APPEAL NO. 990594

This appeal is brought pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act). A contested case hearing was held on January 29, 1999, with the record closing on February 12, 1999. The Decision and Order of the hearing officer indicates that parties agreed to the withdrawal of the issues of when the respondent (claimant) reached maximum medical improvement (MMI) and what is her impairment rating (IR). The remaining issue was whether the claimant waived the right to contest the report of the designated doctor. The report of Dr. R, the designated doctor, is dated April 5, 1995. The hearing officer determined that the claimant disputed Dr. R's report within a reasonable time by calling the Texas Workers' Compensation Commission (Commission) on May 18, 1995, and that the claimant did not waive the right to contest the report of the designated doctor. The appellant (carrier) requested review, urged that the determinations of the hearing officer are so contrary to the overwhelming weight of the evidence as to be clearly wrong and unjust, and requested that the Appeals Panel reverse the decision of the hearing officer. A response from the claimant has not been received.

DECISION

We affirm.

The claimant worked on an assembly line of an automobile manufacturer. The parties stipulated that the claimant sustained a compensable injury on _____. More accurately, the claimant sustained repetitive trauma injuries with a date of injury of _____. Dr. G examined the claimant at the request of the carrier and certified that the claimant reached MMI on November 11, 1994, with a 21% IR. Dr. R rendered a Report of Medical Evaluation (TWCC-69) dated March 1, 1995, in which he certified that claimant reached MMI on November 8, 1994, but did not assign an IR because he did not have all of the claimant's medical records. In a TWCC-69 dated April 5, 1995, Dr. R certified that the claimant reached MMI on November 8, 1994, with a six percent IR. In a one-page narrative attached to the TWCC-69, Dr. R explained that he reviewed an MRI of the cervical spine and assigned six percent for a disc protrusion at C4-5 and that he did not assign a rating for the upper extremities because he did not think that the upper extremity conditions were related to the compensable injury.

The claimant testified that she received the TWCC-69 of Dr. R, that she did not receive the narrative, that Dr. G had assigned a 21% IR, that she did not agree with the six percent IR assigned by Dr. R, and that she called the Commission field office handling her claim on May 18, 1995. She said that she told the person she spoke with that she did not agree with the IR assigned by Dr. R; that the person asked her some questions; that she told the person that she had talked with Dr. S, her treating doctor; that she told the person that Dr. S had not received the report; that she did not understand everything the person was telling her; that she understood the part that she was to go to her doctor and talk with him; that she talked with her doctor; and that Dr. S told her that the report of a designated doctor was "a done deal" and that there was not anything that could be done about it. The

claimant stated that she received impairment income benefits based on the report of Dr. R. She testified that she first saw the narrative of Dr. R in 1998 when another ombudsman faxed a copy to Dr. S's office; that she did not agree with Dr. R's report because he rated only her neck and not the other parts of her injury. The claimant said that she continued to have problems with her neck after she saw Dr. R in 1995; that toward the end of 1996 her neck started getting worse; that she had injections in her neck; that the injections did not solve the problem; that she had another MRI in 1997; that Dr. A performed surgery on her neck on June 27, 1997; and that she did not remember anyone recommending surgery before 1997.

The Dispute Information Resolution System (DRIS) records of the Commission indicate that the claimant called the Commission on May 18, 1995. The text of the note is as follows:

> CLMT ASK (SIC) FOR Mrs. S. SHE HAD QUESTIONS ABOUT NOT AGREEING TO DD [DESIGNATED DOCTOR] REPORT. I ASK (SIC) IF SHE SPOKE TO HER TD [TREATING DOCTOR]. SHE TRIED TO TELL HIM ABOUT HER RATING BUT, SHE SAID, HE DID NOT GET A COPY, & WAS HE SUPPOSE TO. I TOLD HER DD WAS TO SEND OUT COPIES TO TWCC [COMMISSION], INS. CO., CLMT. & HIS/HER ATTY. I EXPLAINED PRESUMPTIVE WEIGHT, & CLMT BECAME CONFUSED. I JUST SIMPLY TOLD HER TO TAKE HER COPY TO TD, IF HE DIS-AGREES, TO PUT IT IN WRITING FOR HER, & DO NOT MAIL IT, HOLD ON TO IT FOR BRC [BENEFIT REVIEW CONFERENCE]. CLMT WILL DECIDE ON BRC AFTER, (SIC) SPEAKING TO HER TD.

