APPEAL NO. 950147

This appeal arises under the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act). Following a contested case hearing held in (city), Texas, on December 21, 1994, the hearing officer, (hearing officer), made certain findings of fact and concluded that the appellant's (claimant) compensable injury of (date of injury), is limited to an inhalation injury and does not include his back or chest, that he had disability from April 29 through May 18, 1994, that he reached maximum medical improvement (MMI) on May 19, 1994, and that his whole body impairment rating (IR) is zero percent. Claimant asserts error in the findings that he did not injure his back and that he has reached MMI with a zero percent IR and seeks our reversal and the rendering of a decision that he has not reached MMI and that benefits are owing. The respondent (carrier) asserts the sufficiency of the evidence to support our affirmance.

DECISION

Reversed and remanded.

Claimant testified that while working as a piping and instrumentation draftsman at a chemical plant on (date of injury), he was exposed to hydrogen sulfide leaking from an open pipe flange at a sulphur recovery unit and that in leaving the area he was climbing over a 24-inch pipe and slipped catching himself by his arm to avoid falling to the ground but hurting his back. He did not testify to injuring his chest in that incident. He said that no one else was present. The carrier did not dispute that claimant sustained a hydrogen sulfide exposure injury on that date but did dispute that he also injured his back and chest. Claimant acknowledged that when talking to his supervisor, (Mr. S), about the incident just after its occurrence and later that day to (Mr. L), the project manager, and to (Mr. D), the safety manager, he did not mention slipping on the pipe or hurting his back. Mr. S, Mr. L and Mr. D all testified that when discussing the exposure incident claimant did not mention slipping on a pipe and injuring his back. Claimant testified to receiving medical treatment that day at the Industrial Clinic from (Dr. MF) and he testified, variously, that he did not mention a back injury to Dr. MF because his chest was hurting so bad and because he was unaware his back had been injured. He said he was given medication and released to return to work the next day. Dr. MF's Initial Medical Report (TWCC-61) for the (date of injury) visit contained no mention of back or chest injuries or pain. Claimant also said he later saw another doctor at that clinic, (Dr. V), and he related, "I think I told them my back was hurting a little." Claimant further testified that he subsequently asked to be seen at the (city) Lung Clinic and an appointment was made with (Dr. GF) who examined him and told him he was "fine" and could return to work. He stated that he may not have told Dr. GF about his back and acknowledged not mentioning slipping on the pipe and injuring his back in the recorded statement he gave to an adjuster on May 20, 1994. Claimant also testified to seeing (Dr. SF) though no records from Dr. SF were in evidence.

Dr. GF's Initial Medical Report (TWCC-61) reflecting claimant's visit on May 16, 1994, stated that the diagnosis was a reported toxic fume examination, that the clinical findings and spirometry were normal, and that claimant could return to work on May 19th. Dr. GF's Report of Medical Evaluation (TWCC-69) stated that claimant reached MMI on "5-19-94" with an IR of "0%" and it referred to an attached report. Claimant objected to the carrier's introduction of the attached narrative report of the same date because it was not signed by Dr. GF. Despite the fact that the TWCC-69 was signed by Dr. GF and incorporated the narrative report by reference, the hearing officer sustained the objection. The same objection was also made and sustained respecting Dr. GF's May 16 and 24, 1994, reports.[1] However, the unsigned May 16th report was also one of claimant's exhibits. A July 12, 1994, report of an examination by (Dr. A) recited improvement of claimant's symptoms from the hydrogen sulfide gas exposure except for some persistent chest discomfort "difficult to specify," and his impression was "toxic fume inhalation - significance and degree unclear." The record contained no mention of a chest or back injury. Dr. A's note of August 1, 1994, stated that claimant has severe musculoskeletal chest pain "likely caused by a recent injury." An emergency room (ER) record reflected that claimant came in on September 25, 1994, complaining of low back pain and gave a history of having such pain "for several weeks" and of its worsening. The diagnosis was "acute exacerbation of lower back pain."

