APPEAL NO. 950512
FILED MAY 16, 1995

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 February 8, 1995. The issues at the CCH were extent of injury, maximum medical improvement (MMI), impairment rating (IR), disability and average weekly wage (AWW). During the hearing the parties reached an agreement that AWW was $302.62. The hearing officer found that the appellant's (claimant herein) injury extended to her back, that she had not yet attained MMI making rating impairment premature, and that claimant had disability from November 9, 1994, continuing through the date of the hearing. The respondent (carrier herein) requests that we review the decision of the hearing officer alleging that certain of his findings are not supported by sufficient evidence, that the hearing officer reached some incorrect conclusions of law and that two of his evidentiary rulings were erroneous. The claimant does not file a response to the carrier's request for review.

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 she was injured when she fell at work on _____. The claimant testified that she was "hurt all over" in the fall, but initially that her most apparent injury was her left ankle, although later her left knee became the focus of her symptoms. The claimant was initially sent by her employer to an occupational clinic and was later treated by her family doctor, Dr. T. Dr. T referred the claimant to an orthopedic surgeon, Dr. H, who performed arthroscopic surgery on the claimant's knee on July 26, 1994.

After the injury the claimant testified that she developed back problems. Dr. H attributed these to her altered gait due to her knee. The claimant acknowledged that she had a prior non-work related back injury requiring surgery in the 1970's. The claimant testified that after this injury she was not having any difficulty with her back until after her knee injury. The claimant testified that on her employment application she had not disclosed her prior back surgery, but that at the time she filled out the form she did not remember it.

After her knee surgery Dr. H prescribed physical therapy and the claimant's left knee problem improved. However, due to her continuing back problems Dr. H prescribed a lumbar epidural steroid (LES) injection and ordered an MRI. The carrier refused to pay for either, but instead requested an examination by a medical examination order (MEO) doctor. The carrier chose Dr. M to perform this examination. Dr. M examined the claimant on November 9, 1994, certifying on a Report of Medical Evaluation (TWCC-69) that the claimant attained MMI on that date with a two percent IR. In his narrative Dr. M stated that the claimant did not have significant back injury, did not need any back treatment, should

return to light duty work, and stated that emotional and motivational factors were responsible for the claimant's persistent complaints. Dr. H stated in a letter of November 30, 1994, that he disagreed with Dr. M.

Dr. W was selected by the Texas Workers' Compensation Commission (Commission) to be the designated doctor. Dr. W stated on a TWCC-69 that the claimant had not attained MMI. In his report Dr. W states that if the back is included as part of the claimant's injury, she is not at MMI and that the MRI should be performed. Dr. W went on to state in his report that should the claimant's injury not include the back and "[i]f we assume that the patient is MMI, then her IR would be 8%." Dr. H stated in a report of his February 3, 1995, examination that the claimant attained MMI for her knee on that date, but had not obtained MMI on her back, which he still relates to the knee injury. Dr. H certified on a TWCC-69 that for the knee injury only the claimant has an 11% IR.

The carrier contests a number of factual findings made by the hearing officer. Specifically, the carrier contests the findings by the hearing officer that the claimant's back problems exist as a result of an altered gait from the knee injury, that the designated doctor confirmed that the claimant had not attained MMI, that an IR could not be assessed, and that the claimant had disability beginning November 9, 1994, continuing through the date of the hearing.

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 great weight and preponderance 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).

While there is conflicting evidence concerning the factual findings of which the carrier complains, there is evidence in the record to support each of the challenged findings. Dr. H strongly states that the claimant's back problem is the result of her altered

