APPEAL NO. 93594

This appeal is brought pursuant to the Texas Workers' Compensation Act, TEX. REV. CIV. STAT. ANN. art. 8308-1.01 *et seq*. (Vernon Supp.) (1989 Act). On June 22, 1993, a contested case hearing (CCH) was held in (city), Texas, with (hearing officer) presiding. The issue at the CCH was whether or not the appellant (claimant herein) had reached maximum medical improvement (MMI), and if so, the claimant's correct percentage of whole body impairment. The hearing officer found that the claimant had reached MMI on November 2, 1992, with a two percent whole body impairment rating, based on the report of a designated doctor selected by the Texas Workers' Compensation Commission (Commission).

The claimant appeals contending essentially that he is not at MMI because he has pain which prevents him from working and that his impairment as a result of the injury is greater than two percent. The respondent, a statutorily self-insured political subdivision (city herein), replies that the hearing officer's findings of MMI and impairment are based upon the opinion of a designated doctor whose opinion was entitled to presumptive weight and was not overcome by the great weight of the other medical evidence. The city also contends that the claimant's appeal is untimely.

DECISION

Finding the appeal timely, no reversible error in the record, and sufficient evidence to support the decision of the hearing officer, we affirm.

First we must consider whether the appeal is timely. Commission records reflect that the decision of the hearing officer was distributed on June 28, 1993. The claimant does not indicate when he received this decision, so we will deem receipt, pursuant to Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 102.5(h) (Rule 102.5(h)) to have been on the fifth day after the decision's distribution, or on July 3, 1993. Pursuant to Article 8308-6.41(a) (1989 Act), a party desiring to appeal the decision of the hearing officer is required to do so not later than 15 days after receiving the decision, or in this case, by July 18, 1993. The claimant mailed a three page request for review to the Commission postmarked July 14, 1993, and received by the Commission on July 16, 1993. The claimant does not indicate in his request for review whether he sent a copy to the city.

On July 29, 1993, the claimant filed a second request for review with the Commission which included the claimant's original three page request for review as well as three additional pages. The Commission sent a copy of the this second request for review by fax transmission to the city on July 29, 1993. The city in its response to the claimant's request for review recites that it received the claimant's request for review on July 29, 1993. The city's response was transmitted to the Commission by Federal Express under cover letter of August 6, 1993, and received by the Commission on August 9, 1993.

The claimant's original three page request for review received on July 16, 1993, was

filed within fifteen days of the date the claimant was deemed to have received the decision of the hearing officer and is clearly timely. The second request for review received July 29, 1993, is clearly untimely and we will not consider the additional three pages found in this request for review. The failure of an appellant to properly serve a respondent with a request for review extends the time for the respondent to file a response. Texas Workers' Compensation Commission Appeal No. 91120, decided March 30, 1992. The city's response to the claimant's request for review is therefore timely.

On January 14, 1992, the claimant was injured while working in the city's tire shop when he hit his left knee while removing a tire. While the claimant was apparently originally treated at the emergency room, (Dr. D), an orthopedic surgeon, later became his treating doctor. Dr. D initially followed a course of conservative treatment and on June 26, 1992, performed surgery, specifically to repair a tear of the medial meniscus of the left knee. After surgery Dr. D continued to follow the claimant and on November 4, 1992, certified on a Report of Medical Evaluation (TWCC-69) that the claimant had reached MMI on November 2, 1992, with a zero percent physical impairment.

The claimant apparently disputed Dr. D's finding and as a consequence the Commission appointed (Dr. H) as a designated doctor. Dr. H certified on a TWCC-69 dated February 24, 1993, that the claimant had reached MMI on November 2, 1992, with a two percent impairment rating. On March 4, 1993, Dr. D issued a second TWCC-69 certifying that the claimant had reached MMI on March 2, 1993, with a four percent impairment rating. At the hearing a report from a (Dr. G), an orthopedic surgeon, was admitted into evidence, stating that in his opinion he believed claimant "could work but could not do continuous squatting," and that the claimant had a six percent impairment to the whole body.

Article 8308-4.25(b) provides that the report of the designated doctor shall have presumptive weight on the issue of MMI, and the Commission shall base its determination on MMI on that report "unless the great weight of the other medical evidence is to the contrary." Article 8306-4.26(g) similarly provides that the if the Commission chooses a designated doctor, the report of the designated doctor shall have presumptive weight on the issue of impairment and the Commission shall base the impairment rating on this report "unless the great weight of the other medical evidence is to the contrary, in which case the commission shall adopt the impairment rating of one of the other doctors." In describing the standard to apply in giving the report of the designated doctor presumptive weight, we stated in Texas Workers' Compensation Commission Appeal No. 92412, decided September 28, 1992:

> We do not read this language to require a mere balancing of the evidence, as, for example, occurs in establishing a compensable claim, and determining that a preponderance of the evidence either does or does not establish that fact. Rather, in the area of MMI and impairment ratings, where there is a dispute regarding medical evidence, an attempt is made under the statute and rules to designate an independent doctor to finally resolve these matters. It is for this apparent reason that "presumptive weight" is specifically accorded to the designated doctor's report. And, it is not just equally balancing evidence or

a preponderance of evidence that can outweigh such report, but only the "great weight" of other medical evidence that can overcome it.

Article 8308-6.34(e) provides that the contested case hearing officer, as finder of fact, is the sole judge of the relevance and materiality of the evidence as well as of the weight and credibility that is to be given the evidence. It was for the hearing officer, as trier of fact, to resolve the inconsistencies and conflicts in the evidence. Garza v. Commercial Insurance Company of Newark, New Jersey, 508 S.W.2d 701, 702 (Tex. Civ. App.-Amarillo 1974, no writ). This is equally true regarding medical evidence. Texas Employers Insurance Association v. Campos, 666 S.W.2d 286, 290 (Tex. App.-Houston [14th Dist.] 1984, no writ). The trier of fact may believe all, part, or none of the testimony of any witness. Taylor v. Lewis, 553 S.W.2d 153, 161 (Tex. Civ. App.-Amarillo 1977, writ ref'd n.r.e.); Aetna Insurance Co. v. English, 204 S.W.2d 850 (Tex. Civ. App.-Fort Worth 1947, no writ). An appeals level body is not a fact finder, and does not normally pass upon the credibility of witnesses or 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 for factual sufficiency of the evidence we should 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 Co., 715 S.W.2d 629, 635 (Tex. 1986).

In the present case, based upon our review of the record, and applying the above standard of review, we do not find that the determination of the hearing officer that the opinion as to MMI and impairment of the designated doctor was not overcome by the great weight of the contrary medical evidence to be against the great weight and preponderance of the evidence. Consequently, we affirm the decision of the hearing officer.

Gary L. Kilgore
Appeals Judge

CONCUR:

Stark O. Sanders, Jr.
Chief Appeals Judge

Philip F. O'Neill
Appeals Judge