APPEAL NO. 033287
FILED FEBRUARY 9, 2004

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 December 1, 2003. The hearing officer determined that the respondent/cross-appellant's (claimant) compensable injury of _____, does extend to include degenerative disc disease and spinal stenosis, but no disc herniations at the L1 through S1 levels; that the claimant reached maximum medical improvement (MMI) on February 3, 2002; and that the claimant's impairment rating (IR) is 36%, as certified by the Texas Workers' Compensation Commission (Commission)-appointed designated doctor. The appellant/ cross-respondent (carrier) appeals the extent-of-injury, MMI, and IR determinations on legal and evidentiary sufficiency grounds. The claimant responds to the carrier's appeal, urging affirmance. The claimant also cross-appeals, asserting that the hearing officer abused her discretion in making prehearing procedural rulings, specifically: a ruling denying the claimant's request to add the issue that the carrier waived the right to dispute the findings generated by the second designated doctor's examination by failing to object to the examination taking place; a ruling granting the addition of the extent-of-injury issue that was requested by the carrier less than 24 hours before the scheduled CCH; and a ruling denying the claimant's request to add a carrier waiver issue. The carrier responds that the hearing officer did not abuse her discretion in adding the extent-of-injury issue.

DECISION

Affirmed.

PROCEDURAL ISSUES

At the CCH, the carrier wanted to litigate the issue of whether the appointment of the second designated doctor was an abuse of discretion by the Commission, but the hearing officer declined to add such an issue, or to consider it as "subsumed" in the issues properly before her. Section 410.151(b) provides, in part, that an issue not raised at a benefit review conference (BRC) may not be considered unless the parties consent or, if the issue was not raised, the Commission determines that good cause exists for not requesting the issue at the BRC. Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 142.7 (Rule 142.7) provides that additional issues may be added by a party responding to the BRC report no later than 20 days after receiving it, by unanimous consent in writing no later than 10 days before the hearing, and on the request of a party if the hearing officer finds good cause. The BRC in this case was held on August 25, 2003, and the reported issues related to MMI and IR. We perceive no error in the hearing officer's refusal to entertain an issue that was not raised at the BRC. The claimant sought to add an issue of whether the carrier had waived its right to dispute the findings of the second designated doctor because it had failed to object to the

examination taking place. The request to add this issue was denied. The issue was not raised at the BRC, the parties did not consent to adding the issue, and the hearing officer did not find good cause to add the issue. Under these circumstances, we perceive no abuse of discretion on the part of the hearing officer in denying the request to add an issue. Downer v. Aquamarine Operations, Inc., 701 S.W.2d 238 (Tex. 1985); Morrow v. H.E.B., Inc., 714 S.W.2d 297 (Tex. 1986).

The claimant asserts that the hearing officer erred in granting the carrier's motion to add the extent-of-injury issue less than 24 hours prior to the CCH.[1] The hearing officer stated as her rationale for finding good cause to add this issue that extent of injury must be decided before the issues of MMI and IR can be determined. We find no fault with that rationale, as we have often remanded cases back to hearing officers for determinations of extent-of-injury issues prior to resolution of MMI and IR issues.

After the hearing officer granted the carrier's motion to add the extent-of-injury issue, the claimant requested that the hearing officer add an issue regarding carrier waiver. The hearing officer denied the motion, citing Rule 124.3(c) for the proposition that carrier waiver does not apply to extent-of-injury issues. To obtain a reversal based upon an abuse of discretion, some showing must be made that the determination is arbitrary or without any basis in the record, that is, whether the hearing officer acted without reference to any guiding rules or principles. Morrow, *supra*. We perceive no error in this ruling.

EXTENT OF INJURY

We have held that the question of the extent of an injury is a question of fact for the hearing officer. Texas Workers' Compensation Commission Appeal No. 93613, decided August 24, 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). 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.

[1] The CCH was originally scheduled for September 24, 2003, but delayed, in part, because the parties needed additional time to prepare their cases after the extent-of-injury issue was added.

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 the present case, there was simply conflicting evidence on the extent of the injury, and it was the province of the hearing officer to resolve these conflicts. Applying the above standard of review, we find that the hearing officer's decision was sufficiently supported by the evidence in the record.

MMI/IR

For a claim for workers' compensation benefits based on a compensable injury that occurred before June 17, 2001, Sections 408.122(c) and 408.125(e) provide that the report of the designated doctor shall have presumptive weight, and the Commission shall base its determination of MMI and IR on the designated doctor's report unless the great weight of the other medical evidence is to the contrary. The hearing officer found that the presumptive weight afforded to the opinion of the second designated doctor was not overcome by the great weight of other medical evidence, and concluded that the claimant reached MMI on February 3, 2002, with a 36% IR as reported by the second designated doctor. We conclude that the hearing officer's decision is supported by sufficient evidence and that it is not so against the great weight and preponderance of the evidence as to be clearly wrong and unjust. Cain, *supra*.

We affirm the decision and order of the hearing officer.

The true corporate name of the insurance carrier is **CAMDEN FIRE INSURANCE ASSOCIATION** and the name and address of its registered agent for service of process is

C. J. FIELDS
5910 NORTH CENTRAL EXPRESSWAY
DALLAS, TEXAS 75206.

_____
Michael B. McShane
Appeals Panel
Manager/Judge

CONCUR:

_____
Chris Cowan
Appeals Judge

CONCUR IN THE RESULT:

_____
Edward Vilano
Appeals Judge