APPEAL NO. 94145

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 held on January 6, 1994, in (city), Texas, with (hearing officer) presiding as hearing officer. The sole issue at the CCH was the date of respondent's (claimant herein) maximum medical improvement (MMI). The hearing officer determined that the claimant had attained MMI on September 10, 1993, based upon the report of a designated doctor selected by the Texas Workers' Compensation Commission (Commission). The appellant (carrier herein) files a request for review arguing that the great weight and preponderance of the medical evidence shows that the claimant reached MMI on November 10, 1992, and that the designated doctor applied an incorrect definition of MMI in formulating his opinion. The claimant files a response contending that the designated doctor's definition of MMI is not incorrect and that his opinion as to MMI is not contradicted by the great weight and preponderance of the other medical evidence.

DECISION

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

The claimant injured his back at work on (date of injury). The claimant was diagnosed with spondylosis at L5-S1 with some narrowing and a small focal central herniated disc at L5-S1. The parties stipulated that the claimant's injury was compensable and resulted in a 10% whole body impairment.

The claimant was originally treated by his family doctor, (Dr. P), D.O. Dr. P treated him conservatively with medication, physical therapy and a work hardening program. The carrier requested the claimant see a doctor of its choice--(Dr. F), an orthopedist. The claimant testified that the carrier told him unless he saw Dr. F, the carrier would seek an order from the Commission requiring him to do so. On November 10, 1992, the claimant was examined by Dr. F who certified on a Report of Medical Evaluation (TWCC-69) dated November 12, 1992, that the claimant attained MMI on November 12, 1992, with a seven percent whole body impairment rating.

On November 23, 1992, the carrier, through its claim representative, (Ms. W), wrote to Dr. P sending him a copy of Dr. F's TWCC-69 and asking him to state on a check-off form whether he agreed or disagreed with the Dr. F's opinion as to MMI and impairment. Dr. P checked off his agreement as to each. At some point Dr. P issued an unsigned and undated TWCC-69 giving no date of MMI, but stating that the claimant had reached MMI with a seven percent impairment "Per Orthopedic Specialist." Dr. P stated as follows in a letter dated November 23, 1993, responding to a November 18, 1993, letter from a Mr. M (a copy of which is not in evidence):

You must understand that I do not make it a practice to determine disability ratings.
I usually would refer to a specialist more familiar with this procedure, and

hence any disability rating the specialists have deemed appropriate, I have concurred with.

The claimant testified that he disputed Dr. F's findings and requested that he be allowed to change treating doctors from Dr. P.

The claimant testified that he checked with the Commission many times on the status of his request to change treating physicians, but it was never acted upon. The claimant testified that in August 1993 he withdrew his application for change of physicians and requested Dr. P provide additional physical therapy which he underwent in August and September of 1993. The claimant testified that he did not think he had healed sufficiently when he had physical therapy in July and August of 1992, and he felt that additional physical therapy, after a period of healing, would be helpful to him.

The Commission selected (Dr. K), M. D., to be the designated doctor. Dr. K examined the claimant, and according to the claimant, had records of his previous treatment at the examination. Dr. K certified on a TWCC-69, dated September 10, 1993, that the claimant reached MMI on September 10, 1993, with a 10% impairment rating. On October 6, 1993, Dr. K wrote a letter to the carrier, specifically to a (Ms. C), as follows:

Thank you for your continued interest in [claimant]. As you know, I saw him for an independent medical exam. Since that time, there have been persistent attempts to clarify what you would like for me to say. Again, the patient had a disk herniation with persistent symptoms in his lower extremities and sensory deficit in the S1 distribution. . . . According to the medical records there is a void in the medical records until September of 1993 where the patient was undergoing additional physical therapy with similar symptoms involving the leg and back. Upon my evaluation, the patient as previously noted was still undergoing physical therapy and I recommended that we discontinue the physical therapy after he completes this in the next four weeks and then start a home back exercise program. I do not recommend surgical intervention or further diagnostic studies. His date of maximum medical improvement would be 9-10-93 upon completion of the last few weeks of physical therapy. This is my fair and impartial opinion of this case based on the records I have available. Should you not be happy with this, I suggest that you schedule the patient for an additional opinion. Thank you for your cooperation in this matter.

The Commission, at the carrier's request, allowed the carrier to take the deposition of Dr. K by written questions. The deposition was accomplished on January 4, 1994, and during it the following interchange took place:

1.Please Provide your definition for the term "maximum medical improvement".

ANSWER:

Maximum medical improvement in my practice means that the patient has reached maximum benefit for all of the medical treatment he has obtained for his injury.

2.At the time of your examination of [claimant], were you aware that both [Dr. F] and the claimant's treating doctor, [Dr. P], had certified that he had reached maximum medical improvement on November 10, 1992?

