APPEAL NO. 94058

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 December 16, 1993, in (city), Texas, with (hearing officer) presiding as hearing officer. The issues at the CCH were disability, maximum medical improvement (MMI), and impairment rating. The hearing officer found that the claimant attained MMI on February 3, 1993, with zero impairment based upon the certification of a designated doctor selected by the Texas Workers' Compensation Commission (Commission). The hearing officer also found that from February 5, 1993, until July 13, 1993, the claimant's injury did not prevent the claimant from obtaining and retaining employment at wages equivalent to the wage he earned prior to his injury. The claimant appeals contending that the designated doctor performed an inadequate examination and did not properly apply the "Guides to the Evaluation of Permanent Impairment," third edition, second printing, dated February 1989, published by the American Medical Association (AMA Guides). He argues that the hearing officer should have found his date of MMI and his impairment rating based on the certification of his second treating doctor. The carrier responds that the findings and decision of the hearing officer are supported by sufficient evidence and should be affirmed.

DECISION

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

The claimant testified that he was employed as a truck driver when he injured his back unloading heavy objects on (date of injury). The claimant was originally treated by (Dr. S), M.D., who later referred the claimant to (Dr. W), M.D. Dr. W prescribed physical therapy and certified on a Report of Medical Evaluation (TWCC-69) that the claimant attained MMI on February 5, 1993, with zero percent permanent impairment. The claimant testified that shortly before Dr. W released him to return to work on February 5, 1993, his employer had terminated his employment.

The claimant disputed Dr. W's finding as to MMI and impairment. The claimant also testified that he applied for and received unemployment benefits through the Texas Employment Commission (TEC). The claimant testified that the TEC required him to apply for work, but he was unable to recall where he applied and never found employment. The claimant also requested the Commission to allow him to change treating doctors to (Dr. K), M.D.

The Commission granted the claimant's request to change treating doctors and the claimant began treating with Dr. K in May 1993. Dr. K ordered lumbar magnetic resonance imaging (MRI)[1] and placed the claimant in a work hardening program. The Commission

[1]The MRI showed degenerative disc disease but no evidence of a herniated nucleus pulposus. According to Dr. K's reports nerve conduction studies were also within normal limits.

selected (Dr. S), M.D., to be the designated doctor. In a report dated June 7, 1993, Dr. S described his examination of the claimant. Dr. S certified on a TWCC-69 that the claimant had reached MMI on February 5, 1993, with zero percent impairment. Dr. S indicated in his report that at time of his examination he did not have records from Dr. K.

Dr. K certified on a TWCC-69 that the claimant attained MMI on July 13, 1993, with a six percent whole body impairment. The claimant testified that he provided records from Dr. K to Dr. S. In response Dr. S issued a second TWCC-69, again certifying that the claimant had reached MMI on February 5, 1993, with a zero percent impairment rating. Dr. K wrote a letter criticizing Dr. S's impairment rating.[2] The claimant stated that Dr. S's examination of him was inadequate alleging that Dr. S did not have Dr. K's records, did not perform measurements and did not properly apply the AMA Guides in assessing his impairment.

Section 408.122(b) provides:

> If a dispute exists as to whether the employee has reached maximum medical improvement, the commission shall direct the employee to be examined by a designated doctor chosen by mutual agreement of the parties. If the parties are unable to agree on a designated doctor, the commission shall direct the employee to be examined by a designated doctor chosen by the commission. The designated doctor shall report to the commission. The report of the designated doctor has presumptive weight, and the commission shall base its determination of whether the employee has reached maximum medical improvement on the report unless the great weight of the other medical evidence is to the contrary.

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

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[2] Dr. K stated in this letter dated September 3, 1993, as follows:

> The basis for my disagreement is as follows: [Claimant] was injured on-the-job on (date of injury). When I last examined [claimant] on 7/13/93, he was still complaining of low back pain. On 5/25/93, a magnetic resonance imaging of the lumbar spine performed at Memorial City Medical Center (medical center) showed degenerative disc disease at L5-S1. Using this information, I consulted the AMA Guides to Evaluation of Permanent Impairment, Third Edition, Second Printing. On page 73, table 49 titled Impairments Due to Specific Disorders of the Spine, section 2, paragraph B, intervertebral disc or other soft tissue lesion unoperated with medically documented pain, recurrent muscle spasm or rigidity associated with none to minimal degenerative changes on structural tests, merits a 5% whole person impairment rating for the lumbar spine. I think that [claimant] clearly fits under this classification.

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. 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 v. Pittsburgh, Pennsylvania v. Soto, 819 S.W.2d 619, 620 (Tex. App.-El Paso 1991, writ denied). When reviewing the 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).

Applying this standard in the present case we cannot say that the hearing officer erred in finding that the certification of MMI and impairment by Dr. S was not overcome by the great weight of contrary medical evidence. Nor do we find persuasive evidence in the record that the designated doctor's examination was inadequate or that he failed to properly apply the AMA Guides. The former issue is not addressed by the written criticism of Dr. S's rating by Dr. K cited above. Nor did Dr. K say that Dr. S failed to properly apply the AMA Guides; he merely stated that he disagrees with Dr. S's results and explained how he arrived at his own.

The claimant testified that Dr. S's examination was inadequate and he did not properly apply the AMA Guides, but his testimony alone is insufficient to establish this. *See*

Texas Workers' Compensation Commission Appeal No. 92255, decided July 27, 1992; Texas Workers' Compensation Commission Appeal No. 92570, decided December 14, 1992. The claimant's main complaint concerning Dr. S's assessment was that it was made without reviewing the medical reports and testing by Dr. K. The claimant rectified this problem by providing this information to Dr. S, who after considering it, issued an amended TWCC-69 showing his opinion was unaffected by this information.

Finally, there is sufficient evidence in the record to support the findings of the hearing officer regarding disability. In any case, since the claimant had attained MMI on February 5, 1993, the claimant would not be entitled to TIBS after February 5, 1993, because to be entitled to TIBS the claimant must have disability and not have attained MMI. *See* Texas Workers' Compensation Commission Appeal No. 93979, decided December 14, 1993.

The decision and order of the hearing officer are affirmed.

Gary L. Kilgore
Appeals Judge

CONCUR:

Robert W. Potts
Appeals Judge

Susan M. Kelley
Appeals Judge