APPEAL NO. 980268
FILED MARCH 26, 1998

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 December 18, 1997, in (City), Texas, with (hearing officer) presiding as hearing officer. The issues at the CCH were the maximum medical improvement (MMI) and impairment rating (IR). The hearing officer found that the appellant (claimant herein) attained MMI on March 17, 1997, with a five percent IR based upon a report from a designated doctor selected by the Texas Workers' Compensation Commission (Commission). The claimant challenges the report of the designated doctor and requests the appointment of a new designated doctor. The claimant argues that the he has not yet reached MMI and that the designated doctor failed to perform range of motion (ROM) testing properly and to rate his whole injury. The respondent (carrier herein) replies that the hearing officer properly gave presumptive weight to the report of the designated doctor.

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.

We adopt the hearing officer's rendition of the evidence and will only briefly touch on the evidence most germane to the appeal. It was undisputed that the claimant suffered a compensable injury on _____. Dr. H, D.C., the claimant's treating doctor, stated on a Report of Medical Evaluation (TWCC-69) dated December 17, 1996, that the claimant would attain MMI on January 20, 1997. Dr. H did not certify an IR on the face of the TWCC-69, but did state in an attached narrative report that he would assess the claimant's IR at 15%. Dr. H testified at the CCH and stated that he had not certified an IR because he had not yet found the claimant to be at MMI, but in his opinion the claimant had a 15% IR. The Commission selected Dr. C, D.C., as the designated doctor. Dr. C certified on a TWCC-69 dated March 17, 1997, that the claimant attained MMI on March 17, 1997, with a five percent IR. Dr. C based his IR on specific disorders of the lumbar spine and referenced Table 49 on page 73. Dr. C did not provide any IR for ROM due to the fact that the claimant failed to meet the straight leg raising criteria. Dr. H testified that he disagreed with Dr. C's assessment and did not believe that Dr. C properly applied the Guides to the Evaluation of Permanent Impairment, third edition, second printing, dated February 1989, published by the American Medical Association (AMA Guides) or rated the claimant's entire injury. Dr. H also testified that he disagreed with Dr. C's MMI date.

Section 408.122(c) 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 [MMI] on the report unless the great weight of the other medical evidence is to the contrary.

Section 408.125(e) provides:

> If 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. If the great weight of the medical evidence contradicts the [IR] contained in the report of the designated doctor chosen by the commission, the commission shall adopt the [IR] of one of the other doctors.

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 claimant's primary attack on Dr. C's certification was that he does not believe he was at MMI on the date certified by Dr. C because he was still in a work-hardening program prescribed by Dr. H. We have previously held that the achievement of MMI does not necessarily equate to a pain free recovery or to claimant's being restored to the preinjury condition. *See* Texas Workers' Compensation Commission Appeal No. 92394, decided September 17, 1992; Texas Workers' Compensation Commission Appeal No. 92670, decided February 1, 1993; Texas Workers' Compensation Commission Appeal No. 93007, decided February 18, 1993. We do not find the fact the claimant was still under treatment a sufficient basis to find that the hearing officer's reliance on Dr. C's report was incorrect as a matter of law.

Under the 1989 Act, the hearing officer is the trier of fact at the CCH and is the sole judge of the relevance and materiality of the evidence offered and the weight and credibility to be given to the evidence. Section 410.165(a). It is the province of the hearing officer to resolve conflicts in the medical evidence. Campos, *supra*. Applying these standards, we would defer to the hearing officer in rejecting most of the criticisms by Dr. H of Dr. C's rating.

The 1989 Act requires that any determination of IR be based upon the Guides. Section 408.124. Failure by a designated doctor to properly follow the Guides has led to reversal of a decision on IR based upon the designated doctor's report. *See* Texas Workers' Compensation Commission Appeal No. 93296, decided May 28, 1993; Texas Workers' Compensation Commission Appeal No. 93769, decided October 11, 1993; Texas Workers' Compensation Commission Appeal No. 931008, decided December 16, 1993; Texas Workers' Compensation Commission Appeal No. 94181, decided March 24, 1994. Where there are sufficient questions concerning whether or not a designated doctor had properly followed the Guides, we have remanded to allow the hearing officer to seek clarification from the designated doctor. *See* Texas Workers' Compensation Commission Appeal No. 93600, decided August 31, 1993; Texas Workers' Compensation Commission Appeal No. 931085, decided January 4, 1994; Texas Workers' Compensation Commission Appeal No. 931099, decided January 11, 1994.

Reviewing the evidence in the present case we find no basis to reverse on the basis of failure to properly apply the AMA Guides. Here there was a difference in the ROM measurements of Dr. H and Dr. C. This did not establish a failure of Dr. C to

follow the protocols of the AMA Guides and in two clarification letters Dr. C responds to Dr. H's criticism on this point. The hearing officer's acceptance of Dr. C explanation was within his province as the finder of fact.

The decision and order of the hearing officer are affirmed.

Gary L. Kilgore
Appeals Judge

CONCUR:

Joe Sebesta
Appeals Judge

Alan C. Ernst
Appeals Judge