APPEAL NO. 93825

This appeal is brought pursuant to the Texas Workers' Compensation Act of 1989, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act). On August 5, 1993, a contested case hearing (CCH) was held in (city), Texas, with (hearing officer) presiding as hearing officer. The sole issue at the CCH was what was the proper impairment rating. The hearing officer concluded that the respondent (claimant herein) had a 28% impairment based upon the assessment of a designated doctor selected by the Texas Workers' Compensation Commission (Commission). The appellant (city herein), a statutorily self-insured political subdivision, files a request for review contending that the great weight of the other medical evidence was against the assessment of the designated doctor. The claimant files a response in which he states his agreement with the findings of the hearing officer.

DECISION

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

At the time of the injury on (date of injury), the claimant was employed by the city's police department. While pursuing a suspect in a sexual assault case through a laundry room, he slipped and fell injuring his left knee and shoulder. The claimant testified that he had a previous left knee injury in 1976. His injuries in the present accident required surgery to both his knee and his shoulder.

The claimant was treated from October 1991 through March 1993 by (Dr. H), who certified on a Report of Medical Evaluation (TWCC-69) that the claimant reached maximum medical improvement (MMI) on September 2, 1992, and assessed his impairment at 17%. The city disputed Dr. H's findings and requested a medical examination by (Dr. W), who stated on a TWCC-69 that he agreed with the MMI determination of Dr. H, but who found that the claimant's impairment rating was 14%. Due to the dispute in the findings of the treating and city's doctors, the Commission selected (Dr. DH) to be the designated doctor. He examined the claimant and on a TWCC-69 certified MMI on September 2, 1992, with a 28% impairment rating.

On appeal the city urges that the impairment rating assessed by Dr. DH, the designated doctor, was against the great weight of the other medical evidence. The carrier urges that the opinion of Dr. H and Dr. W were similar and that the opinion of these two doctors outweighs the opinion of one designated doctor. The city further argues that the treating doctor was more familiar with the claimant's condition than the designated doctor who only saw him once.

Section 408.125(e) provides in relevant part:

> 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

impairment rating on that report unless the great weight of the other medical evidence is to the contrary.

We have previously discussed the meaning of "the great weight of the other medical evidence" in numerous cases. We have held that it is not just equally balancing the evidence or a preponderance of the evidence that can overcome the presumptive weight given to the designated doctor's report. Texas Worker's Compensation Commission Appeal No. 92412, decided September 28, 1992. The legislature must have envisioned in enacting the designated doctor provisions of the 1989 Act that it would not be uncommon for medical practitioners to disagree in assessing an impairment rating. *See* Appeal No. 92412. In fact there are commonly three separate opinions as to impairment: that of the treating doctor, that of the carrier selected doctor and that of the designated doctor. What distinguishes this case from those usually encountered is not that they disagreed as to the impairment rating, but that all three doctors agreed upon an MMI date (which the parties stipulated to be the date of MMI). Therefore, in many cases there will be two medical opinions concerning impairment at variance with that of the designated doctor. To hold that the mere existence of two contrary medical opinions as to impairment would alone constitute the great weight of the contrary medical evidence would tend to invalidate the entire designated doctor scheme and preclude the finality the system was designed to foster. Nor does the degree of variance between the rating assessed by the designated doctor and the other two doctors in and of itself invalidate his assessment. *See* Texas Workers' Compensation Commission Appeal No. 93328, decided June 2, 1993.

Regarding the argument that the treating doctor was more familiar with the patient, we have held that no other doctor's report, including the report of the treating doctor, is accorded the special, presumptive status given to the report of the designated doctor. Texas Workers' Compensation Commission Appeal No. 92366, decided September 10, 1992. The treating doctor will have almost invariably seen the patient more times than the designated doctor, who will generally have only examined the claimant once. To adopt the rule for which the city argues would effectively abrogate the designated doctor system and substitute the treating doctor as the final arbiter of the claimant's impairment rating.

This is not to say that either the number of medical opinions which are contrary to that of the designated doctor or the degree of variance between the rating assessed by a designated and other doctors is not relevant to the determination of whether the great weight of the other medical evidence is contrary to the opinion of the designated doctor. We merely decline to hold that as a matter of law they constitute the great weight of the contrary medical evidence. They are certainly factors the hearing officer may consider in determining the issue. Whether the great weight of the other medical evidence is contrary to the opinion of the designated doctor is basically a factual determination. Texas Workers' Compensation Commission Appeal No. 93459, decided July 15, 1993.

Section 410.165(a) 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).

The hearing officer in the section of his decision entitled "Discussion" explains in detail his reasoning in finding that the opinions of Dr. H and Dr. W as to impairment do not constitute the great weight of other medical evidence contrary to the opinion of Dr. DH, as follows:

> The report of the designated doctor, Claimant's exhibit 1, is a good model for an impairment evaluation. The designated doctor's report contains, in addition to the TWCC-69, a painstaking compilation of data, including nerve conduction studies and range of motion studies. Testimony, which went uncontroverted, suggests that Dr. [W's] evaluation was cursory, at best. While Dr. [H] was the treating physician, and no doubt gave careful attention to the Claimant's case, there is nothing of record to suggest that he examined or caused the Claimant to be examined specifically for an impairment rating. There is nothing in his records that even closely approximates the documentation which was provided by the designated doctor.
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> For the foregoing reasons, the decision of the hearing officer is affirmed.

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Gary L. Kilgore
Appeals Judge

CONCUR:

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Joe Sebesta
Appeals Judge

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Philip F. O'Neill
Appeals Judge