APPEAL NO. 950356

This appeal is brought pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq*. (1989 Act). A contested case hearing was held in (city), Texas, on February 12, 1995, with (hearing officer) presiding as hearing officer. The issues at the hearing were: (1) did the appellant (carrier) waive the right to contest compensability of the claimed left shoulder injury, (2) does the respondent's (claimant) injury extend to her left shoulder, and (3) what is the claimant's impairment rating (IR). The hearing officer determined that: (1) the carrier did not waive the right to contest compensability of the claimed left shoulder injury; (2) the claimant's injury of (date of injury), extends to her left shoulder; and (3) the claimant's IR is 17% as certified by the designated doctor. The carrier appealed urging that the determination that the claimant's injury extends to her left shoulder is contrary to the great weight of the evidence and that the great weight of the other medical evidence is contrary to the report of the designated doctor. The claimant responded urging that the evidence is sufficient to support the determination of the hearing officer that the claimant's injury extends to her left shoulder and that the great weight of the other medical evidence is not contrary to the report of the designated doctor. In her response, the claimant also argues that the evidence is not sufficient to support the hearing officer's determination that the carrier did not waive its right to contest the compensability of the claimed injury to the left shoulder. The claimant's response was filed as a timely response but not as a timely appeal; therefore, we do not have jurisdiction to consider the issue of whether the carrier waived its right to contest compensability of the claimed left shoulder injury.

DECISION

We affirm.

The claimant worked as a sewing machine operator. Her quota was to sew belt loops on 800 pairs of pants daily. The claimant picked up the pants with her left hand and used her left hand to place the pants on the sewing machine. The claimant testified that she went to (Dr. JB) in about the middle of October 1993 and told him that she had pain in her fingers, arm, and shoulder. She said that Dr. JB told her that the pain in her elbow and shoulder was due to the carpal tunnel. She said that in March or April 1994 (Dr. AB) became her treating doctor, that Dr. AB told her the same thing that Dr. JB had told her, and that Dr. AB started therapy on her shoulder.

In an Employee's Notice of Injury or Occupational Disease and Claim for Compensation (TWCC-41) dated March 2, 1994, the claimant indicated that the date of injury was (date of injury), that the injury resulted from repetitive movement, and that the injury was to the left hand and arm. In another TWCC-41 dated April 7, 1994, the claimant indicated that the injury was to her wrist and left arm. In an addendum to a Specific and Subsequent Medical Report (TWCC-64) dated January 5, 1994, Dr. JB reported that the claimant is neurologically sound, that her hand is fine, that she has pain in her left shoulder now, that she has pain right over the biceps tendon, and that supination and abduction hurts

her. In an Initial Medical Report (TWCC-61) dated April 28, 1994, Dr. AB reported that the claimant had bilateral hand and wrist pain due to repetitive type of work and a significant amount of pain in the left shoulder region and diagnosed epicondylitis of the left wrist and elbow and a history of left shoulder strain. In a narrative attached to a Report of Medical Evaluation (TWCC-69) dated October 18, 1994, (Dr. W), the Texas Workers' Compensation Commission (Commission)-selected designated doctor, wrote:

> I also discussed with the patient that she should take the time to use good biomechanics. No amount of therapy or surgery can replace this or circumvent the musculoskeletal pains that can occur with using inappropriate biomechanics. I suggested to the patient to turn her body square to the cart, to pick the jeans out of the cart with both upper extremities, than turn to the machine, and begin sewing before she throws the garment off in a forward direction. This alone would likely save repetitive trauma to her left shoulder joint.

