APPEAL NO. 950372

On February 10, 1995, a contested case hearing was held in (city), Texas, with (hearing officer) presiding as the hearing officer. The hearing was held under the provisions of the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq*. (1989 Act). In response to the issues at the hearing, the hearing officer determined that the appellant/cross-respondent (claimant) did not sustain a neurological deficit as a result of an accident within the course and scope of his employment on (date of injury); that the respondent/cross-appellant (carrier) waived its right to dispute the compensability of the claimant's neurological deficit, except as to the claimant's neurogenic bladder; that the claimant sustained disability until May 2, 1994; and that the claimant reached maximum medical improvement (MMI) on May 2, 1994, with a zero percent impairment rating (IR). The claimant appeals the hearing officer's determinations on the extent of his injury, MMI date, IR, disability, and no waiver of right to contest compensability of the neurogenic bladder. The carrier appeals the hearing officer's determinations on disability, MMI date, and waiver of the right to contest compensability of the neurological deficit, except as to the neurogenic bladder.

DECISION

Affirmed.

On (date of injury), the claimant was on a six foot ladder stocking merchandise at work when the ladder broke and he fell on to bicycles. He testified that shortly after the accident he began to experience "neurological deficits", problems going to the bathroom, weakness in his left leg and hip, and a bruise on the right rib cage. He said that he tried to work, but was unable to stand up. According to medical reports, the claimant worked for a few days after the accident, but has not worked after that time.

The claimant went to (Dr. W) on August 19, 1992, with complaints of chest pain, hip spasms, and incontinence. A radiologist reported that a cystogram done on August 20, 1992, revealed "[s]lightly hypertonic configuration of the bladder possibly associated with cystitis or mild chronic outlet obstructive phenomenon. Other possibility includes subacute neurogenic bladder." In a patient note dated August 20, 1992, Dr. W stated that according to the claimant's history, he had had problems with numbness in his feet, problems with coordination in his feet, and a feeling of numbness in the upper legs that had been going on for a year and had been severe in the last several months. Dr. W stated "[p]ossibly these are related to what appears to be a neurogenic bladder. At this point do not think it was related to back injury." In a Payment of Compensation or Notice of Refused/Disputed Claim (TWCC-21) dated September 3, 1992, which was received by the Texas Workers' Compensation Commission (Commission) on September 11, 1992, the carrier reported that it received its first written notice of injury on August 20, 1992, and stated "[c]laimant's current disability appears to be due to a neurogenic bladder, which is not related to his work injury." Dr. W referred the claimant to (Dr. M), a neurologist, who reported on September 11, 1992, that the claimant presented with symptoms and findings of cervical myelopathy and stated

that his differential diagnosis "will include cervical spinal canal stenosis with exacerbation of his myelopathy secondary to injury. 2. Cervical canal tumor or meningoma. 3. Thoracic spinal cord injury. 4. Demyelinating illness, such as multiple sclerosis."

(Dr. C) examined the claimant at the request of the carrier on September 16, 1992, and he diagnosed a low back strain with functional overlay, and ordered an EMG of the lower extremities and an MRI of the lumbar and thoracic spine. On October 2, 1992, Dr. C reported that the EMG showed no evidence of peripheral neuropathy or radiculopathy, and bilateral sural sensory abnormalities with no other sensory abnormalities. He said the MRI of the thoracic spine showed nonspecific upper thoracic spinal cord disease. Dr. C also stated "I explained to him, that the blow he received had nothing to do with whatever happened to the spinal cord, and regarding this inflammatory disease, I have to wait, until he shows more evidence of a neurological deficit."

The claimant began treating with (Dr. S) in October 1992, and on October 15, 1992, she diagnosed a thoracic cord lesion and stated "[t]he differential for this is demyelinating, neoplastic, or infectious." An MRI of the thoracic spine done on November 18, 1992, showed thickening of the spinal cord at T3 through T5. The radiologist stated "[t]his is compatible with transverse myelitis, however, other differential considerations should be MS [multiple sclerosis] versus spinal cord tumor, or other inflammatory process." On January 11, 1993, Dr. S reported that the claimant told her that his leg strength was better but that his urination problem was worse and that he had numbness in his legs and neck pain and headaches. Dr. S's impression was "[s]uspected transverse myelitis. The reason is not known. Rule out a tumor. Rule out infection, rule out Multiple Sclerosis. It is possibly post traumatic."

