APPEAL NO. 950084
FILED FEBRUARY 28, 1995

On December 21, 1994, a contested case hearing was held. The hearing was held under the provisions of the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq*. (1989 Act). The appellant (claimant) disagrees with the hearing officer's determinations that he reached maximum medical improvement (MMI) on April 29, 1994; that he has a 12% impairment rating (IR); and that his low back condition is not a result of the compensable injury sustained on or about _____. The claimant requests that the hearing officer's decision be reversed and that temporary income benefits be reinstated. The respondent (carrier) requests affirmance.

DECISION

Affirmed.

The claimant sustained a compensable lower back injury in 1985, was diagnosed with herniated discs at the L3-4 and L4-5 levels, and had a lumbar laminectomy performed in 1986. The claimant testified that he was "completely well" from his prior surgery. The claimant had been working for his present employer, for about one month when he sustained his current injury. He testified that on _____, he was herding cows into a corral when the cows got scared and hit a steel gate which he referred to as a door. He said "[t]hey struck the door, and the door struck me. They struck me, and they passed over me." He said he hurt his neck and lower back in that accident and that he went to a hospital emergency room about a week later where he was examined by (Dr. G). He said he told Dr. G that his neck and lower back were hurt in the accident. No report from Dr. G was in evidence. A CT scan of the cervical spine was done at the hospital and the radiologist reported that it showed a compression fracture of the C5 disc and spondylosis and bulging at the C5-6 level. There is no evidence that a diagnostic test was done of the lower back.

Dr. G referred the claimant to (Dr. C) who reported on August 25, 1993, that the claimant complained of neck pain, headache, slight vertiginous symptomatology, and of pain and weakness of the arms. Dr. C recommended a cervical MRI scan which was done on August 27, 1993, and it revealed spinal cord compression at the C5 disc. On September 29, 1993, Dr. C recommended cervical surgery which was performed by Dr. C on October 18, 1993. The claimant continued to treat with Dr. C and on March 2, 1994, Dr. C reported that the claimant was doing well and that he would see the claimant for a final evaluation and release in one month. Then, on March 23, 1994, Dr. C reported that the claimant was complaining of low back pain with lower extremity pain and he recommended a lumbar MRI. This is the first reference to low back pain in Dr. C's reports. The claimant explained that he told Dr. C that he hurt his neck and lower back, but that Dr. C told him that he would fix his neck first and then "continue on" with the back. Dr. C

reported in April 1994 that the claimant continued to have low back pain, that a lumbar MRI was recommended, and that "[m]y review of his handwritten initial symptom complaints indicate he hurt his back at that time, and there was pain there."

The parties agreed that (Dr. CO) is the designated doctor selected by the Texas Workers' Compensation Commission (Commission). In a Report of Medical Evaluation (TWCC-69) dated June 23, 1994, Dr. CO certified that the claimant reached MMI on April 29, 1994, with a 17% IR. The whole body IR was for 12% impairment of the cervical spine and 6% impairment of the lumbar spine which results in a 17% whole body IR under the Combined Values Chart of the Guides to the Evaluation of Permanent Impairment, third edition, second printing, dated February 1989, published by the American Medical Association. Dr. CO diagnosed a compression fracture of the cervical spine (for which he noted surgery was performed) and lumbar spondylosis. Dr. CO noted in his narrative report that he evaluated the claimant for an IR only, that the claimant had previously been determined to have reached MMI on April 29, 1994 (he does not say by whom), and that he agreed with MMI having been reached on April 29, 1994. No other reports regarding MMI or IR were in evidence, including that of (Dr. S). The benefit review conference (BRC) report indicates that Dr. S was a referral doctor and that she determined that the claimant reached MMI on April 29, 1994, with an 18% IR and that the treating doctor, Dr. C, concurred with Dr. S's report.

