APPEAL NO. 980299
FILED APRIL 2, 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 January 12, 1998, in (City), Texas, with (hearing officer) presiding as hearing officer. The issues at the CCH were maximum medical improvement (MMI) and impairment rating (IR). The hearing officer found that the appellant (claimant herein) attained MMI on June 7, 1996, with a zero percent IR based upon the report of a designated doctor selected by the Texas Workers' Compensation Commission (Commission). The claimant appeals, arguing that the designated doctor's opinion was incorrect and motivated by bias and pointing to contrary opinions of other doctors. In a supplemental request for review, the claimant attaches a decision from the Commission's Medical Review Division preauthorizing a discogram, which he asserts is newly discovered evidence. The respondent (carrier herein) replies that we should not consider the new evidence in the claimant's supplemental request for review and that the hearing officer correctly based his determination of MMI and IR on 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.

The parties stipulated that the claimant suffered an injury in the course and scope of his employment on _____. The claimant testified that this injury took place when a five-pound radiator cap exploded upward when he attempted to release pressure from a hot radiator on a bulldozer. Claimant, who was knocked backward by the explosion, suffered burns on his left hand that required skin grafts and subsequently had carpal tunnel and cubital tunnel surgery his right arm as a result of the injury. The claimant also complained of low back problems and was still under treatment for his low back at the time of the CCH. The claimant has been treated by a number of doctors for his injuries. On February 13, 1996, the claimant underwent an MRI of the lumbar spine. The radiology

report from this MRI indicated as follows, "Evidence of multilevel disc dessication without acute herniation."

There have also been several certifications of MMI and IR. Dr. B, one of the claimant's treating doctors at the time, certified on a Report of Medical Evaluation (TWCC-69) dated June 7, 1996, that the claimant attained MMI on June 7, 1996, with an 18% IR. This IR was based on impairment of the claimant's upper right extremity. Dr. C certified on a TWCC-69 dated July 18, 1996, that the claimant attained MMI on July 16, 1996, with a 22% IR. Dr. D, another treating doctor, indicated his agreement with this certification on the face of Dr. C's TWCC-69. Dr. C's rating included an 18% whole body impairment of the upper right extremity combined with a five percent whole body impairment for specific disorders of the claimant's lumbar spine. Dr. R was the designated doctor selected by the Commission. Dr. R certified on a TWCC-69 dated September 25, 1996, that the claimant attained MMI on June 7, 1996, with a zero percent IR. The Commission sought clarification from Dr. R, who indicated in an October 21, 1996, letter that his opinion remained the same. The Commission requested that Dr. R reexamine the claimant in July 1997. On a TWCC-69 dated July 31, 1997, Dr. R again certified that the claimant attained MMI on June 7, 1996, with a zero percent IR. Dr. R stated as follows in the conclusion of his narrative report of July 31, 1997:

> There have been earnest attempts to diagnose and then to help this man with appropriate treatment. So far he has escaped the consequences of misguided attempts to help him. The time must come to say enough is enough. Earnest doctors' beliefs that something might have been missed must not stand in the way of [the claimant's] being told that he is well enough to enjoy life. His family must be suffering greatly as they see him going from doctor to doctor in a hopeless quest. A "tough love" approach cannot be worse than what is happening to this man now. I am convinced that his permanent whole person impairment from his accident is 0 percent.

At some point prior to his reexamination by Dr. R, the claimant changed treating doctors to Dr. S, D.C., who referred the claimant to Dr. Dr. H, a spine surgeon. Dr. H in April 1997 recommended a discogram be

performed. The carrier denied the discogram and Dr. H requested in May 1997 that the carrier review this decision, arguing that there was sufficient evidence of disc problems to warrant this testing. Dr. S indicated his agreement with the need for a discogram. After the carrier's continued denial of this procedure, on January 8, 1998, Dr. H made a request to the Commission's Medical Review Division for medical dispute resolution of the carrier's preauthorization decision regarding the discogram. In his supplemental request for appeal filed on February 13, 1998, the claimant states that on February 13, 1998, he received an order from the Commission's Medical Review Division authorizing the discogram.

The first question is whether we should consider the attachment to the claimant's supplemental request for review. First, we note that the supplemental request for review was filed within the time prescribed for the filing of an appeal pursuant to Section 410.202(a) so there is no question that our jurisdiction has been invoked. However, we note that we will not generally consider evidence not submitted into the record, and raised for the first time on appeal. Texas Workers' Compensation Commission Appeal No. 92255, decided July 27, 1992. To determine whether evidence offered for the first time on appeal requires that a case be remanded for further consideration, we consider whether it came to appellant's knowledge after the hearing, whether it is cumulative, whether it was through lack of diligence that it was not offered at the hearing, and whether it is so material that it would probably produce a different result. Texas Workers' Compensation Commission Appeal No. 93111, decided March 29, 1993; Black v. Wills, 758 S.W.2d 809 (Tex. App.-Dallas 1988, no writ). In certain rare and exceptional cases, we have remanded a case to a hearing officer to consider such attachments. *See* Texas Workers' Compensation Commission Appeal No. 93463, decided July 19, 1993; Texas Workers' Compensation Commission Appeal No. 951215, decided September 7, 1995; Texas Workers' Compensation Commission Appeal No. 960749, decided May 30, 1996; and Texas Workers' Compensation Commission Appeal No. 970199, decided March 24, 1997.

There are a number of factors in the present case that argue against applying such a remedy here. First, while the Commission's order authorizing the discogram was received after the CCH, the hearing officer was aware that such an order had been sought just prior to the CCH. Had

the hearing officer felt that this evidence was critical to making his factual determinations he had the authority, and indeed perhaps the duty, to continue the case *sua sponte*. His failure to do, or even to hold the record open for the determination by the Medical Review Division, are indicia that the hearing officer has determined that the results of the discogram would not change the result of this case. While not a prerequisite for arguing that the Medical Review's decision is newly discovered evidence, the claimant's failure to seek a continuance must also be considered a factor in weighing the importance he ascribed to the decision of the Medical Review Division to his case. Also, we note that there had been testing of the claimant's lumbar spine with the MRI. Thus, any alleged unfairness on the part of the carrier in denying the claimant the means of proving his case by denying testing is somewhat mitigated in the present case. Weighing these factors, we do not believe that under the particular facts of this specific case, a remand is justified. Finally, we observe that, if the results of the discogram become available within the time to appeal our decision and cast doubt on the decision of the hearing officer, the claimant has the right to seek judicial review of our decision affirming the decision of the hearing officer on that basis.

The claimant contends in his request for review that the hearing officer erred in relying on the opinion of the designated doctor in resolving the issues of MMI and IR. Section 408.122(c) provides:

> If a dispute exists as to whether the employee has reached [MMI], 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).

Here, the hearing officer, although expressing some trepidation in his decision[1], adopted the report regarding the MMI and IR of the designated doctor. In light of our standard of review and the presumption in favor of the opinion of the designated doctor, we cannot say that under the facts of this case that the hearing officer erred in doing so.

The decision and order of the hearing officer are affirmed.

Gary L. Kilgore
Appeals Judge

CONCUR:

Stark O. Sanders, Jr.
Chief Appeals Judge

Judy L. Stephens
Appeals Judge

[1]The hearing officer stated as follows in the portion of his decision labeled "Discussion":

> Although it is difficult to imagine that an injured worker with two surgeries and a skin graft should receive a zero percent whole body [IR], the evidence is not sufficient to overturn that rating in this case.