APPEAL NO. 941249

This appeal arises pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. ? 401.001 *et seq.* (1989 Act). A contested case hearing (CCH) was begun on January 18, 1994, and reconvened on June 13, 1994. The record was closed on July 11, 1994. The issues at the CCH were maximum medical improvement (MMI), impairment rating (IR) and disability. The hearing officer determined that the respondent (claimant herein) reached statutory MMI on April 8, 1994, that the claimant's IR is 10% and that the claimant had disability as the result of a compensable injury from May 5, 1992, continuing through the date of the CCH. The appellant (carrier herein) files a request for review challenging certain findings of fact and conclusions of law by the hearing officer and contending the evidence failed to support the decision of the hearing officer as to MMI and disability. The carrier also requests that we grant an offset for impairment income benefits already paid. The claimant responds that the decision of the hearing officer is supported by the evidence.

DECISION

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

The claimant testified that he injured his back on _____, while working for (employer). It was undisputed that this was a compensable injury. The claimant saw several doctors concerning this injury. One of these doctors, Dr. W, certified on a Report of Medical Evaluation (TWCC-69) that the claimant attained MMI on May 5, 1992, with a whole body impairment rating of 10%. In evidence is also a TWCC-69 from Dr. K, an orthopedist and designated doctor selected by the Texas Workers' Compensation Commission (Commission), which certified MMI on April 21, 1993, with an IR of five percent. Dr. M, who was a doctor chosen by the carrier, certified on a TWCC-69 that the claimant reached MMI on May 10, 1993, with an IR of five percent.

The claimant had spinal surgery in October 1993 after several months of dispute through the Commission's spinal surgery approval process. After the first session of the CCH, the hearing officer asked the designated doctor to review the claimant's post-surgical MMI and IR. After re-examining the claimant, the designated doctor issued another TWCC-69 dated May 2, 1994, in which he stated that the claimant had reached MMI "2 years by statute" with a 10% IR. The second session of the CCH was held on June 13, 1994, to give the parties an opportunity to respond to Dr. K's revised rating. The carrier's response at that time was that it did not believe that the TWCC-69 of May 2, 1994, actually showed that the designated doctor had changed his opinion as to MMI. The claimant argued that it clearly did.

In regard to disability, the evidence showed that after the injury, the claimant continued to work at the same wage under restrictions until April 3, 1992, when he was laid off as part of a general layoff. The carrier contended this layoff had nothing to do with the

claimant's injury, but was a large, general layoff. The claimant contends that his restrictions played a part in his being laid off, as the decision as to who to lay off was based on job performance. The claimant testified that he remained under restrictions after the layoff and did not work.

The first question in this case is whether the evidence supported the hearing officer's finding that the claimant reached statutory MMI on April 8, 1994. The carrier contends that the original opinion of the designated doctor that the claimant reached MMI on April 21, 1993, became final because the claimant failed to dispute it within 90 days and that this original opinion was entitled to presumptive weight. Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE ? 130.5(e) (Rule 130.5(e)) states that the first impairment rating assigned becomes final if not disputed with 90 days. Clearly in the present case the designated doctor's original certification of MMI and impairment was not the first rating assigned. Rule 130.5(e) is therefore not applicable to the present case. *See* Texas Workers' Compensation Commission Appeal No. 941137, decided October 10, 1994. While we certainly agree that the opinion of the designated doctor is entitled to presumptive weight, the question then becomes which opinion of the designated doctor is entitled to such weight.

We have held that the designated doctor may amend his report for a proper reason and that such amended report is entitled to presumptive weight. Texas Workers' Compensation Commission Appeal No. 93827, decided November 5, 1993. We have also held that subsequent surgery or the need for further surgery can be a valid reason for a designated doctor to amend his original opinion as to MMI. Texas Workers' Compensation Commission Appeal No. 931107, decided January 21, 1994. The carrier argues that in the present case the decision of the hearing officer robs the original determination of the designated doctor of its finality. We have discussed this issue in a number of cases. *See* Texas Workers' Compensation Commission Appeal No. 94978, decided September 8, 1994, and decisions cited therein. As we stated in Texas Workers' Compensation Commission Appeal No. 94492, decided June 8, 1994:

> [T]here will be those rare, exceptional cases where compelling circumstances, such as the need for further surgery, might reasonably be expected to, or necessarily will, affect the claimant's ultimate IR resulting from the a compensable injury. And while finality may be delayed somewhat in such circumstance, and income benefits adjustments will have to be made at a later date, we can not conclude that a properly revised IR (premised on a clinical or laboratory finding, Section 408.122) should be sacrificed solely for the expediency of finality. We can read that into the 1989 Act. This is particularly so when we observe that Section 410.307 provides that if a case is appealed to the courts, the "[e]vidence of the extent of impairment is not limited to that presented to the commission if the court, after a hearing, finds that there is a substantial change of condition." It does not seem reasonable

> to us to conclude that a substantial change of condition, such as occasioned by required surgery subsequent to an initial IR determination following statutory MMI, must be ignored by the Commission thereby forcing the parties into court. It is our understanding that the 1989 Act desires and attempts to facilitate early resolution in the administrative arena, if at all possible, rather than forcing parties into court on an issue.