An MRI of the brain done on January 15, 1993, was reported to be normal. An MRI of the cervical spine done on January 15, 1993, revealed a central disc herniation at C-4 that indents the thecal sac and minimally the cord. An MRI of the thoracic spine done on February 22, 1993, again showed thickening of the spinal cord between T3 and T5, and the radiologist gave an impression of "[p]robable MS in the thoracic spinal cord at the T3 through T5 level without significant change since 11-18-92." On March 3, 1993, Dr. S reported that it was still not known whether the claimant has MS, and that "[e]ven if he does have MS the stress of the fall and the anxiety related to this could result in his symptoms." On March 5, 1993, Dr. S reported that there was a "possibility of a cord contusion." She also stated "[i]f he does have MS he could have had a cord contusion in that area which made his MS symptomatic. He also appears to have injured his neck and lower back in that accident." On April 13, 1993, another MRI of the thoracic spine was done and it was reported as normal. On April 19, 1993, Dr. S reported that the claimant reported continuing incontinence, weakness in the legs, and sexual dysfunction. In a report of May 18, 1993, Dr. S diagnosed "thoracic spinal cord lesion and the patient's symptoms began after he fell."

(Dr. F) saw the claimant on June 3, 1993, for a neurosurgical evaluation and he stated that "[m]y impression is that the patient sustained a spinal cord injury, probably mild

in nature, with delayed manifestation." He described the injury as being around the T3 or T5 area. He stated that he does not think the claimant has a surgical lesion. He further stated that there is good evidence that the claimant does not have a cord tumor. On June 14, 1993, (Dr. Mc) reported that the claimant had been examined for "incontinence second to neurogenic bladder," and he recommended continued drug therapy. On June 24, 1993, Dr. S reported that the claimant "still has bladder and bowel problems from this cord contusion," and on September 3, 1993, she reported that the claimant was "status post injury to the thoracic spine with myelopathy." The claimant testified that Dr. S has not released him to return to work.

On January 25, 1994, the claimant was examined by (Dr. ST) and in a Report of Medical Evaluation (TWCC-69) dated January 31, 1994, she reported that the claimant reached MMI on January 25, 1994, with a 50% IR. Her diagnosis was "transverse myelopathy secondary to trauma with left lower extremity weakness, difficulty with gait, difficulty of urinary function, difficulty of sexual function, and difficulty of anorectal function." Dr. ST stated that according to Chapter 4 (The Nervous System) of the Guides to the Evaluation of Permanent Impairment, third edition, second printing, dated February 1989, published by the American Medical Association (the Guides), "there may be various degrees of impairment from several categories; however, these are not to be added or combined, but rather the largest value or greatest percentage of the categories of impairment are to be used to represent the impairment for all the categories." Dr. ST added that "using these instructions, [claimant] received a 50% whole person impairment as this represents the greatest percentage of all the categories." According to her report, the claimant was given a 50% IR based on his urinary bladder function since this represented the greatest percentage of all the categories. Lesser impairment percentages were set forth for other categories such as gait, sexual function, and rectal function. Dr. ST also stated that she believed the claimant could go back to work on a light duty basis. In a TWCC-21 dated February 22, 1994, the carrier disputed the 50% IR assigned by Dr. ST (no reason was set forth for the dispute).

In an undated TWCC-69, Dr. S, the treating doctor, reported that the claimant reached MMI on February 24, 1994, with a 50% IR due to thoracic myelopathy. In a TWCC-21 dated March 7, 1994, the carrier disputed the 50% IR assessed by Dr. S and stated that it assessed a 15% IR (no reason was set forth for the dispute). On May 13, 1994, (Dr. D) saw the claimant for complaints of low back pain and he diagnosed mechanical low back pain secondary to muscle weakness. Dr. D stated "[t]his patient comes for a consult with a very complicated history after falling off a ladder onto a bike display 8-6-92. Over the next few weeks he suffered a thoracic spinal-cord myelopathy secondary to trauma and now has numerous neurologic problems." The carrier received Dr. D's report on May 20, 1994.

