APPEAL NO. 990066

This appeal arises pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act). This case is back before us after our remand in Texas Workers' Compensation Commission Appeal No. 981134, decided July 8, 1998. We had remanded the case because the hearing officer failed to fully explain an appropriate rationale as to how the great weight of the other medical evidence overcame the impairment rating (IR) of the designated doctor. We stated that under the particular circumstances of this case, further clarification from the designated doctor would be helpful in defining the issues at hand. A contested case hearing (CCH) on remand was held on December 15, 1998. The hearing officer found that the great weight of the medical evidence was not contrary to the designated doctor's IR. The appellant (carrier) files a request for review, contending that the great weight of the medical evidence was contrary to the designated doctor's IR, which it points out was 19% and not 18% as reflected in the hearing officer's decision, and contending that unilateral contacts with the designated doctor require that the designated doctor's IR be rejected. There is no response from respondent (claimant) to the carrier's request for review in the appeal file.

DECISION

We reform the hearing officer's decision to reflect that the IR was 19% as reflected in the report of the designated doctor. Finding sufficient evidence to support the decision of the hearing officer as reformed and no reversible error in the record, we affirm the decision and order of the hearing officer.

At the hearing on remand, the hearing officer stated that he would consider all the evidence taken at the initial hearing. We summarized that evidence in our decision in Appeal No. 981134, *supra*, as follows:

> There were no stipulations, but it was undisputed that the claimant suffered a compensable injury on _____. This was described as a slip-and-fall injury. Dr. O, M.D., the carrier's MEO[1] doctor, did the initial assessment of IR. Dr. O certified on a Report of Medical Evaluation (TWCC-69) dated June 17, 1997, that the claimant attained maximum medical improvement (MMI) on June 4, 1997, with a seven percent IR. This IR was based upon impairment due to specific disorders of the spine using Table 49 of the Guides to the Evaluation of Permanent Impairment, third edition, second printing, dated February 1989, published by the American Medical Association (AMA Guides). The carrier apparently disputed this IR, leading to the appointment of a designated doctor, Dr. F, D.C., who was selected by the Texas Workers' Compensation Commission (Commission). Dr. F certified on a TWCC-69 dated August 30, 1997, that the claimant attained MMI on August 26, 1997,

[1]Referenced earlier in that decision to mean "medical examination order."

with a 19% IR. This IR consisted of seven percent whole body impairment for specific disorders of the spine, 12% whole body impairment due to loss of range of motion (ROM) and one percent whole body impairment for lower extremity sensory impairment. The carrier sought a peer review of the medical records only by Dr. T, M.D., who appears from his curriculum vitae to be the carrier's medical advisor and in-house physician. In a September 11, 1997, report, Dr. T assessed a seven percent IR based on his review of the claimant's medical reports. His rating has two components–five percent impairment for specific disorders of the spine and a two percent impairment for loss of ROM due to diminished right and left lateral flexion of the spine.

Dr. O testified by telephone at the CCH. He testified that he was an expert on the AMA Guides and had been in charge of various training programs to train doctors in the use of the AMA Guides. He testified that in his opinion Dr. F's rating was not correct under the AMA Guides. The crux of his opinion is that Dr. F's ROM measurements and sensory deficits did not make "anatomical sense."

At the CCH on remand both Dr. F and Dr. O testified live. Dr. F testified that his 19% IR was correctly assessed using the AMA Guides. Dr. O testified that Dr. F's rating did not make anatomical sense and that his own seven percent IR assessment was correct. There were some exhibits from the carrier showing that after the original CCH the claimant's legal representative and his treating doctor had contacted Dr. F to ask him to rebut Dr. O's testimony at that CCH, upon which the hearing officer based his decision that the great weight of the medical evidence was contrary to Dr. F's IR. As we noted in our decision in Appeal No. 981134, *supra*, Dr. F filed a response with the Appeals Panel concerning his IR. We noted that the designated doctor is the Commission's own expert and acknowledged his attempt to provide us additional information, but did not consider his response as he was not a party to the appeal.

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 impairment rating 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 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).

On remand, the hearing officer specifically found that the great weight of the other medical evidence was not contrary to Dr. F's IR. The carrier's appeal argues that Dr. F's IR was "flat wrong." It is somewhat unclear as to whether the carrier means by this that Dr. F's IR was invalid as matter of law or that as a matter of law it was overcome by the great weight of the other medical evidence. We find neither to be the case.

While the carrier argues on appeal that the designated doctor had an incomplete history, we note that at the hearing the hearing officer took a recess for the parties to determine whether the designated doctor had all the medical records at the time of his examination of the claimant and the parties agreed that he did. Under these circumstances, we fail to see how as a matter of law the designated doctor could have insufficient historical information to form a valid opinion as to IR. The carrier also states in its appeal that Dr. F did not personally perform ROM testing. Dr. F testified that the testing was performed by a certified technician under his personal supervision. Both Dr. F and Dr. O testified that this was proper and was, in fact, the procedure that they both used in regard to obtaining the ROM measurement. In light of this testimony and without any showing by the carrier that such personal testing is required, we find do not find this a basis for any error. The carrier argues that an IR must be based upon objective testing. We note

that the IR it is contesting was undisputedly based upon ROM testing and physical examination conducted under the protocols of the AMA Guides. While the carrier repeatedly asserts that the designated doctor's IR makes no sense, it points to no provision of the AMA Guides that was not followed by Dr. F in making his IR assessment. We therefore find no basis to find that Dr. F's IR was invalid as a matter of law. Nor as the carrier presented any rationale as to why the great weight and preponderance of the medical evidence is contrary to the IR assessment of the designated doctor.

It is always a matter of concern whenever there is a unilateral contact with by a party with the designated doctor. Even prior to the statutory prohibition against such contact we stated in a number of decisions that such contact is improper. *See* Texas Workers' Compensation Commission Appeal No. 94240, decided March 31, 1994, and case cited therein. However, as the hearing officer pointed out at the CCH on remand, Dr. F did not change his opinion concerning IR in response to such contact. Under these circumstances, we do not find that Dr. F's opinion, already formed at the time of the unilateral contacts, was invalidated as a result of these contacts. *See* Texas Workers' Compensation Commission Appeal No. 93762, decided October 1, 1993.

The decision and order of the hearing officer are affirmed.

_____
Gary L. Kilgore
Appeals Judge

CONCUR:

_____
Stark O. Sanders, Jr.
Chief Appeals Judge

_____
Thomas A. Knapp
Appeals Judge