A lumbar myelogram was done on October 20, 1994, and (Dr. SH) reported that he could not exclude a disc herniation at L3-4, and he reported that a lumbar CT scan done the same day showed: "1) Discordance with the myelographic results suggesting additional work-up with MRI of the lumbar spine with and without gadolinium might prove beneficial. 2) Epidural fibrosis in the left anterior aspect of the L4-5 canal." He noted that at the L3-4 level there is a diffuse circumferential spondylitic bulge of disc density material. A disc herniation was not noted.

From August 30, 1993, through June 1994, (JS), who is a registered nurse, was retained by the carrier as a case management consultant and she interviewed the claimant, visited with him at his home, and attended doctor's appointments with him. Her reports reflected that she was told by a friend of the claimant's on December 14, 1993, that the claimant was attending physical therapy for muscle spasms in the neck and back area, and that the claimant complained of back pain with pain radiating down his legs on March 24, 1994. She also noted that she attended Dr. S's examination of the claimant on April 29, 1994, and that Dr. S determined that the claimant had reached MMI "in regard to his cervical surgery."

On August 24, 1993, (AB), who is an adjustor for the carrier, conducted a recorded interview with the claimant and in that interview the claimant indicated that he had pain from his head down to about the middle of his back. His friend who was with him at the interview indicated that the claimant had pain "a little bit lower than the middle of his back." The claimant testified that he continues to have problems with his back and neck.

In regard to the issue of whether the claimant's low back condition is a result of the compensable injury sustained on or about _____, the hearing officer found that the claimant sustained a compensable neck injury on _____, but that the claimant's low back condition was not caused by the incident on _____. He concluded that the claimant's low back condition is not a result of the compensable injury sustained on or about _____. The claimant had the burden of proving that his low back condition is a part of his compensable injury. Texas Workers' Compensation Commission Appeal No. 94248, decided April 12, 1994; Texas Workers' Compensation Commission Appeal No. 941732, decided January 31, 1995. In Texas Workers' Compensation Commission Appeal No. 93290, decided June 1, 1993, we stated "any question of injury is resolved by the hearing officer as finder of fact; the designated doctor's opinion is only entitled to a presumption, within the purview of Articles 8308-4.25 and 4.26 [now Sections 408.122 and 408.125(e)], in regard to MMI and [IR], not as to injury." *See also* Texas Workers' Compensation Commission Appeal No. 94311, decided April 29, 1994, wherein we stated that "the designated doctor's opinion as to injury is not entitled to any presumption by the 1989 Act, in contrast to his opinion concerning MMI and [IR] when appointed for those questions." In the instant case there is some evidence that the claimant reported that he had back pain, in addition to neck pain, shortly after his accident of _____. However, in determining whether the claimant's low back condition was caused or aggravated by the accident of _____the hearing officer could consider that the first mention of low back pain in a medical report of the treating doctor in evidence was in March 1994, and it came shortly after the treating doctor reported that the claimant was doing well and that he would be seen for a final evaluation and release in one month.

The hearing officer is the trier of fact in a contested case hearing and is the sole judge of the relevance and materiality of the evidence offered and of the weight and credibility to be given to the evidence. Section 410.165(a). As the trier of fact, the hearing officer can believe all, part, or none of any witness's testimony and judges the credibility of the witnesses. Texas Workers' Compensation Commission Appeal No. 93426, decided July 5, 1993. As the finder of fact, the hearing officer resolves conflicts in the evidence, including the medical evidence, and determines what facts have been established from the conflicting evidence. Appeal No. 941732, *supra*. An appellate 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 (Tex. App.-El Paso 1991, writ denied). This is so even though, were we fact finders, we might have drawn other inferences and reached other conclusions. Salazar v. Hill, 551 S.W.2d 518 (Tex. Civ. App.-Corpus Christi 1977, writ ref'd n.r.e.). When reviewing a hearing officer's decision to determine the factual sufficiency of the evidence, we should set aside the 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 (Tex. 1986). We conclude that the hearing officer's decision on the extent of

the claimant's injury is supported by sufficient evidence and is not so contrary to the overwhelming weight of the evidence as to be clearly wrong and unjust.

