APPEAL NO. 931175

This appeal arises 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 (CCH) was held on November 29, 1993, in (city), Texas, with (hearing officer) presiding as hearing officer. The sole issue at the CCH was what was the respondent's (claimant herein) whole body impairment rating. The hearing officer found that the impairment rating of zero percent assessed by the designated doctor was contrary to the great weight of the other medical evidence and found that the claimant had a 40% impairment rating based upon the assessment of claimant's treating doctor. The respondent (carrier herein) complains of a number of findings of fact and a conclusion of law of the hearing officer and requests that we reverse the decision of the hearing officer and render a new decision that the claimant has a zero percent impairment rating. The claimant replies to the carrier's points and argues that we should affirm the decision of the hearing officer as the impairment assessment of the designated doctor was against the great weight of the contrary medical evidence.

DECISION

We reform Findings of Fact Nos. 5 and 15 to reflect that the doctor mentioned therein is an internal medicine specialist and not a psychiatrist. Finding no reversible error in the record and sufficient evidence to support the decision of the hearing officer, we affirm.

On or about (date of injury), the claimant, while working as boilermaker (although generally employed as a pipefitter) at a refinery in a sulphur recovery unit, inhaled some substance. The claimant developed hoarseness, shortness of breath, a cough and light-headedness. On (date), he fell and stumbled into a rail, breaking several ribs. Claimant has been examined or treated by a number of physicians and psychologists who have stated that the claimant has suffered brain damage as a result of toxic chemical inhalation. These include: (Dr. G), M.D., an internal medicine specialist; (Dr. M), M.D., Ph.D., a psychiatrist; (Dr. W), M.D., a psychiatrist; (Dr. We), Ph.D., neuropsychologist; and (Dr. H), Ph.D., a neuropsychologist. The carrier never controverted the alleged toxic chemical injury and stipulated that the injury for which this claim was filed occurred in the course and scope of employment. The claimant testified that his injury resulted in severe memory and concentration loss as well as an inability to control his temper. He testified that at the time of the CCH he remained under the treatment of Dr. G and Dr. M.

Dr. G, the claimant's treating doctor, certified on a Report of Medical Evaluation (TWCC-69) that the claimant had reached MMI on March 12, 1993, with 40% whole body impairment. Carrier timely disputed this impairment rating and the Commission selected (Dr. Mc) as the designated doctor. Dr. Mc examined the claimant on July 15, 1993, and stated that the claimant had no physical impairment to his pulmonary function or functional capacity. He stated that the claimant may " . . . have difficulties with cognitive dysfunction and may certainly warrant further evaluation from a psychological standpoint." Dr. Mc

recommended further evaluation by (Dr. Ga), Ph.D., " . . . a neuropsychologist experienced in the area of cognitive impairment in brain injury." Dr. Ga was then requested to evaluate the claimant " . . . from a psychological standpoint."

Dr. Ga evaluated the claimant in September 1993. He found that the claimant's neuropsychological test scores were consistent with attention and new learning difficulties. Dr. Ga noted that the claimant was currently functioning relatively well with the positive effect the use of psychoactive medications were having on his mood. He then deferred any recommendations " . . . for return to work, etc . . . " to claimant's psychiatrist. Dr. Ga did not make any comment as to a whole body rating for the claimant. Following Dr. Ga's report, Dr. Mc then made the following addendum to his Report of Medical Evaluation: "After reviewing Psychological Evaluation there is no change in the patient's impairment rating." Dr. Mc then reported on a TWCC-69 dated October 5, 1993, that the claimant had reached maximum medical improvement on March 12, 1993, with a zero percent impairment rating.

On September 17, 1993, the Benefit Review Officer requested that Dr. Mc review a recent psychiatric report from Dr. M which she said she did not think he had seen and in which Dr. M assessed a 45% impairment rating. She asked Dr. Mc to explain the great disparity between his rating and Dr. M's. Dr. Mc did not reply.

The claimant took a deposition by written questions of Dr. M in November 1993. In this deposition the following exchange took place:

5.Utilizing the Guides To The Evaluation Of Impairment, Third Edition, as published by the American Medical Association, do you have an opinion as to whether or not [Dr. Mc's] finding of zero percent (0%) impairment in this case is against the great weight of medical evidence in this case? If so, please state what that opinion is.

Answer: Yes. [Dr. Mc] points out he is not considering neuropsychiatric symptoms but rather physical limitations, thus it is not a <u>complete</u> rating. His statement is limited to ‘physical impairment.’

The claimant also took the deposition by written questions of Dr. Mc in November 1993. The following question and answer are found in this deposition:

7.Please list specifically each basis for your opinion that there is no permanent impairment in this case viewed in light of Chapter 14 titled Mental and Behavioral Disorders of the Guides To The Evaluation Of Permanent Impairment, Third Edition, published by the American Medical Association. I am particularly interested in what portions of [Dr. G's] neuropsychological evaluation that you relied on in rendering your opinion of impairment in this case.

Answer: This patient was witnessed (sic) to be ~~belligerent~~ deceitful & misleading.

