APPEAL NO. 042060
FILED SEPTEMBER 27, 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 July 13, 2004. The hearing officer resolved the disputed issues by deciding that the appellant/cross-respondent's (claimant) compensable injury of _____, does not include an injury to the right hip; that the claimant reached maximum medical improvement (MMI) on January 27, 2004; and that the claimant's impairment rating (IR) is 25%. Both parties appealed. The claimant appealed, disputing the extent-of-injury determination and the determination that the IR, as determined, does not include impairment for the right hip. The respondent/cross-appellant (carrier) responded, urging affirmance of the extent-of-injury determination as well as the determination to exclude impairment for the right hip in the claimant's IR. However, the carrier appealed the IR, arguing that the designated doctor did not indicate radiculopathy is present and therefore, misapplied 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) by assessing a 25% IR. The carrier additionally contends that the great weight of the other medical evidence is contrary to the 25% IR. The appeal file does not contain a response from the claimant.

DECISION

Affirmed.

The parties stipulated that the claimant sustained a compensable injury on _____, and that Dr. S is the Texas Workers' Compensation Commission (Commission)-appointed designated doctor.

The claimant had the burden to prove the extent of his compensable injury. A report from Dr. J was in evidence. Dr. J performed a required medical examination of the claimant to determine whether in his opinion the compensable injury was a producing cause of the claimant's right hip condition. Dr. J opined that the claimant's right hip condition is likely due to damage to the articular cartilage at the time of the fall and is a compensable injury. However, the hearing officer did not find Dr. J's opinion persuasive because Dr. J's opinion was based on a false underlying assumption, specifically, trauma to the right hip at the time of the injury. The claimant testified at the CCH that he did not remember whether or not he fell at the time of the incident. The hearing officer noted that the claimant failed to show, by a preponderance of the evidence, that the compensable injury caused new damage or harm to his right hip, or caused an enhancement, acceleration, or worsening of a preexisting right hip condition.

The hearing officer is the trier of fact and is the sole judge of the relevance and materiality of the evidence and of the weight and credibility to be given to the evidence.

Section 410.165(a). The trier of fact may believe all, part, or none of any witness's testimony because the finder of fact judges the credibility of each and every witness, determines the weight to assign to each witness's testimony, and resolves conflicts and inconsistencies in the evidence. Taylor v. Lewis, 553 S.W.2d 153 (Tex. Civ. App.-Amarillo 1977, writ ref'd n.r.e.); Texas Workers' Compensation Commission Appeal No. 93426, decided July 5, 1993. This is equally true regarding medical evidence. Texas Employers Insurance Association v. Campos, 666 S.W.2d 286 (Tex. App.-Houston [14th Dist.] 1984, no writ). The hearing officer is not bound by the testimony of a medical witness when the credibility of that testimony is manifestly dependent upon the credibility of the information imparted to the medical witness by the claimant. Texas Workers' Compensation Commission Appeal No. 952044, decided January 10, 1996. Nothing in our review of the record indicates that the hearing officer's extent-of-injury determination is so against the great weight and preponderance of the evidence as to be clearly wrong or manifestly unjust.

Sections 408.122(c) and 408.125(c) 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. 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.

The carrier contends that the designated doctor misapplied the AMA Guides by assessing an IR of 25%, because the report of the designated doctor does not indicate that radiculopathy is present. The carrier contends that the operative report shows the multi-level fusion performed on the claimant was to increase space between the vertebrae and not to correct loss of motion segment integrity. The designated doctor stated in his report that he referenced the AMA Guides as well as Commission Advisory 2003-10 dated July 25, 2003,[1] and determined that there exists a Diagnosis-Related Estimate (DRE) Cervicothoracic Spine Impairment Category IV lesion and assessed a 25% IR. It was undisputed that the claimant underwent a multi-level cervical fusion. There is no evidence to indicate that preoperative flexion/extension x-rays were performed in this case. We have previously held that with regard to hearings conducted

[1] We note that Advisory 2003-10 was amended by Advisory 2003-10B, effective February 24, 2004. The provisions relevant to this appeal were not modified.

after July 22, 2003, involving IRs for spinal surgery which would be affected by Advisory 2003-10, it is error not to consider and apply that advisory. Texas Workers' Compensation Commission Appeal No. 032399, decided November 3, 2003. Whether the Commission exceeded its authority in issuing Advisory 2003-10 is a matter for the courts. *See* Texas Workers' Compensation Commission Appeal No. 031441, decided July 23, 2003.

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. When reviewing a hearing officer's decision for factual sufficiency of the evidence we should reverse such decision only if it is so against 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). In this case, we are satisfied that the hearing officer's MMI and IR determinations are sufficiently supported by the evidence.

Because we have affirmed the extent-of-injury determination, we likewise affirm the hearing officer's finding that the 4% whole person impairment for the right hip was given for a noncompensable body part. *See* Texas Workers' Compensation Commission Appeal No. 94646, decided July 5, 1994.

We affirm the decision and order of the hearing officer.

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

RUSS LARSEN
860 AIRPORT FREEWAY WEST, SUITE 500
HURST, TEXAS 75054-3286.

_____
Margaret L. Turner
Appeals Judge

CONCUR:

_____
Judy L. S. Barnes
Appeals Judge

_____
Daniel R. Barry
Appeals Judge