APPEAL NO. 941211

This appeal arises under the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq*. (1989 Act). A contested case hearing (CCH) was held on June 2, 1994, and July 28, 1994. The issues at the hearing were what are the date of maximum medical improvement (MMI) and whether the respondent (claimant) has had disability from January 20, 1994, to the present. The hearing officer determined that the claimant had not reached MMI as reported by the designated doctor and that the claimant has had disability from January 20, 1994, to the present. The appellant (carrier) appeals arguing: (1) that the designated doctor's report is not entitled to presumptive weight because of invalid information provided by the claimant and the great weight of competent medical evidence is contrary to the report of the designated doctor; (2) that the hearing officer's decision that the claimant had disability from January 20, 1994, is against the great weight of the other evidence; and (3) that the hearing officer denied the employer the right to present relevant evidence at the CCH. The claimant responds urging that the Appeals Panel affirm the decision and order of the hearing officer.

DECISION

We affirm.

The claimant has a long history of respiratory problems. The parties stipulated that the claimant sustained a compensable injury on (date of injury). The office in which she worked was being remodeled and she was exposed to chemicals as the result of the use of paint, paint thinners, and adhesives. The amount of time that she was exposed to chemicals was disputed. She testified that she was exposed to fumes at work for about 230 hours. The carrier presented evidence to show that the exposure was less than that and contended that the report of the designated doctor is not based on the facts and is therefore not entitled to presumptive weight.

The claimant testified that she has had allergies most of her life. She said that she had very successful sinus surgery in January 1992 and that she had no sinus infection for 12 months after the surgery. Claimant testified that in December 1992 she went to Dr. L because she had a sore throat and was placed on antibiotics. She said that she first breathed fumes from the remodeling on January 5, 1993; there was no way to ventilate the office; and on (date of injury), she could not handle the fumes. Claimant called Dr. L's office on that day and saw him on January 20, 1993. She said that he diagnosed chemical irritation and recommended that she avoid exposure to the chemicals. She took work home, would take the completed work to the office, and picked up additional work to do at home. Mr. SH, the president of the employer, became upset and told her that she must come to work or there would "be a parting." She went to the office the next day, became violently ill, and went home. After that she worked at the office and at home. Her last day of work was March 11, 1993. Since that date she has been too sick to work. She testified that she has been on antibiotics for about 130 days after she was exposed to the fumes in (month year). On February 19, 1993, she returned to Dr. ST, the doctor who had performed the sinus surgery in January 1992. He treated

her with antibiotics and sinus irrigation. She was also treated by Dr. B, an allergy specialist, and by Dr. SI, a lung specialist. In April 1993 claimant saw Dr. N, an OB-GYN doctor, for her bladder problems. Claimant said that Dr. N told her that her bladder problems were caused by coughing, that she needed surgery, but that he would not perform the surgery until her coughing problems were resolved.

At the request of the carrier, the claimant was evaluated by Dr. C, a toxicologist. In a report dated October 6, 1993, Dr. C reported that he had reviewed the medical records of the claimant and that:

> Although exposure to solvents conceivably could precipitate the acute episode of a few days duration, the solvent exposure sustained by this patient in the workplace is not, in reasonable medical probability, a causative agent for the patient's persisting pulmonary dysfunction.

Dr. C later obtained additional information from the claimant, examined her, and issued a Report of Medical Evaluation (TWCC-69) dated December 8, 1993, in which he reported that the claimant reached MMI on December 8, 1993, with zero impairment rating (IR). In a narrative attached to the TWCC-69, Dr. C reported:

> This patient has sustained exposure to irritant substances in the workplace, to which she responded with exacerbation of her clinical upper respiratory and pulmonary allergies. The exposure in the workplace is capable of precipitating or exacerbating morbidity of pre-existing condition but the nature of the exposure in the workplace is not such as to alter the fundamental disease process which this patient has sustained over a period of several years prior to her exposure.
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> The irritant enhancement of symptoms reasonably may persist under these circumstances for exposure for one to two months following the exposure interval. It is my opinion, in reasonable medical probability, that the patient at this time has continuing dysfunction of an allergic nature, manifest by upper respiratory allergies and bronchial obstructive disease responsible to bronchodilator. It is recommended she continue treatment with her allergist and that adjustment of her bronchodilator symptomatic care may be appropriate.
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> At this time, I find no residuum reasonably related to the workplace exposure which she alleges occurring between (month) and (month) year.