Quite relevant to the present case is our decision in Texas Workers' Compensation Commission Appeal No. 94794, decided August 2, 1994, where we affirmed the hearing officer's decision according presumptive weight to the revised report of the designated doctor, which modified the claimant's IR based upon post-statutory MMI surgery. Noting that the dispute resolution process on the need for spinal surgery was ongoing at the time the claimant reached statutory MMI, the Appeals Panel stated that the designated doctor was not precluded from reevaluating the claimant and revising his IR based upon subsequent surgery and further determined that the hearing officer's decision and order giving presumptive weight to the designated doctor's revised report was supported by sufficient evidence and was not against the great weight and preponderance of the evidence. Similarly, in the present case, the dispute resolution process on the need for spinal surgery was ongoing at the time the claimant reached statutory MMI. We believe that the hearing officer correctly sought the designated doctor's opinion in light of surgery.

The carrier renews its argument made at the second session of the CCH that the designated doctor's second TWCC-69 does not show that he changed his opinion as to MMI. It would appear to us that by stating the claimant reached MMI "2 years by statute," the clear implication of this report is that the claimant did not reach MMI before this. Further, to the degree the revised TWCC-69 is ambiguous, what the designated doctor intended would become a factual question.

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). Applying this standard, we cannot say that the hearing officer's determination that the designated doctor revised his opinion as to MMI in his second TWCC-69 to one of the claimant's only reaching MMI by statute was against the overwhelming weight of the evidence.

In addition to challenging the hearing officer's determination as to MMI, the carrier also challenges the hearing officer's decision that the claimant had disability due to his injury from May 5, 1992 continuing through the date of the CCH. Disability can be established by a claimant's testimony alone, even if contradictory of medical testimony. Texas Workers' Compensation Commission Appeal No. 92285, decided August 14, 1992; Texas Workers' Compensation Commission Appeal No. 92167, decided June 11, 1992. The carrier argues that the fact that the claimant continued to work after his injury until April 1992 and only stopped working as part of a general layoff establishes that the claimant did not have disability due to his injury. The claimant testified that he worked during this time under a restricted duty release. We have indicated that an employee under a conditional medical release does not have to show that work, under the limitations imposed, is not available to have disability. *See* Texas Workers' Compensation Commission Appeal No. 92193, decided July 2, 1992; Texas Workers' Compensation Commission Appeal No. 94238, decided April 11, 1994. Also the question of disability is one of fact. Gee v. Liberty Mutual Fire Insurance Co., 765 S.W.2d 394 (Tex. 1989). Under the standard of appellate review described *supra*, we cannot say that the opinion of the hearing officer is against the overwhelming weight of the evidence.

Finally we review the carrier's request that we clarify the decision of the hearing officer, allowing it to take an offset against the benefits the hearing officer has ordered it to pay for income benefits it has already paid. The hearing officer's Decision and Order reads in relevant part:

> Claimant had disability from May 5, 1992 continuing through the date of this hearing. Claimant reached statutory maximum medical improvement on April 8, 1994. Claimant's impairment rating is 10%. Based on the 10% impairment rating, impairment income benefits are to be paid for 30 weeks beginning April 9, 1994. Income benefits accrued but not paid are to paid with interest in a lump sum.
>
> Carrier is ORDERED to pay medical and income benefits in accordance with this Decision and Order, the Texas Workers' Compensation Act, and the Commission's Rules.
>
> Section 410.169 provides:
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> A decision of a hearing officer regarding benefits is final in the absence of a timely appeal by a party and is binding during the pendency of an appeal to

the appeals panel.

Section 408.081 provides in relevant part:

(a) An employee is entitled to income benefits as provided in this chapter.

(b) Except as otherwise provided by this subtitle, income benefits shall be paid weekly as and when they accrue without order from the commission.

Section 415.002(a)(19) provides:

(a) An insurance carrier or its representative commits an administrative violation if that person wilfully or intentionally:

(19) fails to pay an order awarding benefits.

It is the duty of the carrier to immediately calculate and pay benefits. It may certainly seek the advice of appropriate Commission field office personnel. We do not have sufficient information to calculate the exact dollar amount the carrier owes under this order, and in any case, it is not proper for us to decide this issue which has not been developed below. If this matter cannot be resolved at the disability determination officer or benefit review conference level, then an issue could be properly framed for a CCH. Should its calculation be disputed the issue will have to be fully developed through the dispute resolution process.

The decision and order of the hearing officer are affirmed.

Gary L. Kilgore
Appeals Judge

CONCUR:

Stark O. Sanders, Jr.
Chief Appeals Judge

Tommy W. Lueders
Appeals Judge