APPEAL NO. 012238
FILED NOVEMBER 7, 2001

This appeal arises pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act). A contested case hearing was held on August 22, 2001. He determined that the respondent (claimant) reached maximum medical improvement (MMI) on March 2, 1998, with a 22% impairment rating (IR). The appellant (carrier) contends on appeal that the IR determination is not supported by legally sufficient evidence and is against the great weight and preponderance of the evidence. The appeals file contains no response from the claimant.

DECISION

Affirmed.

The evidence reflects that the claimant sustained a compensable injury on _____, to his cervical and lumbar spine. In August 1997, the claimant was initially assigned a 14% IR. This IR was disputed and, consequently, a designated doctor, Dr. R, was appointed to examine the claimant and render an IR report. Dr. R did not issue a report before the claimant was incarcerated in late 1997 or early 1998. Upon the claimant's release from custody, a new designated doctor, Dr. S, was appointed by the Texas Workers' Compensation Commission (Commission). Dr. S examined the claimant on February 3, 2001, and assigned a 24% IR, which consisted of 16% for the lumbar spine (including a 10% rating for a prior lumbar surgery unrelated to the March 1997 injury), 7% for the cervical spine, and 2% for the thoracic spine. The hearing officer determined that, except for the 2% IR assigned for the thoracic spine which was not a part of the compensable injury, the great weight of the other medical evidence was not contrary to Dr. S's report. The hearing officer deducted the 2% and determined that the claimant's correct IR is 22%. On appeal, the carrier argues that the IR assigned by Dr. S is against the great weight of the evidence and should be adjusted to reflect a reduction of 10% for the prior surgery and 4% for the cervical spine. Alternatively, the carrier urges adopting the 5% IR, which was assigned by Dr. P, who was the claimant's treating doctor, in March 1998.

Sections 408.122(c) and 408.125(e) provide that where there is a dispute as to the date of MMI and the IR, the report of the Commission-selected designated doctor is entitled to presumptive weight unless it is contrary to the great weight of the other medical evidence. 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. Medical evidence, not lay testimony, is the evidence required to overcome the designated

doctor's report. Texas Workers' Compensation Commission Appeal No. 92164, decided June 5, 1992.

The third argument made by the carrier is that the IR assigned by Dr. S is invalid because it is "far too remote in time" We know of no authority, and the carrier cites to none, which would support the proposition that if a designated doctor's assignment of IR is rendered "too remote in time" from the compensable injury, another doctor's IR should be adopted. Consequently, we do not agree that the IR assigned by Dr. S should be invalidated.

In support of its position that the hearing officer erred in determining that the claimant's IR is 22%, the carrier argues that the designated doctor improperly included a prior surgical lesion in his IR. The argument runs contrary to the continuing line of cases where the Appeals Panel has expressly held that the doctor may not "factor out" a prior injury from his assessment of IR. We have emphasized, numerous times, that the effects of a prior injury are to be dealt with in a request for contribution from the carrier, and are not to be deleted from the IR by the designated doctor. Texas Workers' Compensation Commission Appeal No. 93272, decided May 24, 1993; Texas Workers' Compensation Commission Appeal No. 93889, decided November 17, 1993; Texas Workers' Compensation Commission Appeal No. 950727, decided June 22, 1995; Texas Workers' Compensation Commission Appeal No. 980999, decided June 29, 1998; *see also* Texas Workers' Compensation Commission Appeal No. 94390, decided May 17, 1994. The provisions for contribution set forth in Section 408.084 are more than adequate to allow an offset for any contributing effect of the prior surgery on the current impairment. Therefore, we do not agree that the IR assigned by Dr. S is incorrect because it includes a rating for the previous lumbar surgical lesion.

The carrier also contends that the IR assigned by Dr. S should not be adopted because Dr. S was "improperly influenced" by the claimant. The evidence reflects that subsequent to assigning the IR, the claimant wrote a letter to Dr. S, dated May 29, 2001, which states, in pertinent part, "[P]lease consider my case closely if you are asked to reduce my impairment rating." The Appeals Panel has consistently deplored unilateral contact between a party and a Commission-selected designated doctor. *See* Texas Workers' Compensation Commission Appeal No. 950435, decided May 4, 1995, and cases cited therein. We have never, however, applied a per se rule that would either disqualify a designated doctor or require that the report of that designated doctor be disregarded solely on the basis of a unilateral communication without first testing for bias, improper influence, or at least the perception of improper influence stemming from that communication. *See* Texas Workers' Compensation Commission Appeal No. 94553, decided June 17, 1994. Examples of resulting bias or improper influence include misleading the designated doctor as to either the applicable law or facts, *see e.g.*, Texas Workers' Compensation Commission Appeal No. 94602, decided June 17, 1994, or threatening to withhold medical or other benefits due a claimant. *See* concurring opinion in Texas Workers' Compensation Commission Appeal No. 94423, decided May 25, 1994. In the present case, there is no allegation that the contact by the claimant with the

designated doctor consisted of a misstatement of the applicable law or facts, could in any way be construed as a threat, or suggested an answer or provided an opinion on the points raised. *See* Appeal No. 94553, *supra*. Given the content of the claimant's contact with the designated doctor, we do not agree that invalidating the doctor's IR is warranted in this case.

The remaining argument urged by the carrier is that because it was not established that the claimant had documented pain for six months, Dr. S incorrectly included 4%, under Table 49(II) of the Guides to the Evaluation of Permanent Impairment, third edition, second printing, dated February 1989, published by the American Medical Association, in the 7% total IR assigned for the cervical spine. The carrier notes that Dr. Sm testified that she disagreed with including the 4% in the cervical spine IR. While Dr. Sm disagrees with the designated doctor in this respect, we do not agree that this difference in opinion constitutes the great weight of the other medical evidence required to overcome the presumptive weight afforded to the designated doctor's opinion.

Whether the great weight of the other medical evidence was contrary to the opinion of the designated doctor is a factual determination. Texas Workers' Compensation Commission Appeal No. 93459, decided June 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 are satisfied that the evidence sufficiently supports the hearing officer's determination that, excepting the 2% assigned for the thoracic spine, which was not part of the compensable injury, the great weight of the medical evidence is not contrary to the designated doctor's IR. Accordingly, no sound basis exists for us to reverse the determination that the claimant's correct IR is 22%.

The decision and order of the hearing officer are affirmed.

The true corporate name of the insurance carrier is **OLD REPUBLIC INSURANCE COMPANY** and the name and address of its registered agent for service of process is

PRENTICE HALL CORPORATION SYSTEM, INC.
800 BRAZOS
AUSTIN, TEXAS 78701.

Gary L. Kilgore
Appeals Judge

CONCUR:

Elaine M. Chaney
Appeals Judge

Michael B. McShane
Appeals Judge