APPEAL NO. 032511
FILED NOVEMBER 7, 2003

This appeal arises pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq*. (1989 Act). A hearing on remand was held on September 3, 2003. In Texas Workers' Compensation Commission Appeal No. 030585, decided April 30, 2003, we remanded the case for the hearing officer to seek clarification from the designated doctor with regard to the date of maximum medical improvement (MMI) and the impairment rating (IR). Specifically, the designated doctor was to be informed that the claimant's compensable injury included a herniation at L5-S1, and that the IR should include this condition. On remand, the hearing officer determined that the appellant/cross-respondent's (claimant) compensable injury includes herniations at C5-6 and C6-7; that the date of MMI is October 2, 2001; that the IR is 16%, which includes a rating for the lumbar herniation and also a rating for cervical spine herniations; that the claimant had disability from April 26, 2001, through the date of the hearing on remand; and that the respondent/cross-appellant (carrier) did not waive the right to contest compensability of the lumbar herniation injury. The carrier appeals the IR determination and reasserts its argument that the compensable injury does not include the lumbar herniation and that the claimant did not have disability from April 26, 2001, through September 3, 2003. The claimant appeals the MMI determination. Both parties responded to the opposition's request for review. The waiver determination has not been appealed and has become final pursuant to Section 410.169.

DECISION

Affirmed as reformed in part, reversed and rendered in part.

We initially address the carrier's assertion that the hearing officer erred in determining that the compensable injury includes a posterior disc herniation at L5-S1 in the nature of an extruded fragment and that the claimant had disability from April 26, 2001, through the date of the hearing on remand. Those issues were appealed and affirmed in Appeal No. 030585 and will not be considered again. However, we note that at the initial hearing, the hearing officer determined that the claimant had disability from April 26, 2001, through February 12, 2003, and, although that issue was not to be further considered on remand, the hearing officer did so and determined that the disability date extended to September 3, 2003. Because this issue was not presented to the hearing officer on remand, the hearing officer's decision is reformed to delete Finding of Fact No. 7 and Conclusion of Law No. 5.

On remand, the hearing officer sought clarification from Dr. E, the Texas Workers' Compensation Commission (Commission)-selected designated doctor, in accordance with our decision in Appeal No. 030585. Dr. E responded to the clarification request and explained that the claimant's lumbar spine, including the herniation at L5-S1, warranted a 7% rating under Table 49(II)(C) of the Guides to the Evaluation of

Permanent Impairment, third edition, second printing, dated February 1989, published by the American Medical Association (AMA Guides). Additionally, for reasons that are unclear, Dr. E went on to reconsider his previous rating for the cervical spine, which initially was comprised of 4% for loss of range of motion and 4% for specific disorders of the cervical spine for a total of 8%. The record from the initial hearing does not reflect that there was a dispute regarding the 8% originally assigned for the cervical spine. In his clarification following remand, Dr. E additionally assigned 6% for "moderate to severe degenerative changes on structural testing including herniated nucleous pulposus" in the cervical region, despite the fact that no request had been made to reconsider the cervical area. Combining the values for the cervical and lumbar spine, Dr. E assigned a 16% whole person IR. Upon receiving the amended report, the carrier's attorney submitted a letter to the hearing officer requesting that additional clarification be sought from Dr. E regarding the reconsideration of the IR with regard to the cervical spine. This written request was apparently denied and the carrier then requested at the hearing on remand that a motion for continuance be granted in order to obtain the clarification. The motion was denied and the hearing officer explained that he would treat the cervical spine herniation issue as a threshold matter requiring resolution in order to determine the MMI and IR issues. The hearing officer then concluded that the compensable injury included a herniation at C5-6 and C6-7 and that, in accordance with the amended report of Dr. E, the claimant reached MMI on October 2, 2001, with a 16% IR.

The hearing officer did not err in refusing to seek additional clarification from Dr. E, as requested by the carrier, subsequent to the receipt of Dr. E's amended report assigning a 16% IR. We are unaware of any authority requiring the hearing officer to acquiesce to the request. Furthermore, given the specific nature of the remand, the hearing officer need not have resolved the issue regarding the cervical herniations. While we have held that it is preferable for a hearing officer to make explicit findings on the extent of injury as a threshold issue in a dispute over an IR (Texas Workers' Compensation Commission Appeal No. 951097, decided August 17, 1995), we cannot agree that it was appropriate under the facts of this case given the explicit instructions on remand. The hearing officer's consideration, discussion, and determination of this matter went beyond the scope of the remand and is not appropriate, authoritative, or binding. Texas Workers' Compensation Commission Appeal No. 962637, decided February 10, 1997. For these reasons, it was error for the hearing officer to consider the extent-of-injury issue relating to the cervical herniations. Accordingly, we strike Finding of Fact No. 6 in its entirety and that portion of Conclusion of Law No. 4 referring to the cervical herniations.

The remaining issue is what is the correct MMI date and IR. Sections 408.122(c) and 408.125(e) provide that for injuries occurring prior to June 17, 2001, 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. Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 130.6(i) (Rule 130.6(i)) provides that the designated doctor's response to a request for clarification is also considered to have presumptive weight, as it is part of the

designated doctor's opinion. *See also* Texas Workers' Compensation Commission Appeal No. 013042-s, decided January 17, 2002. 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 was a factual question for the hearing officer to resolve. 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 to 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). 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). In this case, we are satisfied that the hearing officer's MMI determination is sufficiently supported by the evidence. Accordingly, we cannot agree that the hearing officer erred in determining that the claimant reached MMI on October 2, 2001.

Similarly, but for the inclusion of a rating for cervical herniations, we cannot agree that Dr. E's amended report is not entitled to presumptive weight. Dr. E's initial report assigned 8% for the cervical spine and this rating was not disputed at the initial hearing. Combining the 8% with the 7% assigned for the lumbar spine in the amended report yields a 14% IR under the Combined Values Chart of the AMA Guides. Accordingly, the hearing officer's decision that the IR is 16% is reversed and a new decision rendered that the IR is 14%.

The true corporate name of the insurance carrier is **AMERICAN HOME ASSURANCE COMPANY** and the name and address of its registered agent for service of process is

CORPORATION SERVICE COMPANY
800 BRAZOS, SUITE 750, COMMODORE 1
AUSTIN, TEXAS 78701.

_____
Chris Cowan
Appeals Judge

CONCUR:

_____
Elaine M. Chaney
Appeals Judge

_____
Michael B. McShane
Appeals Panel
Manager/Judge