APPEAL NO. 022253
FILED OCTOBER 15, 2002

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 August 7, 2002. The hearing officer resolved the disputed issues by concluding that the appellant (claimant) reached maximum medical improvement (MMI) on November 26, 1996, with an impairment rating (IR) of 14%, as certified by the Texas Workers' Compensation Commission (Commission)-selected designated doctor, Dr. B, on a Report of Medical Evaluation (TWCC-69) dated October 19, 2001. The claimant appeals, asserting that the designated doctor failed to consider all of the compensable injury and did not properly reexamine the claimant and consider a new MMI date. The claimant also states that the designated doctor's actions give the appearance of retaliation because the designated doctor was previously sued by the claimant's attorney and should have removed himself from rating the claimant because of a conflict of interest. The respondent (carrier) responds, contending that there is sufficient evidence to support the determinations of the hearing officer.

DECISION

Affirmed.

The claimant sustained a compensable injury on _____. Dr. Be, the claimant's initial treating doctor, certified that the claimant had reached MMI on November 26, 1996, with an IR that is not apparent from the records admitted at the CCH, Dr. B was selected as the designated doctor to resolve the issues of MMI/IR. After an examination of the claimant on February 12, 1997, Dr. B certified on a TWCC-69 dated February 14, 1997, that the claimant reached MMI on November 26, 1996, with an IR of 8% based upon reduced range of motion (ROM) of the right wrist, reduced sensory function of the right median nerve, and reduced motor function of the right median nerve. Although the record is not developed to provide the entire history of the litigation involved in this case, the CCH record includes the final judgment from the 327th Judicial District, El Paso County, dated October 2, 2000, with jury findings that the claimant's compensable injury extended to include the claimant's left upper extremity and her cervical area. A CCH was held on February 7, 2001, with the hearing officer in that case issuing a decision and order on February 8, 2001, which decided that the claimant's MMI and IR were not ripe for adjudication. The hearing officer ordered that the claimant be sent to the designated doctor for reexamination, with the instruction to rate all of the body parts included in the compensable injury and to determine if the MMI date previously assigned was correct.

Although there is no letter in the record from the Commission to the designated doctor concerning the reexamination, there was apparently a request made to the designated doctor to reevaluate the claimant, and he did so on March 27, 2001. It is clear that Dr. B did not understand that he was to consider the left upper extremity and

the cervical area as part of the original compensable injury. In a TWCC-69 dated March 30, 2001, he reiterated his earlier finding that the compensable injury consisted of right carpal tunnel syndrome and de Quervain's tendonitis of the right wrist with an IR of 8% and an MMI date of November 26, 1996. This report prompted a benefit review conference on September 6, 2001, which led to another Commission request to Dr. B to evaluate the claimant. This request to Dr. B attached the District Court judgment, and specified that the compensable injury extended to and included the cervical spine and bilateral hands, wrists, forearms, elbows, and shoulders. The designated doctor submitted a third TWCC-69 which is dated October 19, 2001; he did not conduct a third physical examination of the claimant, but sent the claimant to Dr. N, an independent examiner, for physical impairment measurements. Dr. N provided a report indicating that the claimant was evaluated for the diagnoses of carpal tunnel syndrome, shoulder pain, elbow pain, and wrist pain. He provided charts documenting cervical ROM impairment of 6%, right wrist impairment of 3%, right elbow impairment of 0%, right shoulder impairment of 6% (total of 9% for right upper extremity impairment, which is 5% whole person impairment), left wrist impairment of 0%, left elbow impairment of 0%, and left shoulder impairment of 5% (total of 5% for left upper extremity impairment, which is 3% whole person impairment). Dr. N combined the whole person impairments of 6%, 5%, and 3% for a total IR of 14%. Dr. B continued to find that the MMI date is November 26, 1996, and, relying on Dr. N's measurements, assigned an IR of 14% for the compensable cervical spine and both upper extremities. A letter from the Commission, dated April 17, 2002, asked Dr. B if his opinion of the date of MMI remained the same, asked Dr. B why he did not conduct a physical examination on October 16, 2001, and asked if a review of Dr. M certification would change his opinion about the correct IR for the injury. Dr. B responded the same day, answering that he believed the November 26, 1996, date of MMI was valid, that he did not believe a third physical examination by himself of the claimant would have added any useful information, and that the examination done by Dr. M which awarded an IR of 20% was not valid for this patient as it was done under the Guides to the Evaluation of Permanent Impairment, fourth edition (issued by the American Medical Association) (AMA Guides), rather than under the proper third edition, second printing, February 1989, of the AMA Guides.[1]

First, as to the assertions of retaliation and conflict of interest, there is no evidence in the record to support such assertions. We will not entertain allegations of this nature raised for the first time on appeal and without evidence in the record.