Mr. C and Ms. C, his daughter, both worked in the office in which the claimant worked. Both testified that they were bothered by the dust when the demolition for the remodeling was being done, but that the fumes were not strong. They said that both of

them were on vacation the week most of the renovation was done and did not have personal knowledge of what the conditions were then and how much time the claimant spent in the office that week. Mr. C testified that the work was basically completed when he returned. He also said that Mr. SH has since died. Mr. C said that his daughter kept records of how much time the claimant spent in the office and that he found it hard to believe that the claimant spent as much time in the office exposed to fumes as she said that she did. Ms. C testified that on (date of injury), the claimant was coughing and said that she could not be in the office because it would make her sick. Ms. C referred to a calendar on which she had written notes when testifying; however, the calendar was not offered into evidence. Ms. C said that Mr. SH told the claimant to stay at home and work there. She testified that the claimant would come to the office to get work, that the claimant would honk the horn of her car, and Ms. C would go to the car to give her work and pick up things that the claimant returned. Ms. C said that she returned from vacation on January 19, 1993, that most of the renovation work had been completed by then, and that a little touch-up was done after that. She said that the only fumes she smelled after January 26, 1993, were from cups of vinegar and burning candles that the claimant had placed in the office. Mr. C and Ms. C both testified that the claimant opened the doors, that they felt cold, and that the claimant would open the doors and Ms. C would close the doors. Neither testified to a number of hours that the claimant was exposed to fumes in the office.

Dr. J, the Texas Workers' Compensation Commission (Commission) selected designated doctor, issued a TWCC-69 dated March 7, 1994, in which he reported that the claimant had not reached MMI and estimated that she would reach MMI on January 1, 1995. Attached to the TWCC-69 is a document prepared by the claimant in which she sets forth her work schedule from January 5, 1993, through March 11, 1993; the results of pulmonary functional tests and bronchial challenge tests performed by his laboratory; and a detailed narrative report in which Dr. J wrote:

> I have also had an opportunity to review the rather comprehensive records of Dr. [B], Dr. [L], and Dr. [ST].
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> * * * * *
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> It is apparent that the prolonged exposures resulted in exacerbation of her reactive airway disease, her respiratory allergies, and her latent sinusitis with exacerbation of infection in the sinuses. The prolongation of the exposures also resulted in considerable coughing which in turn exacerbated her pelvic problems, resulting in a return her urethrocystocele with associated bladder discomfort and incontinence.

> It is my feeling that the prolonged duration of contact to the irritating fumes and dusts that the [claimant] was subjected to in the workplace resulted in a continuum and worsening of her symptoms with secondary effects that have to be incorporated into the effect of the workplace exposures. The aggravation of pre-existing conditions cannot be overlooked. I therefore feel that she should be given additional time to reach [MMI] as she is continuing to have symptoms and problems that directly relate to her workplace exposures.

Disputes involving medical evidence are not uncommon. The 1989 Act sets forth a mechanism to help resolve conflicts concerning MMI and IR by according presumptive weight to a doctor referred to as the Commission selected designated doctor. Texas Workers' Compensation Commission Appeal No. 92495, decided October 28, 1992. Section 408.122(b) provides:

> The report of the designated doctor has presumptive weight, and the commission shall base its determination of whether the employee has reached [MMI] on the report unless the great weight of the other medical evidence is to the contrary.

We first look to the contention of the carrier that the report of the designated doctor is not entitled to presumptive weight. The hearing officer is the sole judge of the relevance and materiality of the evidence and of the weight and the credibility of the evidence. Section 410.165(a). The evidence on the amount of the claimant's exposure to irritants in the workplace is conflicting. The carrier also contends that the report of Dr. J shows that the claimant misinformed the designated doctor concerning her health after her surgery in January 1992 and whether she had sinus infections after the surgery and prior to the exposure to irritants at work. It was for the hearing officer to resolve inconsistencies and conflicts in the evidence. Garza v. Commercial Insurance Co. of Newark, New Jersey, 508 S.W.2d 701 (Tex. Civ. App.-Amarillo 1974, 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 (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 or manifestly 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 evidence is not so overwhelming as to establish that the hearing officer erred in accepting the factual basis for Dr. J's report.