The Commission selected (Dr. B) as the designated doctor to determine IR only. In a TWCC-69 dated June 10, 1994, Dr. B reported that the claimant reached MMI on May 2, 1994, with a 50% IR. However, next to the IR he wrote "not related to WC." In a narrative report dated May 2, 1994, which is attached to the TWCC-69, Dr. B reviewed the reports of

the diagnostic studies, the history of the injury and medical treatment, and set forth his findings on physical examination. He opined to the effect that the claimant does not have a spinal cord contusion and stated:

> In short, this gentleman may have a transverse myelopathy on a viral basis though I can't be sure. Likewise, he can have a spinal form of MS though the testing has not proven or disproven it. I think with this much time, however, that tumor is less likely.
>
> Needless to say, the three top qualifiers for the etiology of his difficulty are not contusion.
>
> Unfortunately this gentleman is fixated that he has had a spinal cord contusion from the fall. Indeed he had a fall and indeed he has neurologic deficit but indeed they are not related. Spinal cord contusions are worse when they occur and do not progress.
>
> I have read all of the information available and I can't for the life of me figure out how [Dr. S] and [Dr. F] can feel that this patient's problems are post traumatic. If you don't have a traumatic injury to the spinal cord, it is difficult to have post traumatic problems.
>
> At this time, this gentlemen has probably reached [MMI]. I would ascribe a fifty percent disability relative to the Third Edition Guides to Evaluation of Permanent Impairment of the AMA. I will, however, suggest that the impairment is not from the fall but from his progressive disease process.

In a TWCC-21 dated July 11, 1994, the carrier stated that it interpreted Dr. B's report to mean that the 50% IR was not related to the on-the-job injury of (date of injury), and that if it was mistaken then it disputed that rating. The benefit review officer asked Dr. B for clarification and on December 7, 1994, Dr. B stated:

> The fifty percent [IR] that I gave him was from his disease process which did not have anything to do with his compensable injury. At best this gentleman probably had a strain as a compensable injury which long ago resolved with no residual. The problems he has now are not from his fall but from his disease.

Again, the transverse thoracic myelopathy that this gentlemen has is not on the basis of trauma. The cord would certainly not be enlarged this long after an injury. Likewise, he would have been very bad and progressively improved which he has not demonstrated. The possibility of multiple sclerosis, transverse myelitis or an intramedullary tumor must be considered. I don't think that a specific diagnosis can be given in this gentlemen though it is not traumatic.

I still believe that [claimant] has a fifty percent impairment but again I must stress from the disease process that he is experiencing and not from the alleged incident that occurred on (date of injury).

The issues at the hearing were: (1) whether the claimant's "neurological deficit" is a result of his compensable injury of (date of injury); (2) whether the carrier has waived its right to dispute the compensability of "such condition;" (3) whether the claimant has sustained disability; (4) when the claimant reached MMI; and (5) what is the claimant's correct IR.

The hearing officer made the following pertinent findings of fact and conclusions of law:

FINDINGS OF FACT

4.On (date of injury), claimant sustained an injury when he fell off a ladder while engaged in the exercise of his regular job duties with employer.

5.Claimant's compensable injury of (date of injury), did not result in the neurological deficit with which claimant has subsequently been diagnosed.

6.Carrier received its first written notice of injury on August 20, 1992.

7.Within sixty days of August 20, 1992, more specifically, on September 11, 1992, carrier filed a TWCC-21 disputing any causal relationship between claimant's compensable injury of (date of injury), and claimant's neurogenic bladder condition.

8.On or before May 20, 1994, carrier received its first written notice that claimant's compensable injury of (date of injury), was alleged to include a neurological deficit.

9.Within 60 days of May 20, 1994, carrier did not dispute the alleged compensability of claimant's neurological deficit.

10.Until at least May 2, 1994, claimant's compensable injury of (date of injury), prevented claimant from obtaining and retaining employment at wages equivalent to the wage claimant earned prior to (date of injury).

11.[Dr. B] was appointed by the [Commission] to act as a designated doctor in this case.

12.[Dr. B] certified claimant as having reached [MMI] on May 2, 1994, with a zero percent [IR] attributable to claimant's compensable injury of (date of injury).

13.The [MMI] and [IR] certification of [Dr. B] has not been overcome by the great weight of contrary medical evidence.

CONCLUSIONS OF LAW

3.Claimant did not sustain a neurological deficit as a result of an accident within the course and scope of his employment on (date of injury).

4.Carrier has not waived its right to dispute the compensability of claimant's neurogenic bladder.

