APPEAL NO. 94014
FILED JANUARY 31, 1994

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 19, 1993, in (City), Texas, with _____ presiding as hearing officer. The sole issue at the CCH was the appellant's (claimant herein) correct impairment rating. The hearing officer found that the claimant's correct impairment rating was seven percent based upon the opinion of a designated doctor selected by the Texas Workers' Compensation Commission (Commission). The claimant appeals, disagreeing with the hearing officer's reliance on the designated doctor's assessment of impairment, which he contends was not realistic or arrived at fairly. The respondent (self-insured herein), a statutorily self-insured political subdivision, replies that the hearing officer and the designated doctor were correct and requests that we affirm the decision below.

DECISION

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

The claimant alleged that on (date of injury), he injured his back lifting a heavy trash can while working for the self-insured as a trash collector. The claimant was treated by several doctors including (Dr. J). Dr. J certified on a Report of Medical Evaluation (TWCC-69) that the claimant attained maximum medical improvement on May 3, 1993, with a 23% impairment rating. The carrier disputed this rating and the Commission appointed (Dr. S) to be the designated doctor. Dr. S certified on a TWCC-69 that the claimant had a seven percent impairment rating.

The claimant testified that Dr. S did not personally examine him. He also stated that the technician who performed the range of motion test required him to bend more than he was able to do. He testified that Dr. S was in the room taking notes while the technician performed the range of motion studies. Dr. S wrote a letter in response to an inquiry by the Benefit Review Officer stating that she had physically examined the claimant in compliance with all Commission guidelines.

One of the claimant's treating doctors, (Dr. G), wrote a letter to the Commission stating the impairment rating of Dr. J was fairer than the rating of Dr. S and suggesting the appointment of an independent therapist to do range of motion studies.

Section 408.125(e) provides:

> 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. 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.

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 Workers' Compensation Commission Appeal No. 92412, decided September 28, 1992. We have also held that no other doctor's report, including the report of the treating doctor, is accorded the special, presumptive status accorded to the report of the designated doctor. Texas Workers' Compensation Commission Appeal No. 92366, decided September 10, 1992; Texas Workers' Compensation Commission Appeal No. 93825, decided October 15, 1993.

Whether the great weight of the other medical evidence was 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).

Under this standard of review the opinions of Dr. J and Dr. G do not constitute the great weight of the other medical evidence. *See* Appeal No. 93825, *supra*. A claimant's lay testimony does not constitute medical evidence that can be considered in determining whether the "great weight" rebuts the "presumptive weight" of the designated doctor's report. *See* Texas Workers' Compensation Commission Appeal No. 93072, decided March 12, 1993, and Texas Workers' Compensation Commission Appeal No. 93518, decided August 5, 1993. However, an attack on the validity of the report of the designated doctor based on non-medical issues, such as failure to comply with "the underlying statutory requirements of certification," may be based on lay testimony. Texas Workers'

Compensation Commission Appeal No. 93046, decided March 5, 1993; *See also* Texas Workers' Compensation Commission Appeal No. 93483, decided July 26, 1993.

The Appeals Panel has in the past addressed allegations by claimants that a physical examination was either not done at all by the designated doctor or done only in cursory fashion. *See, e.g.*, Texas Workers' Compensation Commission Appeal No. 93852, decided November 4, 1993, *and* Texas Workers' Compensation Commission Appeal No. 93539, decided August 12, 1993. In addition, the Commission has directly addressed what is expected of a designated doctor in TWCC Advisory 93-04, dated March 9, 1993. What is required is personal involvement by the designated doctor in an actual physical examination and a review of the results of pertinent tests so that the medical conclusions are those of the designated doctor, independently arrived at, and not just a rubber-stamp endorsement of the opinions of others. The time the doctor spends in an examining room actually performing a physical examination is not necessarily controlling on the question of the adequacy of the examination. A hearing officer must also consider the report prepared by the designated doctor and may accept the recitations in the report as evidence that the designated doctor was personally involved in the examination; that the designated doctor reviewed all pertinent test results conducted by himself and others; and that the certification given on the TWCC-69 is the product of the sound professional judgment of the designated doctor. Unlike Texas Workers' Compensation Commission Appeal No. 93095, decided March 19, 1993, where the evidence showed that the examination "may well not have been performed by the designated doctor," in the case now under appeal Dr. S clearly states in her letter to the Benefit Review Officer that she examined the claimant. We are thus unwilling to conclude as a matter of law that Dr. S's examination of the claimant was inadequate.

For the foregoing reasons, the decision and order of the hearing officer are affirmed.

_____
Gary L. Kilgore
Appeals Judge

CONCUR:

_____
Stark O. Sanders, Jr.
Chief Appeals Judge

_____
Robert W. Potts
Appeals Judge