The hearing officer found that on (date of injury), claimant did not injure his back or chest while engaged in the performance of his regular job duties with the employer and concluded that his compensable injury of that date is limited to an inhalation injury and does not include an injury to his back or chest. Claimant appealed from the determination that he did not sustain a back injury but not from the determination that he did not sustain a chest injury. We are satisfied the evidence sufficiently supports the finding and conclusion and they are affirmed. Claimant had the burden to prove that he sustained an injury to his back (and chest) by a preponderance of the evidence and the issue was one of fact for the hearing officer to resolve. Texas Workers' Compensation Commission Appeal No. 91028, decided October 23, 1991. The hearing officer is the sole judge of the materiality, relevance, weight and credibility of the evidence. Section 410.165(a). The testimony of a claimant alone may be sufficient to prove both a compensable injury and disability. Texas Workers' Compensation Commission Appeal No. 92167, decided June 11, 1992. However, the testimony of a claimant, as an interested party, only raises an issue of fact for the hearing officer to resolve. Burelsmith v. Liberty Mutual Insurance Co., 568 S.W.2d 695 (Tex. Civ. App.-Amarillo 1978, no writ). The hearing officer may believe all, part, or none of the testimony of any witness including the claimant. Taylor v. Lewis, 553 S.W.2d 153 (Tex. Civ. App.-Amarillo 1977, writ ref'd n.r.e.). The hearing officer could consider that claimant did not mention slipping on a pipe and hurting his back to his supervisors and managers or to doctors treating him for the (date of injury) inhalation

[1]Because those rulings have not been appealed, we refrain from commenting on their correctness.

injury. The hearing officer could also consider the ER record of September 25th stating a history of back pain "for several weeks."

Turning to the remaining appealed issue, in evidence was a TWCC-69 from the designated doctor, (Dr. W), dated December 13, 1994, stating that claimant had not reached MMI. Dr. W's narrative report of December 2, 1994, in the history portion, stated that while at work on (date of injury), claimant "suffered an inhalation of hydrogen sulfide which led to him blacking out and falling backwards landing on his left side. He awoke from this incident with his eyes burning and he felt nauseated." This report also stated that claimant had had back discomfort and was sent to Dr. SF who felt claimant had "lumbar syndrome" and SI joint dysfunction and who, on October 10, 1994, recommended physical therapy (PT), a TENS unit and an exercise program. Dr. W stated that while he felt that claimant had reached MMI for his pulmonary condition from which he would have "very little impairment if any," he also felt that claimant had not yet reached MMI with regards to his lumbar spine because he continues to have "some lumbar pain." Dr. W further stated his view that claimant should be sent for the PT recommended by Dr. SF and, apparently, denied by the carrier.

The hearing officer made the following findings and conclusions concerning the MMI and IR issues:

FINDINGS OF FACT

8.[Dr. W] certified that Claimant had not reached [MMI] with regard to his compensable injury of (date of injury).

9.The sole reason [Dr. W] failed to certify Claimant as having reached MMI with respect to Claimant's compensable injury of (date of injury), was because of the condition of Claimant's back.

10.The opinion of [Dr. W] has been overcome by the great weight of contrary medical evidence.

11.[Dr. GF] certified Claimant as having reached [MMI] with regard to Claimant's inhalation injury, only, on May 19, 1994, with a zero percent whole body impairment.

CONCLUSIONS OF LAW

3.Claimant's compensable injury of (date of injury), is limited to an inhalation injury, and does not include an injury to Claimant's back or chest.

5.Claimant reached [MMI] on May 19, 1994.

6.Claimant has a zero percent whole body impairment.

The hearing officer's discussion cites Section 408.125(e) to the effect that the report of the designated doctor on the IR is to be given presumptive weight and that if that report is contrary to the great weight of the other medical evidence, the hearing officer shall adopt the report of another doctor. Section 408.122(b) contains a similar provision regarding the designated doctor's determination of a dispute over MMI. The Appeals Panel has held that the designated doctor's entitlement to presumptive weight is limited to the determinations of MMI and IR and does not extend to opinions on other matters such as the extent of the injury, the latter being a question of fact for the hearing officer. *See e.g*., Texas Workers' Compensation Commission Appeal No. 93735, decided October 4, 1993. Claimant's statement of the hearing officer's error regarding the MMI and IR determinations posits that the hearing officer apparently decided that Dr. W would adopt Dr. GF's IR, that such a supposition is without foundation in the record, that since Dr. GF did not examine claimant's whole body he could not give a whole body IR, and that "there is no reason why [Dr. W] would have given the same [IR] given his different expertise."