5.Carrier waived its right to dispute the compensability of claimant's neurological deficit, except as to claimant's neurogenic bladder.

6.Claimant sustained disability until at least May 2, 1994.

7.Claimant reached [MMI] on May 2, 1994.

8.Claimant has a zero percent whole body impairment.

The parties take issue with a number of the findings and conclusions of the hearing officer. We observe that the hearing officer is the sole judge of the relevance and materiality of the evidence offered and of the weight and credibility to be given to the evidence. Section 410.165(a). The hearing officer can believe all, part, or none of the testimony of any witness, and resolves conflicts in the evidence, including the medical evidence, and determines what facts have been established. Texas Workers' Compensation Commission Appeal No. 950084, decided February 28, 1995. An appellate level body is not a fact finder and does not normally pass upon the credibility of witnesses or substitute its judgement for that of the trier of fact, even if the evidence would support a different result. Appeal No. 950084. When reviewing a hearing officer's decision to determine the factual sufficiency of the evidence, we should set aside the decision only if it is so contrary to the overwhelming weight of the evidence as to be clearly wrong and unjust. Appeal No. 950084.

The claimant challenges the hearing officer's finding and conclusion that his compensable injury of (date of injury), did not result in a neurological deficit. The question as to the extent of the claimant's compensable injury was a fact issue for the hearing officer

to resolve. While other doctors gave contrary opinions, Drs. W, C, and B did not believe the neurological deficit resulted from the compensable injury. It is clear from the hearing officer's discussion of the evidence that she considered all the evidence on the issue of the extent of injury in determining that issue. We conclude that the challenged finding and conclusion are supported by sufficient evidence and are not contrary to the overwhelming weight of the evidence.

The claimant challenges the hearing officer's finding that the carrier timely disputed his neurogenic bladder condition and her conclusion that the carrier did not waive its right to dispute the compensability of that condition. The evidence shows that the carrier was given written notice of the injury on August 20, 1992, and that by September 11, 1992, (within 60 days) it had filed a TWCC-21 with the Commission stating that the neurogenic bladder is not related to the work injury. We conclude that the challenged finding and conclusion are supported by sufficient evidence and are not contrary to the overwhelming weight of the evidence.

The claimant challenges the hearing officer's finding that Dr. B certified that the claimant reached MMI on May 2, 1994, with a zero percent IR attributable to his injury of (date of injury). Such finding is supported by the TWCC-69 and December 7, 1994, letter of Dr. B. While Dr. B opined that the claimant may have a transverse myelopathy which results in a 50% IR, he stated that such impairment was not from the fall of (date of injury), but was due to his progressive disease process. In his opinion the claimant's injury consisted of a strain which was resolved with no residuals.

The claimant challenges the hearing officer's conclusion that he reached MMI on May 2, 1994, on the grounds that he did not reach MMI until he reached statutory MMI, which is 104 weeks after income benefits begin to accrue. There is no medical evidence that the claimant did not reach MMI until statutory MMI. All three doctors who opined on MMI determined that the claimant reached MMI on or before May 2, 1994. Thus, we find no merit in the claimant's contention regarding statutory MMI. Also, in regard to the claimant's contention that he has had disability beyond May 2, 1994, we observe that even if he had disability after the May 2, 1994, date of MMI he would not be entitled to temporary income benefits (TIBS) after the date of MMI, because under Section 408.101(a) an employee is entitled to TIBS if the employee has a disability and has not attained MMI.

The claimant challenges the hearing officer's finding giving presumptive weight to the report of the designated doctor on IR and the conclusion that he has a zero percent IR. Section 408.125(e) provides that if the designated doctor is chosen by the Commission, the report of the designated doctor shall have presumptive weight, and the Commission shall base the IR on that report unless the great weight of the other medical evidence is to the contrary. The 50% IR assigned by Dr. B, the designated doctor, was for transverse thoracic myelopathy, which he said was not the result of the injury of (date of injury), but was from a disease process. Other doctors, including Drs. W and C, appear to agree with Dr. B in regard to the extent of the injury. We conclude that the hearing officer did not err in

determining that the designated doctor assigned a zero percent IR for the compensable injury, in according his report on IR presumptive weight, and in determining that the great weight of the other medical evidence was not contrary to his report. *See* Texas Workers' Compensation Commission Appeal No. 941052, decided September 19, 1994.

