APPEAL NO. 991069

This appeal arises under 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. 982819, decided January 15, 1999. We had remanded the case directing the hearing officer to seek clarification from the designated doctor as to his opinion as to maximum medical improvement (MMI) and impairment rating (IR), and to appoint a second designated doctor unless the first designated doctor provided an IR consistent with the Guides to the Evaluation of Permanent Impairment, third edition, second printing, dated February 1989, published by the American Medical Association (AMA Guides). On remand the hearing officer sought clarification from the designated doctor and later appointed a second designated doctor. After giving the parties an opportunity to comment she made findings on the issues before her at the original contested case hearing (CCH) in the case, finding that the appellant/cross-respondent (claimant herein) attained MMI on March 8, 1999, with a 10% IR based upon the report of the second designated doctor and finding that the claimant had disability since June 2, 1998. The claimant appeals arguing that he is still recovering from spinal surgery and is not at MMI, making the assessment of an IR premature. The respondent/cross-appellant (carrier herein) replies that the evidence is consistent with the claimant having reached MMI and that if the report of the first designated doctor is not given presumptive weight, the report of the second designated doctor must be. The carrier appeals the decision of the hearing officer that the second designated doctor should not have been appointed and the MMI and IR certification of the first designated doctor should have been given presumptive weight. The carrier also argues that the hearing officer erred in addressing the disability issue and in denying its motion to depose the designated doctor. There is no response from the claimant to the carrier's request for review in the appeal file.

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 facts of the case prior to remand are outlined in our decision in Appeal No. 982819, *supra.* In that decision we summarized the facts of the case as follows:

> The essential facts of this case are not in serious dispute. It is undisputed that on _____, that the claimant suffered a compensable injury. Medical reports describe this injury as taking place when the claimant was struck by a forklift and thrown backwards causing him to fall and hit his back and head. Dr. T, an orthopedic surgeon and carrier-selected required medical examination doctor, certified on a Report of Medical Evaluation (TWCC-69) that the claimant attained MMI on March 18, 1998, with a zero percent IR. The claimant disputed this and invoked the designated doctor process.
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> In a May 14, 1998, medical report Dr. G, an orthopedic surgeon and a doctor to whom the claimant had been referred by his treating doctor, recommended that the

claimant undergo a 360 degree lumbar fusion. The carrier invoked the second spinal surgery process and due to the concurrence of the doctor selected by the carrier, the Commission [Texas Workers' Compensation Commission] approved spinal surgery in a letter of July 9, 1998. In the meantime the claimant was examined on June 2, 1998, by Dr. M, an orthopedic surgeon and the Commission-selected designated doctor, who certified on a TWCC-69 that the claimant attained MMI on June 2, 1998, with a five percent IR. In his report, Dr. M evaluates the claimant for a cervical and lumbar contusion and strain. He assesses the five percent whole body impairment entirely for loss of cervical range of motion. In his report he mentions Dr. G's surgical recommendation.

> There was a CCH held on August 12, 1998, to determine whether the claimant sustained a compensable herniated nucleus pulposus at the L4-5 level as a result of his on-the-job accident of _____, and whether spinal surgery should be approved. The hearing officer's decision from that CCH, which is evidence in the present case, reflects that the hearing officer found that the claimant's compensable injury of _____, extends to and includes a herniated nucleus pulposus at the L4-5 level. The hearing officer also concluded that as a result of the Commission's spinal surgery process that the carrier was liable for spinal surgery. This decision was apparently not appealed by either party.
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> On September 14, 1998, the claimant underwent a 360 degree lumbar fusion at the L4-5 level. In response to an inquiry by the Commission Dr. M stated as follows in an October 2, 1998, letter to the Commission:
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> > I have reviewed additional medical documentation sent to me since I evaluated this gentleman on June 2, 1998. This medical documentation has not changed my opinion, and I am still declaring him at [MMI] as of the date I saw him with 5 (five) percent impairment.

