APPEAL NO. 991487

This appeal arises under the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq*. (1989 Act). On June 22, 1999, a contested case hearing was held. With respect to the issue before him, the hearing officer determined that the respondent's (claimant) impairment rating (IR) was 17% based upon the report of a designated doctor selected by the Texas Workers' Compensation Commission (Commission). The appellant (carrier) files a request for review, arguing that the hearing officer erred in relying on the 17% IR which was assessed long after the claimant reached statutory maximum medical improvement (MMI). The carrier argues that the hearing officer should have relied upon the opinions of other doctors estimating what the claimant's IR would have been at the time of statutory MMI. 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 parties stipulated that the claimant sustained a compensable injury on _____, and that the claimant reached statutory MMI on February 3, 1993. The parties also stipulated that Dr. D was the designated doctor selected by the Commission. The claimant testified that his injury took place when he struck his head while driving a forklift and that as a result of his injury he was off work from January 31, 1991, through February 18, 1991. The claimant further testified that he returned to work but remained under the treatment of Dr. W who treated him with pain medication. The claimant also testified that the pain medication began to affect his memory and he expressed his concern to Dr. W who ordered an MRI and then referred him to Dr. B who immediately recommended surgery. The spinal surgery process was invoked and the surgery was approved based upon a concurrence in the need for surgery by the second opinion doctor chosen by the carrier. On January 15, 1998, the claimant underwent an anterior cervical discectomy and fusion at C5-6 and C6-7.

The claimant testified that during the period he was undergoing surgery, a coworker told him about getting an IR. The claimant said this was the first he had ever heard about an IR, having not been informed earlier by either the carrier or his doctors concerning the matter. The claimant stated that he asked Dr. W about an IR and was told by Dr. W that he did not do them but that Dr. B could give him an IR. Dr. B certified on a Report of Medical Evaluation (TWCC-69) that the claimant's IR was 20%. The carrier disputed this rating and assessed the claimant's IR at three percent. Dr. D was selected by the Commission to be the designated doctor. Dr. D certified on a TWCC-69 dated August 22, 1998, that the claimant had a 17% IR. A request for clarification was sent by the Commission to Dr. D who responded in part as follows in a letter of March 29, 1999:

I am in receipt of your letter dated February 17, 1999. I have been asked to determine the above claimants [sic] [IR] as it may have been on 2/3/93. As a designated doctor, when I examine a claimant, I am asked to evaluate he/she as they are on that particular date. It is difficult to determine what the [IR] would have been for the claimant on 2/3/93 as is obvious, I did not have the opportunity to exam the claimant at that time.

The carrier had previously posed the same question to Dr. B who responded in part as follows to the carrier in a letter of September 25, 1998:

> She [carrier's employee] posed a hypothetical question to me about what would [claimant's] disability have been back in 1993 which would have been the statutory 2 years following his injury. Looking at the Guide to Permanent Partial [sic] Impairment produced by the AMA Third Edition [Guides to the Evaluation of Permanent Impairment, third edition, second printing, dated February 1989, published by the American Medical Association (AMA Guides)], it would be between 6-8% just on the degenerative changes and spondylosis at the 2 symptomatic levels. This is assuming that there would be no percentage added for limitations of motion, which I have no way of gauging.

The carrier also sought a report from Dr. X who performed a records review through (Company) and stated in part as follows in a report dated September 29, 1998:

> IMPAIRMENT AS OF 2/4/93, ASSUMING THAT THERE IS NO RESTRICTED MOTION WOULD BE 4% (due to cervical resolved strain with min. degenerative changes). THAT IMPAIRMENT IS FROM TABLE 49 PAGE 73 OF [The AMA Guides].

The hearing officer, in deciding to base his IR determination on Dr. D's report, stated his rationale as follows:

> The Carrier's position, that the Claimant's IR should not be based on surgery that was not under active consideration at the time of SMMI (statutory MMI), has ascertain [sic] facial appeal, particularly given the length of time between the date of SMMI and the surgery and subsequent IR certifications. However, in this instance, the Carrier's position is impractical to the point of being untenable. Simply put, there is no way to retroactively assess an IR with any degree of accuracy in the absence of an examination made for that purpose; certainly, it could not be done under these circumstances. [Dr. D] noted this in refusing to guess at Claimant's probable IR as of February 3, 1993; [Dr. X] and [Dr. B], is [sic] making their own retroactive assessments, each note that a critical element range of motion, could not be measured and could not be assessed. The "equitable" arguments advanced by the Carrier are mitigated by the fact that the Carrier, as well as the Claimant, has a great interest in determining a Claimant's ultimate IR once disability has been

established (as it was here). Clearly, the Carrier bears at least as much responsibility as the Claimant for the absence of a more timely-assessed IR.

The Commission has appointed a Designated Doctor to assess the Claimant's IR, and the doctor has done so. The alternate assessments of IR proposed by the Carrier are essentially guesses which facially acknowledge a missing and unobtainable critical element. As such, they can in no way be regarded as "the great weight of medical evidence" necessary to overturn the Designated Doctor's certification.

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 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 understand that the carrier's essential argument is not that the hearing officer erred by not finding the great weight of the medical evidence contrary to the decision of the hearing officer, but that the hearing officer's error was in adopting an IR so long after statutory IR which assessed impairment for a surgery performed after statutory MMI which was not under consideration at the time the claimant reached statutory MMI. However, we note that the carrier cites no provision of the 1989 Act which absolutely requires that IR be based upon impairment at the time of statutory MMI, although Section 408.121 does provide that entitlement to impairment income benefits begins on the date after the date the employee reaches MMI. Nor does the carrier cite a rule of the Commission to that effect. The carrier does cite a number of Appeals Panel decisions, but most of them deal with situations where IR was assessed at or near the time of MMI and the claimant has sought to amend the IR due to surgery subsequent to statutory MMI. This is simply not the case here. The underlying rationale of the cases cited by the carrier was to give finality to an established IR so that it could not easily be challenged long after it had been assessed. In the present case, there was no assessment of IR prior to the claimant's surgery. Under these particular and unique circumstances, we do not find any requirement that the surgery be under consideration at the time of statutory MMI for it to be taken into account in assessing the claimant's impairment. While it certainly is better to have an IR assessed at the time of statutory MMI because of the link between MMI and IR, the present case exposes the impracticality and artificiality of attempting to recreate long afterwards the circumstances that existed at the time of statutory MMI. We see absolutely no reason to attempt to do this merely to discount the effects of a surgery that was indisputably due to the claimant's compensable injury.

The decision and order of the hearing officer are affirmed.

_____
Gary L. Kilgore
Appeals Judge

CONCUR:

_____
Stark O. Sanders, Jr.
Chief Appeals Judge

_____
Susan M. Kelley
Appeals Judge