He stated he couldn't get around because ‘I can't drive’ then I & my staff witnessed pt. drive away alone in auto.

The carrier challenges the following Findings of Fact and Conclusion of Law made by the hearing officer:

FINDINGS OF FACT

4.Claimant suffered a toxic chemical inhalation injury while at work on or about (date of injury).

5.Claimant's treating doctor, [Dr. G], a psychiatrist, found that Claimant reached maximum medical improvement on March 12, 1993 with an impairment rating of 40%.

7.[Dr. Mc] found on July 15, 1993 that Claimant has no physical impairment of his pulmonary function or functional capacity, but referred him to a psychologist, [Dr. G], to determine if Claimant had any impairment from a psychological standpoint.

8.[Dr. G] deferred any recommendations for return to work or similar matters to Claimant's treating psychiatrist who had found Claimant to have an impairment rating of 40%.

9.Based on his examination and on [Dr. G's] neuropsychological report, [Dr. Mc] determined as the designated doctor that Claimant had a whole body impairment rating of 0%.

10.The determination of [Dr. G] of a 40% impairment rating was based on his treatment and extensive neuropsychological testing by two neuropsychologists, [Dr. H] and [Dr. We].

11.Dr. H's testing of Claimant in July 1991 and May 1992 led him to conclude that Claimant suffered brain damage at the level of cerebral functioning.

14.The impairment rating of 0% found by [Dr. Mc], the designated doctor, is contrary to the great weight of the other medical evidence in the case.

15.[Dr. G]'s impairment rating of 40% is the only other impairment rating properly given in this case.

16.Claimant reached maximum medical improvement on March 12, 1993 with an impairment rating of 40%.

* * * * * *

CONCLUSION OF LAW

3.Claimant reached maximum medical improvement on March 12, 1993 with an impairment rating of 40%.

In regard to the hearing officer's Finding of Fact No. 4, the carrier objects to the hearing officer's use of the word "toxic." Carrier then goes on to say that it does not dispute that the claimant suffered a chemical inhalation injury[1], but questions whether the chemical inhaled by the claimant was a "toxin" or merely an "irritant." While the carrier also seems to indicate that there is some evidence that the chemicals shown to be present at the injury site would not cause central nervous system damage, there is certainly substantial evidence in the record that the claimant suffered an organic brain injury due to chemical exposure. This would certainly support the use of the term "toxic" by the hearing officer.

The carrier's objection to Finding of Fact No. 5 is twofold. First, the carrier points out that Dr. G is an internal medicine specialist and not a psychiatrist. This is true and we reform the hearing officer decision to reflect this fact. Carrier's second point is that Dr. G issued a second opinion as to impairment. After reviewing a report from Dr. M in which Dr. M stated that the claimant had a 45% impairment rating, Dr. G stated in narrative report[2] dated October 14, 1993, that he agreed with this 45% rating. We fail to see how this makes Finding of Fact No. 5 untrue or would constitute reversible error.

The carrier objects to Finding of Fact No. 7 in that the hearing officer found that Dr. Mc referred the claimant to Dr. Ga to determine if he had any impairment from a psychological standpoint. The carrier takes the position that Dr. Mc referred the claimant to Dr. Ga for a psychological evaluation not for an impairment rating. Again this appears to be only a semantic distinction. Clearly, Dr. Mc's referral to Dr. Ga was premised on Dr. Mc's belief that Dr. Ga would be better able to evaluate the claimant in regard to psychological or brain injury than he could himself. He obviously wanted to use this information in making his own final determination in regard to impairment. We have previously held that a designated doctor can consider and rely on tests, exams, data, medical reports, etc., performed by others in arriving at his final evaluation in a given case. *See* Texas Workers' Compensation Commission Appeal No. 93095, decided March 19, 1993.

The carrier complains that the hearing officer's Finding of Fact No. 8 is incorrect in that Dr. Ga's statement that he would defer any recommendations in regard to return to work or similar matter to the claimant's treating psychiatrist would not mean Dr. G because he is not a psychiatrist. Dr. Ga's statement that these matters should be deferred to the

[1]It would be really too late to do so as the claimant has alleged a chemical inhalation injury and the carrier failed to dispute such injury within 60 days (*See* Section 409.021) and in fact stipulated to injury at the beginning of the CCH.

[2]Although he never issued an amended TWCC-69.

claimant's treating psychiatrist is somewhat ambiguous. It raises the question as to whether "similar matters" means impairment and whether Dr. Ga means to defer to the claimant's treating physician (who is clearly Dr. G) or to a psychiatrist who has been treating the claimant (clearly Dr. M). Resolution of inconsistencies and ambiguities in the evidence, is the province of the hearing officer as trier of fact. *See* Garza v. Commercial Insurance Company of Newark, New Jersey, 508 S.W.2d 701, 702 (Tex. Civ. App.-Amarillo 1974, no writ). This also true of medical evidence. Texas Employers Insurance Association v. Campos, 666 S.W.2d 286, 290 (Tex. App.-Houston [14th Dist.] 1984, no writ). We will set such a determination aside only if we find that it is against the great weight and preponderance of the evidence. Cain v. Bain, 709 S.W.2d 175, 176 (Tex. 1986); Pool v. Ford Motor Co., 715 S.W.2d 629, 635 (Tex. 1986). Here, we do not find that the hearing officer's determinations that by "similar matter" Dr. Ga meant impairment and by "treating psychiatrist" he meant Dr. G are against the great weight and preponderance of the evidence.