In our view, the hearing officer, instead of simply adopting the only reported MMI date and IR in evidence, should have gone back to the designated doctor and advised him of her determination that claimant's compensable injury did not extend to his back but was restricted to his inhalation injury, and asked for another report addressing the MMI and IR issues for the inhalation injury only. It is clear from his report that while Dr. W felt claimant had reached MMI for his inhalation injury, Dr. W refrained from assigning an IR for that injury because he felt claimant was not at MMI for his back condition, a condition the fact finder since found not to be part of the compensable injury to be evaluated by the designated doctor for MMI and an IR.

In Texas Workers' Compensation Commission Appeal No. 92617, decided January 14, 1993, after the designated doctor found that the employee had reached MMI and assigned a 12% IR (seven percent for the neck and five percent for the lower back), the hearing officer reopened the record and asked the designated doctor to provide a new report limited to the back injury since the hearing officer had found that the compensable injury did not include the employee's neck. The designated doctor then issued a new report assessing an IR of five percent for the employee's back. On appeal, issue was taken with the hearing officer's decision to reopen the record and obtain another report from the designated doctor. However, the Appeals Panel affirmed noting the statutory duty of the hearing officer to fully develop the facts (Section 410.163(b)) and that the Appeals Panel has said that a designated doctor's report can be revised. *And see* Texas Workers' Compensation Commission Appeal No. 94880, decided August 18, 1994. In Texas Workers' Compensation Commission Appeal No. 93827, decided November 5, 1993, the hearing officer decided that the employee's IR was 20% based on an amended report of the designated doctor and on appeal the employee asked us to render a decision

that the IR was 43% based on the designated doctor's original report. We affirmed stating that the hearing officer "was on firm ground in reopening the hearing, with notice to all parties, for the purpose of resolving an apparent deficiency in the report of the designated doctor." We further observed that a hearing officer should seek to resolve deficiencies in a designated doctor's report when it is feasible and can be accomplished without undue delay, that a designated doctor may amend his or her report for a proper reason, and that "a correction or amendment of the first report generated by the designated doctor, especially when the first document was based upon incomplete or erroneous facts, which is done fairly soon after the first report, may be given presumptive weight."

In Texas Workers' Compensation Commission Appeal No. 941732, decided January 31, 1995, the hearing officer determined that the employee's compensable injury did not include a ganglion cyst on her wrist and that her IR was 18%. The designated doctor's report assessed a total IR of 22% for cervical and lumbar spine injuries as well as for the wrist, however, the 18% IR for the compensable injuries could be determined from the report without going back to the designated doctor. We noted in that decision that "[i]t may be that under certain circumstances not found in this case, going back to the designated doctor to obtain an amended report which rates only the compensable injury would be the appropriate action for the hearing officer to take." *Compare* Texas Workers' Compensation Commission Appeal No. 941323, decided November 16, 1994, where the hearing officer adopted the 15% IR of another doctor for cervical and lumbar spine injuries after determining that the five percent IR of the designated doctor for only the lumbar spine injury was against the great weight of the other medical evidence. The Appeals Panel viewed the hearing officer as evidently believing that the designated doctor failed to take into account the full extent of the injury and found support for such inference in the record. However, under the circumstances of that case the Appeals Panel said it could not say the hearing officer was required to go back to the designated doctor a second time in that he had already reviewed and commented on the objective tests (showing the cervical injury). We believe that under the circumstances of this case the appropriate action is for the hearing officer to seek another report from Dr. W after advising him that the compensable injury to be evaluated for MMI and the assignment of an IR is limited to the inhalation injury.

The decision and order of the hearing officer are reversed and the case is remanded for the further development of the evidence and for such further consideration and findings as may be appropriate and not inconsistent with this decision.

Pending resolution of the remand, a final decision has not been made in this case. However, since reversal and remand necessitate the issuance of a new decision and order by the hearing officer, a party who wishes to appeal from such new decision must file a request for review not later than 15 days after the date on which such new decision is received from the Texas Workers' Compensation Commission's division of hearings,

pursuant to Section 410.202. *See* Texas Workers' Compensation Commission Appeal No. 92642, decided January 20, 1993.

Philip F. O'Neill
Appeals Judge

CONCUR:

Gary L. Kilgore
Appeals Judge

Alan C. Ernst
Appeals Judge