APPEAL NO. 991171

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 May 10, 1999. The sole issue at the CCH was the respondent's (claimant herein) impairment rating (IR). The hearing officer concluded that the claimant has an 18% IR based upon the report of a designated doctor selected by the Texas Workers' Compensation Commission (Commission). The appellant (carrier herein) files a request for review, arguing that the 18% IR given by the designated doctor is incorrect under the Guides to the Evaluation of Permanent Impairment, third edition, second printing, dated February 1989, published by the American Medical Association (AMA Guides) and that the hearing officer erred in relying on it in determining the claimant's IR. The claimant responds that a difference of medical opinion does not justify setting aside the IR certification of the designated doctor and that the hearing officer's decision is sufficiently supported by the medical evidence.

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 hearing officer summarized the evidence in this case in detail and analyzes it in the section of his decision labeled "Statement of the Evidence." We adopt this the hearing officer's "Statement of the Evidence" which reads as follows:

STATEMENT OF THE EVIDENCE

The Claimant worked for the Employer, and sustained a compensable left knee injury on _____. According to medical evidence from the Claimant's treating doctor, [Dr. J], M.D., the Claimant sustained a compensable injury when he fell from a telephone pole approximately ten to fifteen feet. In a medical report dated November 13, 1998, [Dr. J] writes:

> **He (Claimant) sustained a severe injury to his left knee, which was treated in (City No. 4) at (Hospital). The initial operative report reveals a complete tearing of the patella tendon, medial and lateral meniscal tears, a mid-substance tear of the anterior cruciate ligament, a partial tear of the posterior cruciate ligament[,] a medial collateral ligament tear and a posterolateral tibial plateau fracture.** (See Claimant's Ex. 1)

On September 14, 1998, [Dr. J] preformed [sic] a left total knee arthroplasty to relieve the effects of the Claimant's injury. (See Claimant's Ex. 2)

In a letter dated November 13, 1998, [Dr. J] writes:

> **The disability rating, two years to the day of his injury, is established from tables in the 4th edition of the Guides to the Evaluation of Permanent Impairment, section 3.2. Table 64 describes total knee replacement, which would equate to a fair result at this time.**
>
> **The fair result is based on decreased ROM, muscle wasting of the thigh and the necessity for ambulatory aids. This is calculated at 20% whole person impairment and 50% lower extremity impairment.** (See Claimant's Ex. 1)

Subsequently, the Claimant was referred to a Commission selected designated doctor, [Dr. T], D.O. [Dr. T] examined the Claimant and prepared a Report of Medical Evaluation dated December 16, 1998. [Dr. T] certified that the Claimant had reached maximum medical improvement with an eighteen percent [IR]. (See Carrier's Ex. 4) In a narrative report dated December 16, 1998, [Dr. T] explains his [IR]. (See Carrier's Ex. 5)

The Carrier contends that the report of the designated doctor was not prepared in accordance with the AMA Guides and is not entitled to presumptive weight. [Dr. C] reviewed the Claimant's medical records, at the Carrier's request. In a letter dated January 6, 1999, [Dr. C] writes:

> **Once an individual has a knee replacement, it is the replacement arthroplasty that is rated as opposed to any other entity, as those considerations have been negated by the knee replacement. Thus, I believe it is inappropriate to assign an impairment for a torn meniscus when an individual has had a total knee replacement arthroplasty. Therefore, the doctor should have utilized Table 36 on page 61 and assigned impairment according to Category 3, which describes knee replacement arthroplasty. This receives a 20% impairment of the lower extremity. I would point out that it appears that that is the same impairment that was assigned by the treating doctor.** (See Carrier's Ex. 6)

[Dr. C] also writes:

> **Also, you will note according to Table 36 that we are not instructed to include range of motion impairment when one has a knee replacement arthroplasty.** (See Carrier's Ex. 6)

The Carrier contends that the Claimant's correct [IR] is eight percent. There is a dispute between [Dr. T], a commission selected designated doctor, and [Dr. C] concerning the interpretation of the AMA Guides. According to the Appeals Panel a dispute of this nature presents: An issue to be resolved by the fact finder". (See APD 941061)

In a letter dated January 12, 1999, [Dr. T] writes:

