was reached to be September 21, 1992. Contrary to claimant's

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or disagreement with Dr. T's certification of MMI and IR is without merit.

assertion, we can find no evidence in the record that Dr. ST equated the date of her examination with the achievement of MMI. The hearing officer's decision is not so against the great weight and preponderance of the evidence as to be clearly wrong and manifestly unjust. In re King's Estate, 150 Tex. 662, 244 S.W.2d 660 (Tex. 1951).

We note that Finding of Fact No. 1 incorrectly refers to Lubbock, Texas, as venue for the hearing. The hearing took place in Amarillo and we reform this finding accordingly.

The decision is affirmed as reformed.

Stark O. Sanders, Jr.
Chief Appeals Judge

CONCUR:

Susan M. Kelley
Appeals Judge

Lynda H. Nesenholtz
Appeals Judge