After remand, pursuant to our instruction, the hearing officer sought clarification from Dr. M sending him a copy of our decision in Appeal No. 982819, *supra*. Dr. M responded as follows in a letter dated February 9, 1999:

> I did not use Table 49 of the [AMA Guides] as there was no pathology related according to the records provided me by Texas Workers' Compensation Commission.

After receipt of this letter the hearing officer wrote to the parties stating as follows in relevant part:

> [Dr. M] recently responded to my previous inquiry, and a copy of his response is included for your reference. Under the circumstances of this case, I see no realistic alternative but to have the Commission appoint a new

designated doctor, and notification of the new designated appointment will be sent to you under separate cover.

The carrier filed motions with the hearing officer requesting a hearing prior to the appointment of a second designated doctor. Dr. B was selected by the Commission to be the second designated doctor. Dr. B certified on a TWCC-69 dated March 8, 1999, that the claimant attained MMI on March 8, 1999, with a 10% IR. The carrier filed a motion to take Dr. B's deposition on written questions which the hearing officer denied because good cause was not shown. The hearing officer mailed the parties Dr. B's report giving them an opportunity to respond. The carrier filed additional exhibits by letter which have been made part of the record.

We first address the carrier's argument that a second designated doctor should not have been appointed. We note that the primary reason for our remand was Dr. M's failure, without explanation, to rate the claimant's herniated disc using Table 49 of the AMA Guides. The carrier argues that in his response to the hearing officer's inquiry Dr. M explained his reason for not doing so. The problem with his explanation is, as we noted in our decision in Appeal No. 982819, *supra*, the Commission had previously adjudicated the question of whether the claimant's compensable injury included a herniated lumbar disc and had found that it did. This determination being final, Dr. M's statement that he did not rate the lumbar disc because it was not part of the compensable injury can reasonably be read as a simple refusal to rate the compensable injury rather than an explanation for how he rated it. Under these circumstances, we perceive no error in the hearing officer's appointing a second designated doctor and in fact would have been forced to reverse her had she not done so under these circumstances.

We next address the carrier's contention that the hearing officer erred in denying its request to depose Dr. B by written questions. The carrier argues on appeal that it requested to depose the designated doctor to clarify precisely what films were reviewed by the designated doctor. Under the particular circumstances of the present case, we do not perceive any harm in the hearing officer's denial of the carrier's request to depose the designated doctor. The claimant's injury included his operated herniated disc as a matter of law based upon the finality of the prior adjudication of this issue. The carrier fails to provide any explanation of how this could have been affected by the films the designated doctor viewed. We also note that the hearing officer gave both parties the opportunity to send all medical information to the designated doctor. Even were we to find error in denying the carrier's request, it would be harmless.

Finally, the carrier argues that the hearing officer erred in addressing the issue of disability. We note that in her decision on remand the hearing officer merely restated the same findings of fact and conclusions of law she made in her original decision. We note that neither party appealed the issue of disability from that original decision. Thus, we find no error in the carrier's contention that the hearing officer exceeded the scope of the remand by reciting these determinations from her earlier decision. The carrier has produced evidence that since the original CCH there had been a benefit review conference

(BRC) on the issue of disability and an agreement between the parties. While the record is not entirely clear on why a BRC was convened on an issue already pending at a CCH on remand, we do not need to consider this matter or the effect of the agreement. We simply find no error in the hearing officer's decision on remand reciting unappealed findings of fact and conclusions of law from her original decision.

The claimant has appealed the hearing officer's reliance on the second designated doctor's opinion contending that she should have relied on the opinion of the treating doctor that the claimant is not yet at MMI. 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.

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).

We find no error in the hearing officer's reliance on the report of Dr. B in resolving the issue of MMI. We affirm the decision and order of the hearing officer.

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Gary L. Kilgore
Appeals Judge

CONCUR:

_____
Stark O. Sanders, Jr.
Chief Appeals Judge

_____
Alan C. Ernst
Appeals Judge