gait. Evidence to the contrary or inconsistent with this does not constitute the great weight and preponderance of the evidence. The carrier argues that the designated doctor did not make a finding as to MMI. The hearing officer found that the designated doctor had not found that the claimant had yet attained MMI if her injury extended to her back. This is supported by the narrative report of the report of the designated doctor. A finding of no MMI is a finding on the issue of MMI and the designated doctor is not required to render an opinion on the issue of extent of injury. We have held that extent of injury is a matter to be determined by the hearing officer and that while the designated doctor may express an opinion regarding it and such opinion may be considered by the hearing officer, it is not entitled to presumptive weight. *See* Texas Workers' Compensation Commission Appeal No. 941732, decided January 31, 1995. The fact that Dr. H, Dr. M and Dr. W expressed opinions as to IR does not constitute the great weight and preponderance of the evidence that an IR can be assessed. We have in fact held that there can be no valid IR until the claimant attains MMI. *See* Texas Workers' Compensation Commission Appeal No. 92595, decided December 21, 1992. The carrier argues that Dr. M's report saying the claimant can return to light work is dispositive of the issue of disability. The claimant testified she had disability. 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. Thus we find the carrier's challenge to the hearing officer's factual findings to be without merit.

The carrier challenges the hearing officer's conclusion of law that the claimant's injury extends to her back. We have previously affirmed a hearing officer who found that a claimant's injury extended to the back because of an altered gait. *See* Texas Workers' Compensation Commission Appeal No. 93414, decided July 5, 1993. On the issue of MMI, the hearing officer is required to give presumptive weight to the opinion of the designated doctor. Section 408.122(b). The hearing officer does so in this case because the designated doctor states that the claimant is not at MMI if her back is part of her injury. As a matter of law IR cannot be assessed until the claimant attains MMI. Texas Workers' Compensation Commission Appeal No. 92670, decided February 1, 1993.

The carrier's argument that we should remand to obtain clarification from the designated doctor because his report is incomplete is groundless. The carrier is under the misapprehension that the designated doctor is required to give an opinion as to the extent of injury. A designated doctor certainly may give such an opinion, but a designated doctor is appointed to determine MMI and IR. As pointed out earlier any opinion that the designated doctor should give concerning the issue of extent of injury would not be entitled to presumptive weight. This is because the 1989 Act only provides presumptive weight to be given to the designated doctor on the issues of MMI and IR. Section 408.122(b); Section 408.125(e). It is also because the extent of injury is a question of fact

for the hearing officer. Texas Workers' Compensation Commission Appeal No. 93613,

decided August 24, 1993.

The carrier raises two evidentiary issues on appeal. First the carrier states that the hearing officer erred in admitting a piece of evidence without first allowing counsel for the carrier to read it. Here the claimant proffered a medical report she stated she had just received from her treating doctor the day before the hearing. The carrier initially objected on failure to exchange, but the hearing officer found good cause for the late exchange in that the claimant had only received the document just before the hearing. The carrier then objected to admission of the document based on its attorney not being given an opportunity to read it prior its admission. Clearly, the hearing officer should have afforded the attorney for carrier the opportunity to read the document so that he could formulate any other objections to it. Any error for failing to do so in this instance is harmless in that on appeal the carrier points to no reason that the document should not have been admitted and we find none.

The carrier also complains that the hearing officer cut off its questioning of the claimant concerning her employment application. As stated earlier the claimant testified that she failed to mention her prior back surgery on her employment application saying that at the time she did not remember. The hearing officer indicated that he did not need further evidence on this point to determine its weight in his determination of the claimant's credibility. The carrier argues that it was precluded from bringing forth evidence of credibility by the ruling of the hearing officer. Carrier obviously misunderstood the hearing officer's ruling. The hearing officer was not ruling that the carrier could not challenge the claimant's credibility or present evidence bearing on that issue generally, but that specifically the hearing officer had heard sufficient evidence concerning the claimant's not mentioning her prior surgery in her employment application to determine what weight to give this in his determination of her credibility. Certainly the hearing officer could have stated this more clearly and perhaps he would have had the carrier make a point of the issue. In fact when the hearing officer instructed the carrier to move on the carrier neither objected nor requested a bill of review. Without doing the former we do not believe that the carrier preserved error below and without the latter are we unable in this case to determine any harm in the action of the hearing officer. Further, the question was asked and answered and the carrier fails to state on appeal what it could have established by further questioning.

The decision and order of the hearing officer are affirmed.

_____
Gary L. Kilgore
Appeals Judge

CONCUR:

_____
Robert W. Potts
Appeals Judge

_____
Thomas A. Knapp
Appeals Judge