The only issue in this case is quite unusual. Neither the 1989 Act nor the Commission rules prescribe a time within which a party is to dispute the report of a designated doctor certifying whether a claimant reached MMI, the date a claimant reached MMI, or the IR of a claimant. In Texas Workers' Compensation Commission Appeal No. 980101, decided March 4, 1998, that Appeals Panel held that the hearing officer was wrong in stating that later surgery always permitted the dispute of a prior certification of MMI and IR no matter how much time had elapsed and remanded to the hearing officer to make a determination on whether or not the claimant had waived the right to dispute the report of the designated doctor. After the remand, the Appeals Panel affirmed a determination that the claimant did not waive the right to dispute the report of the designated doctor during the two and one-half years that he waited to dispute the report of the designated doctor. Texas Workers' Compensation Commission Appeal No. 981144, decided July 13, 1998. Under extremely unusual circumstances, the question of a claimant waiving the right to dispute a report of a designated doctor may be raised. Normally, the designated doctor will have rendered another report, and the questions will be whether the designated doctor rendered another report for a valid reason and within a reasonable time.

The hearing officer is the trier of fact and is the sole judge of the relevance and materiality of the evidence and of the weight and credibility to be given to the evidence.

Section 410.165(a). The trier of fact may believe all, part, or none of any witness's testimony because the finder of fact judges the credibility of each and every witness, the weight to assign to each witness's testimony, and resolves conflicts and inconsistencies in the testimony. Taylor v. Lewis, 553 S.W.2d 153 (Tex. Civ. App.-Amarillo 1977, writ ref'd n.r.e.); Texas Workers' Compensation Commission Appeal No. 93426, decided July 5, 1993. An appeals level body is not a fact finder, and it 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). The DRIS note dated May 18, 1995, and the claimant's testimony may be interpreted differently. That different factual determinations may be made based upon the same evidence is not a sufficient basis to overturn factual determinations of a hearing officer. Texas Workers' Compensation Commission Appeal No. 94466, decided May 15, 1994. The hearing officer's determination that the claimant disputed Dr. R's report by calling the Commission on May 18, 1995, is not so against the great weight and preponderance of the evidence as to be clearly wrong or unjust. In re King's Estate, 150 Tex. 662, 244 S.W.2d 660 (1951); Pool v. Ford Motor Co., 715 S.W.2d 629, 635 (Tex. 1986). There was no contention that a dispute on May 18, 1995, was not within a reasonable time.

The record does not indicate that the designated doctor amended his report or rendered a second report. In its appeal, the carrier cited Appeals Panel decisions stating that a designated doctor may amend a report for a valid reason and within a reasonable time. Since the record does not contain an amended report or an additional report and the Decision and Order of the hearing officer states that the issues of MMI and IR were withdrawn, we will not consider contentions concerning a designated doctor amending a report for a valid reason within a reasonable time.

We affirm the decision and order of the hearing officer.

_____
Tommy W. Lueders
Appeals Judge

CONCUR:

_____
Thomas A. Knapp
Appeals Judge

CONCUR IN THE RESULT:

The Texas Workers' Compensation Act contains specific provisions addressing waiver of rights under particular circumstances. *See, e.g.*, Sections 409.021(c) and 408.147(b). Carrier has cited no statutory or rule provision which addresses waiver under the circumstances of this case.

_____
Robert W. Potts
Appeals Judge