The carrier disputes the hearing officer's Finding of Fact No. 9 claiming the record reflects that Dr. Mc relied upon the reports of other doctors and not just his own examination and the report of Dr. Ga in making his impairment determination. The hearing officer did not state in his finding that Dr. Mc relied upon only his examination and Dr. G's report. The hearing officer does not find that Dr. Mc did or did not rely upon anything else in making his determination. As stated, this finding is clearly supported by the evidence.

The carrier attacks the hearing officer's Finding of Fact No. 10 stating that the record does not reflect that Dr. G in arriving at his 40% rating relied upon the evaluations of Dr. H and Dr. We. The record reflects that both Dr. H and Dr. W saw the claimant prior to Dr. G's arriving at his 40% rating. On his TWCC-69 Dr. G mentions a neuropsychological evaluation. The record reflects that both Dr. H and Dr. We did neuropsychological evaluations. The record reflects that it was Dr. G who referred the claimant to Dr. H for a neuropsychological evaluation. The hearing officer's finding is a reasonable inference from the evidence.

The carrier disagrees with the hearing officer's Finding of Fact No. 11 because Dr. H mentions alcohol abuse and the hearing officer does not include this in his finding. The finding of the hearing officer is that testing by Dr. H led him to conclude that the claimant suffered brain damage. A reading of Dr. H's report shows that he concurs with Dr. We's conclusion that the claimant suffered from brain damage. The carrier's point is without merit.

The carrier contests the hearing officer's Finding of Fact No. 14 that the impairment rating of the designated doctor is against the great weight of the other medical evidence. The carrier argues that the opinion of the designated doctor is correct and is correctly based upon Dr. Mc's opinion that the claimant's impairment is due to alcohol abuse and that he is deceitful. First, we would point out that while throughout the records there are indications that the claimant has had problems with alcohol abuse, this is not relevant to the claimant's injury. There is no evidence that the claimant was intoxicated at the time of the alleged

injury. If the carrier is attempting to interpose a defense based upon the contention that the claimant's use of alcohol, and not his chemical inhalation injury, is the cause of his brain injury then the carrier must prove that the claimant's use of alcohol is the sole cause of his brain injury. *See* Texas Workers' Compensation Commission Appeal No. 93864, decided November 10, 1993, and decisions cited therein. Sole cause is not an issue in this case.

The carrier's argument does point to a problem with the designated doctor's opinion. To the degree that the designated doctor failed to rate the claimant's injury--organic brain injury due to chemical inhalation--his opinion is defective. That is to say unless he rates the injury in question, the designated doctor's rating is not valid. *See* Texas Workers' Compensation Commission Appeal No. 93735, decided October 4, 1993.

We have held that in determining whether the opinion of the designated doctor is contrary to the great weight of the other medical evidence we must look at the circumstances of the particular case. *See* Texas Workers' Compensation Commission Appeal No. 93400, decided July 7, 1993. In the present case where a number of doctors and neuropsychologists have found the claimant extremely mentally dysfunctional, where the claimant appeared mentally impaired during his testimony, where the designated doctor asks for neuropsychological evaluation to aid him in determining impairment and then ignores that evaluation, and where the designated doctor is requested by the Commission to explain the great discrepancy between his impairment rating and that of other doctors, but fails to do so, we cannot say that the hearing officer's determination that the assessment of the designated doctor is against the great weight of the contrary medical evidence is erroneous.

The carrier attacks the hearing officer's Finding of Fact No. 15 complaining that the hearing officer again states that Dr. G is a psychiatrist when he is not. As with Finding of Fact No. 5 we reform Finding of Fact No. 15 to conform with the evidence. The carrier also attacks this Finding of Fact No. 15 asserting that Dr. G is not qualified to give an impairment rating. Carrier cites no basis for this assertion and we know of none.

In contesting Finding of Fact No. 16, the carrier again asserts that the hearing officer should have used Dr. Mc's impairment rating rather than Dr. G's. We have already explained in discussing Finding of Fact No. 14 why we would sustain the finding of the hearing officer that Dr. Mc's impairment rating was contrary to the great weight of the other medical evidence. If the great weight of the medical evidence contradicts the impairment rating contained in the report of the designated doctor chosen by the Commission, the Commission shall adopt the impairment rating of one of the other doctors. Section 408.125. We find nothing erroneous in the hearing officer's decision to choose Dr. G's 40% rating.

For the foregoing reasons, the Decision and Order of the hearing officer are affirmed.

Gary L. Kilgore
Appeals Judge

CONCUR:

Robert W. Potts
Appeals Judge

Thomas A. Knapp
Appeals Judge