We have previously discussed the meaning of "the great weight of the other medical evidence." 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 report of the designated doctor. Texas Workers' Compensation Appeal No. 92412, decided September 28, 1992. No other doctor's report 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 hearing officer resolves conflicts in expert evidence and assesses the weight to be given to expert evidence. Texas Employers Insurance Association v. Campos, 666 S.W.2d 286 (Tex. App.-Houston [14th Dist.] 1984, no writ). The hearing officer determined that the report of the designated doctor is entitled to presumptive weight and that the great weight of the other medical evidence is not contrary to his report. Only were we to conclude, which we do not in this case, that the determinations of the hearing officer are so against the great weight and preponderance of the evidence as to be clearly wrong or unjust would there be a sound basis to disturb her determination on MMI. In re King's Estate, 150 Tex. 662, 244 S.W.2d 660 (1951). We also find the evidence sufficient to support the determination of the hearing officer that the claimant has had disability from January 20, 1994, to the date of the hearing.

At the session of the hearing held on June 2, 1994, the carrier called Dr. C as a witness. The claimant objected and argued that he should not be permitted to testify because the carrier did not timely advise the claimant that it intended to call Dr. C as a witness. The objection was sustained. The hearing officer permitted the carrier to question Dr. C and the claimant to cross-examine him to preserve his proposed testimony, but she did not consider it in making her decision. The carrier also offered Dr. C's curriculum vitae and two articles written by Dr. C. The claimant objected to the three documents arguing that they were not timely exchanged. The objections were sustained, and the documents were not admitted. At the session of the hearing held on July 28, 1994, the employer offered a transcript of the testimony of Dr. C preserved at the first session; a copy of the audio tape made at the first session containing the testimony of Dr. C; Dr. C's curriculum vitae; and two articles written by Dr. C. The claimant objected. The hearing officer sustained the objection, and the exhibits were not admitted. In Texas Workers' Compensation Commission Appeal No. 92410, decided September 25, 1992, we addressed the employer's rights under Section 409.011 (then Article 8308-5.10). In a concurring opinion in Appeal No. 92410, *supra*, Chief Judge Sanders wrote:

I concur with the decision and reasoning of the author judge. I would only emphasize that while an employer's representative can testify pursuant to Article 8308-5.10 separate and apart from the carrier's case, that article does not give a carrier the right to call, as part of its case, the employer's representative particularly when the carrier's evidence has been properly excluded for failure to comply with discovery procedures. As I view this issue, there is a delicate balance involved where an employer may wish to testify over and above the matters presented by a carrier or may desire to bring forth a different perspective in a given case. However, there is nothing to indicate to me in Article 8308-5.10 that it can be used by a carrier to circumvent procedural restrictions imposed on it in the presentation of its case.

In the case before us, the carrier did not appeal the hearing officer's determination not to permit Dr. C to testify and not to admit Dr. C's curriculum vitae and the two articles written by Dr. C when offered by the carrier. Instead, the carrier argues that it was error for the hearing officer not to admit the evidence when offered by the employer. We do not permit the carrier to have the employer introduce evidence that the carrier was unable to get admitted because it did not comply with discovery provisions in the 1989 Act and the Commission rules.

In addition, we have held that when an employer is not a party to that hearing, the employer lacks standing to appeal from the hearing below. Texas Workers' Compensation Commission Appeal No. 92110, decided May 11, 1992. In the case before us, the employer is not a party and does not have standing to appeal. The carrier has not presented authority for the carrier to appeal the hearing officer's failure to admit evidence offered by the employer, and we are not aware of any.

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

Tommy W. Lueders
Appeals Judge

CONCUR:

Joe Sebesta
Appeals Judge

Gary L. Kilgore
Appeals Judge