APPEAL NO. 042740
FILED DECEMBER 21, 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 October 7, 2004. The hearing officer resolved the disputed issues by deciding that: (1) the compensable injury includes a cervical strain, but does not extend to and include the diagnoses of herniated discs at C3-4, C4-5, C5-6, and C6-7, and radiculopathy at C5-6; (2) the respondent (claimant) had disability from September 25, 2003, through the date of the CCH; (3) the claimant reached maximum medical improvement (MMI) on September 25, 2003; and (4) the claimant's impairment rating (IR) is 18%. The appellant (carrier) appealed, disputing the extent-of-injury and IR determinations. The claimant responded, urging affirmance. The disability and MMI determinations have not been appealed and have become final pursuant to Section 410.169.

DECISION

Affirmed in part as reformed and reversed and remanded in part.

The parties stipulated that the claimant sustained a compensable injury on _____. The carrier contends that it was error for the hearing officer to determine that the compensable injury includes a cervical strain because the stated issue regarding extent of injury identified the specific diagnoses of herniated discs at C3-4, C4-5, C5-6, and C6-7, and radiculopathy at C5-6, but did not include cervical strain. We would agree that the stated issue at the CCH did not specifically include a cervical strain. However, even though the stated issue was limited to specific diagnoses of cervical herniations and radiculopathy, what was actually litigated was generally whether the claimant's compensable injury extends to include an injury to his cervical spine. The claimant testified that he began reporting neck pain to his medical providers within 8 to 10 days after the injury and the claimant correctly points out in his response that there were medical records in evidence that included a diagnosis of cervical strain. We perceive no reversible error.

Additionally, the carrier contends that there is insufficient evidence to support the hearing officer's determination that the injury extended to include a cervical strain. Extent of injury is a question of fact. 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 (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 (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 (Tex. Civ.

App.-Amarillo 1977, writ ref'd n.r.e.); Aetna Insurance Company 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. Cain v. Bain, 709 S.W.2d 175, 176 (Tex. 1986); Pool v. Ford Motor Company, 715 S.W.2d 629, 635 (Tex. 1986).

In the present case, there was simply conflicting evidence, and it was the province of the hearing officer to resolve these conflicts. The designated doctor expressed the opinion that the claimant's "delayed onset of neck pain and subsequent diffuse neck complaints" were not associated with the compensable injury. Dr. P was appointed as the designated doctor for purposes of MMI and IR. Therefore, Dr. P's opinion on the issue of extent of injury is not entitled to presumptive weight and there was contrary medical evidence which the hearing officer apparently found to be more persuasive. *See* Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 130.6(a)(2) (Rule 130.6(a)(2)). Applying the above standard of review, we cannot say that the hearing officer erred as a matter of law in so finding.

We reform Findings of Fact Nos. 8, 9, and 11 to reflect the fact that the name of the designated doctor is Dr. P rather than Dr. T. The parties stipulated that the designated doctor is Dr. P and the evidence also reflects that he is the designated doctor in this case. We note that the hearing officer also mistakenly refers to Dr. T in his Background Information. The reference to Dr. T is clearly a clerical error. We reform Findings of Fact Nos. 8, 9, and 11 to conform to the evidence and the stipulation of the parties.

The carrier argues that the hearing officer erred in finding that the cervical strain was entitled to a 5% IR. We agree. The evidence reflects that a letter of clarification dated July 14, 2004, was sent to the designated doctor that requested him to provide a whole person IR for the claimant if the cervical condition is added to the previously rated body parts (knee, thigh, and lumbar). The designated doctor responded in a letter dated July 19, 2004, and referenced the MRI report of the cervical spine which suggested multilevel mild disk protrusions, worse at C5-6, but present at other levels. The designated doctor went on to state that "if the cervical condition is considered part of the compensable injury, an additional 5% would need to be added to the whole person [IR], which I previously suggested was a 14% based upon the low back, thigh, and knee involvement." There is no indication that the designated doctor was assessing impairment for cervical strain when he assessed 5% impairment for the claimant's "cervical condition." We reverse the hearing officer's determination that the claimant's IR is 18% and remand this case back to the hearing officer to seek clarification from the designated doctor. The designated doctor should be instructed that the claimant's compensable injury includes a cervical strain and then asked to

assess impairment for that condition as of the date of MMI. After clarification is obtained, the hearing officer should allow comment by the parties. The hearing officer should then issue a new decision regarding IR, consistent with this decision.

We affirm the hearing officer's determination that the compensable injury of _____, includes a cervical strain. We reverse the hearing officer's determination that the IR is 18% and remand for further proceedings consistent 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 which was amended June 17, 2001, to exclude Saturdays and Sundays and holidays listed in Section 662.003 of the Texas Government Code in the computation of the 15-day appeal and response periods. *See* Texas Workers' Compensation Commission Appeal No. 92642, decided January 20, 1993.

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

LEO F. MALO
12222 MERIT DRIVE, SUITE 700
DALLAS, TEXAS 75251-2237.

_____
Margaret L. Turner
Appeals Judge

CONCUR:

_____
Thomas A. Knapp
Appeals Judge

_____
Robert W. Potts
Appeals Judge