ANSWER:

I was aware that [Dr. F] felt hat [sic] the patient had reached maximum medical improvement on November 10, 1992.

3.If your answer to Question No. 2 was "yes", please state your reasons for your disagreement with those two doctors' opinions on the issue of the date the claimant reached maximum medical improvement.

ANSWER:

I do not agree or disagree with the date of maximum medical improvement of November 10, 1992. The patient received treatment following this date, although I was not available for examination of the patient throughout this time. Therefore, I cannot issue an opinion with regard to how much he benefited from this treatment. I think this would have to be answered by his primary care physician rather than myself. I do feel, though, that the patient does have residual symptoms with regard to his herniated disk and that no further intervention on the physician's part will change this significantly but that he will benefit from playing an active role in his own treatment with a back exercise program long term.

4.If it is your opinion that some treatment took place be6tween [sic] November 10, 1992, and September 10, 1993, that materially improved the condition of [claimant], please describe the treatment that took place, name the doctor under whom the treatment took place and describe how the claimant's condition was materially improved by that treatment and give the basis for your knowledge of the claimant's condition both before and after the treatment you reference.

ANSWER:

I refer you to the complete medical records between November 10, 1992, and September 10, 1993, for a description of the treatment that took place and the physician and physical therapist, etc., who took care of the patient.

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.

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).

In the present case the evidence to which the carrier points does not in our view constitute the overwhelming weight of the evidence. It is true it might appear both Dr. P and Dr. F state that the claimant reached MMI earlier than the designated doctor, but we have previously held that the opinion of the treating and carrier doctors do not necessarily

constitute the great weight of the contrary medical evidence. *See* Texas Workers' Compensation Commission Appeal No. 93633, decided September 9, 1993. Nor are we convinced that Dr. P actually ever gave an independent opinion upon the question of MMI, but rather seems to have deferred to Dr. F. Neither do we find the lapse in active treatment, in and of itself, strongly indicative of MMI, particularly when, as here, it is explained by the claimant.

The carrier argues that in his answer to Question No. 4 in his deposition, Dr. K defers to the treating doctor's opinion of MMI of which he had been previously unaware. We do not read his answer, quoted above, as stating this, but instead as stating that his own opinion remained unchanged. Further, as stated earlier, it is really unclear as to whether Dr. P, the treating doctor, ever really expressed an independent opinion as to MMI to which Dr. K could defer. While it is true that one basis of Dr. K's opinion is his reluctance to state an opinion as to MMI prior to his examination of the claimant, we have upheld the opinion of designated doctors who have expressed similar reservations. *See* Texas Workers' Compensation Commission Appeal No. 93341, decided June 16, 1993. While the carrier argues that the medical evidence did not establish that the claimant's condition was improved by any of the treatment he received after November 12, 1992, the carrier points to no evidence sufficiently persuasive to overcome the presumption to be given to the opinion of the designated doctor, nor the finding of the hearing officer. *See* Appeal No. 93341.

The carrier contends that the designated doctor applied an incorrect definition of MMI as shown between the variance between the definition he gives in his answers to deposition on written question (Question 1 quoted above) and the statutory definition *supra*. We believe that the definitions are substantially the same under the circumstances of this case, and in any case, no harmful error or prejudice is evident nor is it evident that Dr. K limited himself to the definition he recited in his deposition in determining MMI. Further, if the carrier was concerned that Dr. K apply the statutory definition as exactly worded, it could have provided him with that definition in its written questions and predicated its questions on MMI regarding that definition. We note that the designated doctor complained in his letter of October 6, 1993, of "persistent attempts to clarify what you would like for me to say." There is no other indication of what these "persistent attempts" entailed, but clearly these refer to communications by the carrier to the designated doctor without notice to either the opposing party or the Commission.

We have disapproved in numerous cases of unilateral communications by a party with the designated doctor. *See* Texas Workers' Compensation Commission Appeal No. 92595, decided December 21, 1992; Texas Workers' Compensation Commission Appeal No. 93272, decided May 24, 1993; Texas Workers' Compensation Commission Appeal No. 93336, decided June 16, 1993; Texas Workers' Compensation Commission Appeal No. 93496, decided August 3, 1993; Texas Workers' Compensation Commission Appeal No. 93613, decided August 24, 1993; Texas Workers' Compensation Commission Appeal No. 93702, decided September 27, 1993; Texas Workers' Compensation Commission Appeal No. 93762, decided October 1, 1993. The hearing officer recognized this problem and admonished the attorney for the carrier to advise his client that such unilateral

communication is improper. The proper way for a carrier who desires clarification from a designated doctor is through the hearing officer or, as the carrier later did in this case, to seek permission to take a deposition on written questions.

The decision and order of the hearing officer are affirmed.

Gary L. Kilgore
Appeals Judge

CONCUR:

Joe Sebesta
Appeals Judge

Susan M. Kelley
Appeals Judge