In regard to the issue of MMI, the hearing officer determined that the claimant reached MMI on April 29, 1994, as reported by Dr. CO, the designated doctor. However, the hearing officer did not indicate that he gave presumptive weight to Dr. CO's determination of MMI as he did to the IR Dr. CO assigned for the cervical injury. We have previously held that when a designated doctor is appointed to determine IR only, his or her opinion on MMI is not entitled to presumptive weight, although it is prudent, if not essential, for a designated doctor who is appointed to evaluate a claimant for an IR to also render an opinion on MMI inasmuch as an IR is not assessed until MMI is reached. *See* Texas Workers' Compensation Commission Appeal No. 93910, decided November 22, 1993. We conclude that the hearing officer's determination on the date of MMI is supported by sufficient evidence and is not contrary to the overwhelming weight of the evidence.

Concerning the IR issue, the hearing officer determined that the claimant has a 12% IR as Dr. CO, the designated doctor, assigned for the cervical injury, and that that determination is not contrary to the great weight of the other medical evidence. Section 408.125(e) provides that "[i]f the designated doctor is chosen by the commission, the report of the designated doctor shall have presumptive weight, and the commission shall base the [IR] on that report unless the great weight of the other medical evidence is to the contrary." However, as we have previously pointed out, the designated doctor's opinion as to the extent of the claimant's injury is not entitled to presumptive weight. Appeal No. 93290, supra. "Impairment" means any anatomic or functional abnormality or loss existing after MMI that results from a compensable injury and is reasonably presumed to be permanent. Section 401.011(23). "IR" means the percentage of permanent impairment of the whole body resulting from a compensable injury. Section 401.011(24). Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 130.1(g) provides, in part, that the medical evaluation report form shall contain an instruction to the doctor that the IR shall be based on the compensable injury alone. In Appeal No. 941732, *supra*, the issues were whether the claimant's ganglion cyst on her wrist was a result of her compensable injury and what was the IR of the claimant. The hearing officer found that the ganglion cyst was not a result of the compensable injury. However, the designated doctor had assigned impairment for the noncompensable wrist injury as well as for the compensable back and neck injuries. The hearing officer determined that the great weight of the other medical evidence was not contrary to the findings of the designated doctor in regard to impairment for the compensable back and neck injuries. In affirming the hearing officer's decision, which gave no impairment for the noncompensable wrist injury, we stated:

> The instant case does not involve rejection by the hearing officer of a portion of the IR assigned by the designated doctor for the compensable injury. Rather, an issue as to the extent of the claimant's injury was before the hearing officer and he decided that the injury did not extend to the wrist. As previously noted, the hearing officer decides questions as to the extent of

> injury, and the designated doctor's opinion is not entitled to presumptive weight on that question. [Citation omitted.] Thus, not being part of the compensable injury, the right wrist condition should not have been assigned any impairment by the designated doctor and the portion of the IR he assigned for the wrist was easily separated from the IR he assigned for the compensable back and neck injuries. We believe the hearing officer was not in error in determining that the claimant's IR consisted of the impairment assigned by the designated doctor for the compensable back and neck injuries.

In the present case the hearing officer determined that the claimant's compensable injury does not extend to his low back, thus the claimant is not entitled to the six percent impairment the designated doctor assigned for the low back condition. However, it is undisputed that the claimant sustained a compensable neck injury and we agree with the hearing officer's decision that the great weight of the other medical evidence is not contrary to the 12% IR the designated doctor assigned for the compensable neck injury. Accordingly, we conclude that the hearing officer did not err in determining that the claimant has a 12% IR, that sufficient evidence supports that determination, and that it is not contrary to the overwhelming weight of the evidence.

There has been no appeal of the hearing officer's decision that the carrier is not entitled to contribution for the claimant's earlier compensable back injury.

The hearing officer's decision and order are affirmed.

Robert W. Potts
Appeals Judge

CONCUR:

Susan M. Kelley
Appeals Judge

Thomas A. Knapp
Appeals Judge