APPEAL NO. 032615
FILED NOVEMBER 20, 2003

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 28, 2003. The hearing officer determined that the appellant (claimant) reached maximum medical improvement (MMI) on April 18, 2002, with a 0% impairment rating (IR), in accordance with the report of the Texas Workers' Compensation Commission (Commission)-selected designated doctor, and that the claimant had continued disability since April 18, 2002. The claimant appeals the MMI and IR determinations, arguing that she reached MMI statutorily with a 25% IR, in accordance with the report of her treating doctor. The claimant also asserts that various errors, which are more fully discussed below, have occurred. The respondent (carrier) urges affirmance of the hearing officer's decision. The disability determination has not been appealed and has become final pursuant to Section 410.169.

DECISION

Affirmed as reformed.

The claimant correctly points out that Finding of Fact No. 7 incorrectly reflects that the date of injury was June 9, 2001, when in fact it was _____. As the hearing officer's decision repeatedly and accurately lists the correct date, we reform the obvious typographical error to reflect that the correct date of injury is _____.

EVIDENTIARY OBJECTIONS

The claimant asserts on appeal that her Exhibit Y should have been admitted at the hearing. However, a review of the record reflects that only Exhibits A-X were offered and admitted at the hearing. As Exhibit Y was not offered, the claimant cannot complain that it was improperly excluded.

The claimant also asserts that the hearing officer improperly admitted Carrier's Exhibit No. 4, over her objection, because it was not timely exchanged. In admitting the exhibit, a report from Dr. B, the hearing officer noted that the carrier provided the report of Dr. S, which the report of Dr. B is based upon, to Dr. B in a timely manner and that Dr. B's report, although not timely exchanged with the claimant, was exchanged on the same day it was received by the carrier. We find no abuse of discretion in the hearing officer's admission of the exhibit on the grounds that good cause existed for the late exchange. Nonetheless, we further note that in order to obtain a reversal for the admission of evidence, the claimant must demonstrate that the evidence was actually erroneously admitted and that "the error was reasonably calculated to cause and probably did cause rendition of an improper judgment." Hernandez v. Hernandez, 611 S.W.2d 732, 737 (Tex. Civ. App.-San Antonio 1981, no writ). It has also been held that reversible error is not ordinarily shown in connection with rulings on questions of

evidence unless the whole case turns on the particular evidence admitted or excluded. Atlantic Mut. Ins. Co. v. Middleman, 661 S.W.2d 182 (Tex. App.-San Antonio 1983, writ ref'd n.r.e.). In this instance, even if the admission of the exhibit were an abuse of discretion, it would not rise to the level of reversible error because there is no indication that the exhibit was the basis for the hearing officer's decision. We also point out that the carrier was not required, as the claimant contends, to designate Dr. B as a witness in order to offer the documentary evidence that Dr. B prepared.

ALLEGATIONS OF IMPROPRIETY, FRAUD, AND PREJUDICE

The claimant generally argues, without pointing to any specific incident, that her civil rights have been violated. It is not clear who the claimant is contending perpetrated the alleged violations; however, there is absolutely no evidence in the record to substantiate them. The claimant additionally argues that the hearing officer and the designated doctor, Dr. O, were "grossly negligent and duplicitous" because they did not follow the Guides to the Evaluation of Permanent Impairment, fourth edition (1st, 2nd, 3rd, or 4th printing, including corrections and changes as issued by the American Medical Association prior to May 16, 2000) (AMA Guides) protocol. There is no evidence in the record to suggest that either Dr. O, or the hearing officer in adopting his report, failed to correctly apply the AMA Guides. In fact, Dr. O gives a thorough explanation as to how he arrived at his MMI and IR determinations in accordance with the instructions provided by the AMA Guides. The claimant contends that Dr. O was also prejudiced by his fiduciary position with the Commission; however, there is no fiduciary relationship between designated doctors and the Commission. The claimant also implies that Dr. B is biased and prejudiced because his report reflects that he and Dr. O have the same mailing address (a post office box) and phone number. We cannot agree that this similarity constitutes impropriety.

MMI AND IR

Sections 408.122(c) and 408.125(e) provide that for injuries occurring after 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 26, 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 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). Nothing in our review of the record indicates that the hearing officer's MMI and IR determinations are so contrary to the great weight and preponderance of the evidence as to be clearly wrong and unjust. Cain v. Bain, 709 S.W.2d 175, 176 (Tex. 1986).

The hearing officer's decision and order are affirmed as reformed.

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

CORPORATION SERVICE COMPANY
800 BRAZOS
AUSTIN, TEXAS 78701.

_____
Chris Cowan
Appeals Judge

CONCUR:

_____
Thomas A. Knapp
Appeals Judge

_____
Robert W. Potts
Appeals Judge