> **[Dr. C] states that the appropriate way to evaluate this patient's knee would have been to give him 20% impairment of the lower extremity based on specific disorders listed in Table 36 on page 61 of the AMA Guidelines. He went on to further state it would have been appropriate to give him a category 3 impairment which describes a total knee arthroplasty. This certainly would not be an incorrect way to impair this patient, however, I chose rather than specific disorder to rate the patient on [ROM] deficits as well as specific disorders and arrived at an 18% whole person [IR]. <u>The guidelines are not clear</u> in this area that we must choose specific disorders over [ROM] combined with specific disorders. Let me elaborate. The patient ultimately did have a total knee arthroplasty. This is a fact. However, prior to his having a total knee arthroplasty the patient underwent several other knee surgeries that were unsuccessful. Specifically the patient suffered torn medial and lateral menisci of the knee which on page 61 table 36 category 2 awards 25% for specific disorders. It is also within the guidelines to combine category 2 with [ROM] deficits which is what I did in my [IR] arriving at 45% lower extremity which correlates to 18% whole person. I felt in lieu of this patient's severe disability that he suffered from this injury that it was appropriate to give him the higher [IR] of the two options.** (See Carrier's Ex. 7)

As the "finder of fact" it should be noted that [Dr. T's] interpretation of the AMA Guides is at least as reasonable as [Dr. C's]. There is no valid reason to disregard the [IR] of the designated doctor. The [IR] of the designated doctor was performed in accordance with the Guides and is entitled to presumptive weight.

The more reasoned approach would seen [sic, seem] to be as follows: Give the Claimant specific disorder impairment from Table 36, No. 3, combined with impairment for [ROM] deficits. In a report dated December 16, 1998, the designated doctor noted that the Claimant had a twenty-seven percent lower extremity deficit due to [ROM]. This translates to a eleven percent whole

person [IR]. Arguably, the specific disorder impairment should be combined with the [ROM] impairment, resulting in a whole person [IR] of eighteen percent. In other words, there is no valid reason to exclude [ROM] impairment. If the Claimant receives a whole body [IR] of eight percent it will truly constitute "manifest injustice" and subvert the goals of the Workers' Compensation Act.

Even thought all of the evidence presented was not discussed, it was considered. The Findings of Fact and Conclusions of Law are based on all of the evidence presented.

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 impairment rating contained in the report of the designated doctor chosen by the commission, the commission shall adopt the impairment rating 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 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).

The 1989 Act requires that any determination of IR be based upon the AMA Guides. Section 408.124. Failure by a designated doctor to properly follow the AMA 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 AMA 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.

In the present case, clarification was sought and received from the designated doctor. The designated doctor stated that his rating complied with the AMA Guides. Dr. C testified that it did not. The hearing officer found as a finding of fact that the report of the designated doctor was prepared in accordance with the AMA Guides. We do not find the overwhelming evidence contrary to that determination. Nor are we persuaded that the one Appeals Panel decision cited by the carrier in its appeal--Texas Workers' Compensation Commission Appeal No. 941061, decided September 21, 1994--requires reversal in the present case, particularly in light of the fact that we affirmed the decision of the hearing officer in that case. Merely because we affirmed a hearing officer who relied upon the report of a designated doctor in assessing impairment and we rejected the argument that the AMA Guides required the assessment of IR for loss of range of motion in that case, it does not necessarily follow that the method used to assess impairment in that case is the only acceptable method under the AMA Guides or that assessment of impairment for loss of range of motion constitutes error as a matter of law in the present case. In fact, there is Appeals Panel precedent which supports affirmance in the present case. *See* Texas Workers' Compensation Commission Appeal No. 93637, decided September 10, 1993; Texas Workers' Compensation Commission Appeal No. 970105, decided February 26, 1997 (Unpublished).

While the carrier argues that the hearing officer inappropriately arrived at his own assessment of IR by mixing and matching portions of the opinions of various doctors, we do not find this to be the case. It appears from his findings that he relied upon the report of the designated doctor in determining the claimant's IR. In any case, the decision of the hearing officer may be affirmed upon any reasonable theory supported by the evidence. Daylin, Inc.

v. Juarez, 766 S.W.2d 347,352 (Tex. App.-El Paso 1989, writ denied). Reliance upon the report of the designated doctor to resolve the issue of IR is certainly such a reasonable theory.

The decision and order of the hearing officer are affirmed.

_____
Gary L. Kilgore
Appeals Judge

CONCUR:

_____
Alan C. Ernst
Appeals Judge

_____
Dorian E. Ramirez
Appeals Judge