APPEAL NO. 002221

Following a contested case hearing (CCH) held on July 24, 2000, pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act), the hearing officer, resolved the disputed issues by determining that the respondent (claimant herein) reached maximum medical improvement (MMI) on July 3, 1999, with a 70% impairment rating (IR). The appellant (carrier herein) files a request for review arguing that these determinations were contrary to the great weight and preponderance of the evidence. There is no response from the claimant to the carrier's request for review in the appeal file.

DECISION

Reversed and remanded.

The parties stipulated that on _____, the claimant sustained a compensable injury to her cervical, thoracic and lumbar spine.[1] The claimant describes her injury as taking place when she was working as a registered nurse and was working in the postoperative area. The claimant testified that she was injured when she was assisting with an arthroscopy and was required to transfer a sedated patient who weighed about 210 pounds from a stretcher to a bed and to move a 300-pound arthroscopy monitor.

There were three certifications of MMI and IR in evidence. Dr. F, the carrier's required medical examination order doctor, certified on a Report of Medical Evaluation (TWCC-69) dated November 7, 1997, that the claimant attained MMI on October 3, 1997, with a zero percent IR. The claimant was very critical of Dr. F's examination which she characterized, based upon her experience as a registered nurse, as being cursory. Dr. B, the designated doctor selected by the Texas Workers' Compensation Commission (Commission), certified on a TWCC-69 dated February 23, 1998, that the claimant attained MMI on February 20, 1998, with a zero percent IR. Also in evidence is a brief letter to the Commission from Dr. B dated April 23, 1998, in which he stated that he would not change his certification in response to a letter from Dr. M, one of the claimant's treating doctors, which he had been sent by the Commission. Dr. S, another of the claimant's treating doctors, certified on a TWCC-69 dated February 29, 2000, that the claimant attained MMI on July 3, 1999, with a 70% IR.

There was also other medical evidence in the record. Dr. S testified live at the CCH concerning MMI and IR, contending her certification was correct and those of Dr. F and Dr. B were incorrect. There is a medical report from Dr. X, a carrier peer review doctor, stating that based upon his review of the claimant's medical records, he agreed with Dr. F that the claimant's injury was a resolved soft tissue injury. There is a medical report dated

[1]We note the stipulation on the record is somewhat broader than the stipulation recited in the decision of the hearing officer which merely states that the parties stipulated that the claimant sustained a compensable injury on _____.

August 17, 1998, from Dr. Mi, a neurosurgeon, who the claimant saw on referral, which stated that the claimant had not yet reached MMI and needed further testing.

The hearing officer's findings of fact and conclusions of law include the following:

FINDINGS OF FACT

5. [Dr. S's] findings on [MMI] and [IR] are not contrary to the great weight of other medical evidence.

6. [Dr. B's] findings on [MMI] and [IR] are not valid and are not entitled to presumptive weight.

CONCLUSION OF LAW

2. Claimant reached [MMI] on July 3, 1999 with a 70% [IR] per [Dr. S], Claimant's treating doctor.

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.

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 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 Guides to the Evaluation of Permanent Impairment, third edition, second printing, dated February 1989, published by the American Medical Association (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, the hearing officer did not adopt the certification of the designated doctor. She did not determine that the great weight of the other medical

evidence was contrary to the designated doctor's certification of MMI and IR, but she did find that the MMI and IR findings of the designated doctor were not valid. However, the hearing officer did not explain the basis on which she determined the designated doctor's certification to be invalid. There was evidence in the record that the claimant had suffered herniated discs as a result of her compensable injury. There was also medical evidence that the claimant had only suffered soft tissue injuries. We have previously held that the AMA Guides require that a herniated disc be rated or that a designated doctor provide an explanation for refusing to do so. *See* Texas Workers' Compensation Commission Appeal No. 94471, decided June 7, 1994; Texas Workers' Compensation Commission Appeal No. 982290, decided November 9, 1998. We have also stated many times that it is the province of the hearing officer, and not the designated doctor, to determine the extent of injury.