Second, as to the assertion that the designated doctor did not properly reexamine the claimant because he relied on the measurements of Dr. N, we have previously recognized that as long as the designated doctor does not abdicate his evaluative role to a consulting doctor, he may consult with other experts concerning the IR to be assigned to a claimant for the compensable injury. Texas Workers'

[1] We note that the TWCC-69 from Dr. M that is included as an exhibit in the record is dated June 27, 2002, assigns an IR of 26%, and purports to be based upon the proper edition of the AMA Guides. Neither party provided us with Dr. M's TWCC-69 based on an examination done on January 24, 2002, which assigned an IR of 20%, and which Dr. B alleges was based on use of the fourth edition of the AMA Guides.

Compensation Commission Appeal No. 961215, decided August 7, 1996; Texas Workers' Compensation Commission Appeal No. 92627, decided January 7, 1993. This assertion of error is without merit.

Third, as to the assertion that the designated doctor did not consider all of the compensable injury, the narrative report attached to the latest TWCC-69 (dated October 19, 2001) from Dr. B indicates that he understood the injuries to be "the right wrist, shoulder, and elbow; the left wrist, shoulder, and elbow, and the cervical spine," and that he "was specifically directed to perform [IR] of both upper extremities and the cervical spine." While Dr. B did not personally evaluate the claimant, her history and medical records were provided to Dr. N, and Dr. N took measurements of each of these areas. There was thus evidence from which the hearing officer could conclude that the claimant's injuries, as substantiated by her medical records, have been properly evaluated.

The report of a Commission-selected designated doctor is given presumptive weight with regard to MMI status and IR. Sections 408.122(c) and 408.125(e). The amount of evidence needed to overcome the presumption is the "great weight" of the other medical evidence. *See* Texas Workers' Compensation Commission Appeal No. 92412, decided September 28, 1992. Medical evidence, not lay testimony, is the evidence required to overcome the designated doctor's report. *See* Texas Workers' Compensation Commission Appeal No. 92166, decided June 8, 1992.

The hearing officer expressly determined that the presumptive weight afforded Dr. B's opinion was not overcome by the great weight of the other medical evidence. Upon review of the record, we conclude that the hearing officer did not err in according presumptive weight to Dr. B's certification of MMI and IR. The disputed issues presented questions of fact for the hearing officer. The hearing officer is the sole judge of the weight and credibility of the evidence. Section 410.165(a); Texas Employers Insurance Association v. Campos, 666 S.W.2d 286 (Tex. App.-Houston [14th Dist.] 1984, no writ). There was conflicting evidence presented on the disputed issues, and the hearing officer concluded that the other evidence did not constitute the great weight of the contrary medical evidence necessary to overcome the opinion of the designated doctor. It was for the hearing officer, as the trier of fact, to resolve the conflicts and inconsistencies in the evidence and to determine what facts had been established. Garza v. Commercial Insurance Company of Newark, New Jersey, 508 S.W.2d 701 (Tex. Civ. App.-Amarillo 1974, no writ). Nothing in our review of the record reveals that the hearing officer's determination is so contrary to the great weight and preponderance of the evidence as to be clearly wrong or manifestly unjust. As such, no sound basis exists for us to reverse that determination on appeal. Cain v. Bain, 709 S.W.2d 175, 176 (Tex. 1986).

We affirm the decision and order of the hearing officer.

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

MR. RUSSELL R. OLIVER, PRESIDENT
221 WEST 6TH STREET
AUSTIN, TEXAS 78701.

_____
Michael B. McShane
Appeals Judge

CONCUR:

_____
Susan M. Kelley
Appeals Judge

DISSENTING OPINION:

I dissent in regard to the IR and MMI determinations. The September 16, 2001, letter from the Commission directed Dr. B to evaluate the "entire compensable injury" ("cervical spine, bilateral hands, wrists, forearms, elbows and shoulders"), and I do not believe that the record reflects that he has done so. The reports of Dr. B and Dr. N do not reference an evaluation of the hands. As far back as the Decision and Order which emanated from the February 7, 2001, CCH, it was recognized that no IR had been assigned which included the entire compensable injury, and this still appears to me to be the case. Further, although I recognize that there can be ROM impairment to a cervical spine injury without there being an impairment for a specific disorder of the cervical spine ratable under Table 49 of the AMA Guides (*see*, for example, Texas Workers' Compensation Commission Appeal No. 000827, decided May 24, 2000), I would expect that the report would at least mention that there was no specific disorder found. The reports of both Dr. B and Dr. N are silent on this point. Of even greater concern is the fact that, as to the MMI date, Dr. B's latest comment is "that the patient's original date of [MMI] of 11-26-96 was valid for the reasons defined on the first and second report." With additional body parts added to the compensable injury by virtue of the judicial decision of October 2, 2000, it should have been incumbent on the designated doctor to explain fully why the MMI date remained the same, despite years of intervening treatment. For these reasons, I conclude that it was error for the hearing officer to give presumptive weight to the MMI/IR determinations of the designated

doctor. I would reverse and remand this case for the hearing officer to obtain a report that rates the claimant's entire injury and which addresses the other concerns I have expressed.

_____
Gary L. Kilgore
Appeals Judge