The claimant contends that since the carrier waived its right to contest the compensability of his "neurological deficit" the report of the designated doctor cannot be given presumptive weight. Under the particular facts of this case, we disagree with the claimant's contention, because while the hearing officer did find that the carrier waived its right to dispute the compensability of the claimant's neurological deficit, she also found that it had not waived its right to dispute the compensability of the claimant's neurogenic bladder, which, according to the medical reports, constitutes the major portion of his neurologic deficit. In fact, Dr. ST attributed her 50% IR to the claimant's urinary bladder function, and the claimant acknowledges in his appeal that his neurogenic bladder is a large part of his neurological deficit. In addition, in Appeal No. 941052, *supra*, we stated that "[w]hile we find sufficient evidence to support the hearing officer's determinations that the carrier waived its right to contest the compensability of the May 22, 1991, injury and that it did not make a sufficient showing of newly discovered evidence to reopen the compensability issue, such does not preclude a dispute or contest of IR."

The claimant also asserts that the carrier withdrew its third exhibit (reports of Dr. C) after objection by the claimant. We find from our review of the record that the carrier did not withdraw its third exhibit and that it was admitted into evidence. We also find that no sustainable objection was made to that exhibit (the claimant disagreed with Dr. C's factual recitations).

The carrier challenges the hearing officer's finding and conclusion that it waived its right to dispute the compensability of the claimant's neurological deficit, except as to the neurogenic bladder. We conclude that the challenged finding and conclusion are supported by sufficient evidence and are not contrary to the overwhelming weight of the evidence in that the TWCC-21 disputing compensability only referred to the neurogenic bladder. The carrier argues that it is not required to dispute the extent of the claimant's injury within sixty days if it has "already accepted an underlying injury." Since the carrier has failed to inform the hearing officer, the Appeals Panel, or the Commission of what "underlying injury" it accepted, its argument is without factual basis and will not be considered. In prior decisions we have addressed the need to contest additional injuries or follow-on injuries within 60 days of receiving written notice of those injuries under Section 409.021. Texas Workers' Compensation Commission Appeal No. 950218, decided March 29, 1995; Texas Workers' Compensation Commission Appeal No. 93491, decided August 2, 1993.

The carrier challenges the hearing officer's finding and conclusion that the claimant has had disability until at least May 2, 1994. It has been held that in workers' compensation cases the issue of disability may be established by the testimony of the claimant alone, even

though such lay testimony is contradicted by the unanimous opinions of medical experts. Houston General Insurance Company v. Pegues, 514 S.W.2d 492 (Tex. Civ. App.-Texarkana 1974, writ ref'd n.r.e.). While different inferences and conclusions might be reached from the evidence, we conclude that sufficient evidence supports the finding and conclusion on disability and that they are not contrary to the overwhelming weight of the evidence.

The carrier also challenges the May 2, 1994, date of MMI found by the hearing officer because the hearing officer accorded presumptive weight to the date of MMI determined by the designated doctor who was only appointed to determine IR. In accordance with our decision in Texas Workers' Compensation Commission Appeal No. 93710, decided September 28, 1993, a designated doctor's opinion on MMI is not entitled to presumptive weight when he or she is appointed to determine IR only. However, even where a designated doctor is appointed to determine IR only, we have stated that "the report of a doctor who assigned an [IR] without first determining that a claimant had reached MMI would be found to be faulty, or, at a minimum, premature." Texas Workers' Compensation Commission Appeal No. 93377, decided July 1, 1993. We have also stated that "it would seem prudent, if not essential, that a designated doctor would himself have to be satisfied that MMI had been reached before attempting to assess an [IR]." Texas Workers' Compensation Commission Appeal No. 92517, decided November 12, 1992. In any event, the carrier states in its appeal that "[i]f the Appeals Panel determines that a remand is required on this issue, and for no other issue, the carrier would withdraw its dispute of this Finding of Fact." Since we are affirming the hearing officer's other findings and conclusions which have been challenged on appeal, we regard the carrier's contention in regard to the date of MMI to have been withdrawn.

The hearing officer's decision and order are affirmed.

Robert W. Potts
Appeals Judge

CONCUR:

Gary L. Kilgore
Appeals Judge

Tommy W. Lueders
Appeals Judge