In the present case, it is not clear whether the hearing officer followed the correct legal standards in weighing the designated doctor's report because her rationale is less than clear. If the basis of the hearing officer's rejection of the designated doctor's report is that he failed to rate the claimant's injury or apply the AMA Guides, then the hearing officer needs to make this more explicit in her findings. More importantly, if this is indeed the case, the hearing officer needs, as part of her duty to develop the record, to seek clarification from the designated doctor and attempt to get him to rate the claimant's injury applying the AMA Guides. This may require the hearing officer to inform the designated doctor of the extent of the claimant's injury as well as the requirement that he rate the claimant's herniated discs or provide a reasonable explanation for not doing so. If the hearing officer is unable to get the designated doctor to rate the compensable injury or to properly apply the AMA Guides, she may appoint a second designated doctor.

Pending resolution of the remand, a final decision has not been made in this case. However, since reversal and remand necessitate the issuance of a new decision and order by the hearing officer, a party who wishes to appeal from such new decision must file a request for review not later than 15 days after the date on which such new decision is received from the Commission's Division of Hearings, pursuant to Section 410.202. *See* Texas Workers' Compensation Commission Appeal No. 92642, decided January 20, 1993.

Gary L. Kilgore
Appeals Judge

CONCUR:

Robert W. Potts
Appeals Judge

CONCURRING OPINION:

I concur in the reversal and remand but write separately to disassociate myself from the language in the majority opinion which indicates that if one or more herniated discs, as distinguished from bulges and protrusions, are determined by the Texas Workers' Compensation Commission (Commission) to be part of the compensable injury, they **must** be given an impairment rating (IR) greater than zero percent under 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). "[IR]" means the percentage of permanent impairment of the whole body resulting from a compensable injury and "impairment" means any anatomic or functional abnormality or loss existing after maximum medical improvement (MMI) that results from a compensable injury and is reasonably presumed to be permanent. Sections 401.011(24) and (23). Table 49 II, which provides for the rating of intervertebral discs or other soft tissue lesions, makes clear that for unoperated discs or lesions there is no rating where there are no "residuals"and that the amount of the rating assigned for an unoperated disc or lesion with "residuals" depends on the medical documentation of six months of pain, recurrent muscle spasm, or rigidity associated with either none-to-minimal degenerative changes, or, for a higher percentage, moderate-to-severe degenerative changes.

In my opinion, a treating doctor can, under Table 49, determine that there is no ratable impairment for a particular herniated nucleus pulposus, for instance, where there is no objective evidence of nerve root encroachment or other sequellae resulting in range of motion, or motor or nerve deficits. The majority decision cites Texas Workers' Compensation Commission Appeal No. 982290, decided November 9, 1998, for the proposition that if a herniated disc is part of a compensable injury, it **must** be rated under Table 49 and cites in support the author judge's decision in Texas Workers' Compensation Commission Appeal No. 94471, June 7, 1994. In my opinion, the latter decision, which remanded for the designated doctor to explain why an IR was not assigned for a herniated disc, did not hold that a rating (presumably greater than zero) **must** be assigned for a compensable herniated disc and the decision in Appeal No. 982290 overread it.

In Texas Workers' Compensation Commission Appeal No. 962076, decided November 27, 1996, the Appeals Panel stated that it did not agree with the hearing officer's apparent belief that when six months of pain are documented, an IR must necessarily be rendered under Table 49 (II)(B). We stated that "Table 49 sets forth a minimum duration of pain, along with other factors, for an evaluator to consider in

determining whether or not the condition is ‘reasonably presumed to be permanent,’ but we do not believe it removes from the evaluator the ability to judge that impairment is not present." *See also*, Texas Workers’ Compensation Commission Appeal No. 991702, decided September 24, 1999.

Philip F. O’Neill
Appeals Judge