We first address the issue concerning the extent of the injury. The burden of proof is on the claimant to prove by a preponderance of the evidence that an injury occurred in the course and scope of employment, Texas Workers' Compensation Commission Appeal No. 91028, decided October 23, 1991, and the extent of the injury, Texas Workers' Compensation Commission Appeal No. 94851, decided August 15, 1994. 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). While a claimant's testimony alone may be sufficient to prove a claim, the testimony of a claimant is not conclusive but only raises a factual issue for the trier of fact. Texas Workers' Compensation Commission Appeal No. 91065, decided December 16, 1991. 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, the weight to assign to each witness's testimony, and resolves conflicts and inconsistencies in the testimony. 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). An appeals level body is not a fact finder, and it 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). Only were we to conclude, which we do not in this case, that the hearing officer's determination that the claimant's injury extends to her left shoulder is so against the great weight and preponderance of the evidence as to be clearly wrong or unjust, would there be a sound basis to disturb that determination. In re King's Estate, 150 Tex. 662, 244 S.W.2d 660 (1951); Pool v. Ford Motor Co., 715 S.W.2d 629, 635 (Tex. 1986). Since we find the evidence sufficient to support the determination of the hearing officer, we will not substitute our judgment for his. Texas Workers' Compensation Commission Appeal No. 94044, decided February 17, 1994.

We next address the IR of the claimant. Dr. W assigned a 29% IR to the claimant's left upper extremity by combining eight percent for sensory impairment, seven percent for motor impairment, seven percent for shoulder range of motion (ROM), six percent for wrist ROM, and one percent for elbow impairment. She reported that this 29% IR to the upper extremity results in a 17% whole body IR. Dr. W reported that "[t]he patient's shoulder passive range of motion is full. Her active range of motion is limited secondary to feelings of tightness and discomfort in the anterior pectoral region primarily." The carrier had the report of Dr. W reviewed by GENEX Services, Inc., and introduced a report that includes an eight percent IR consisting of three percent for left wrist loss of ROM, four percent for left shoulder motor loss, and one percent for left elbow loss of ROM. The claimant was examined by (Dr. RA) at the request of the carrier and in a TWCC-69 dated August 8, 1994, Dr. RA reported that the claimant reached MMI on August 14, 1994, with a four percent IR. Dr. RA reported that the claimant has a two percent impairment for loss of ROM to the left wrist and four percent impairment for median nerve sensory deficit resulting in a six percent impairment to the upper extremity and a four percent whole body IR. In a TWCC-69 dated September 4, 1994, Dr. AB reported that the claimant had not reached MMI. The carrier argues that the designated doctor should have used the passive ROM and not the active ROM of the claimant's shoulder, but does not provide any authority for using the ROM in which the doctor assists the claimant in the ROM tests rather than ROM tests that are made when the claimant completes the ROM tests without assistance. The carrier also argues that there were no objective findings of impairment to the claimant's shoulder. GENEX Services, Inc., includes a four percent for left shoulder motor loss. The report from GENEX Services, Inc., and the results of the ROM tests to the left shoulder in the report of Dr. W are sufficient objective findings of impairment to the left shoulder.

Disputes involving medical evidence are not uncommon. The 1989 Act sets forth a mechanism to help resolve conflicts concerning IR by according presumptive weight to the report of a doctor referred to as the designated doctor. Texas Workers' Compensation Commission Appeal No. 92495, decided October 28, 1992. If the Commission selects the designated doctor as was done in this case, the Commission shall base its determination of the claimant's IR on the report of the designated doctor unless the great weight of the other medical evidence is to the contrary. Section 408.125(e). 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 report of the designated doctor. Texas Workers' Compensation Commission Appeal No. 92412, decided September 28, 1992. No other doctor's report is accorded the special presumptive status given to the report of the designated doctor. Texas Workers' Compensation Commission Appeal No. 92366 decided September 10, 1992. The hearing officer resolves conflicts in expert evidence and assesses the weight to be given to expert evidence. Campos, *supra*. The hearing officer determined that the report of the designated doctor is entitled to presumptive weight and that the great weight of the other medical evidence is not contrary to the report of the designated doctor. Only were we to conclude, which we do not in this case, that the determinations of the hearing officer are so against the great weight and preponderance of

the evidence as to be clearly wrong or unjust would there be a sound basis to disturb his determinations. In re King's Estate, *supra*.

We affirm the decision and order of the hearing officer.

Tommy W. Lueders
Appeals Judge

CONCUR:

Robert W. Potts
Appeals Judge

Lynda H. Nesenholtz
Appeals Judge