APPEAL NO. 002578-S

Following a contested case hearing held on October 6, 2000, pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act), the hearing officer resolved the disputed issue by determining that the respondent (claimant herein) had an impairment rating (IR) of 15% based upon the report of a designated doctor selected by the Texas Workers' Compensation Commission (Commission) and that the designated doctor did not have a disqualifying association or conflict of interest. The appellant (self-insured herein) appeals these determinations. The self-insured asserts that the great weight of the other medical evidence was contrary to the report of the designated doctor and that the hearing officer incorrectly placed the burden of proof on the self-insured to show that the designated doctor had a disqualifying association. There is no response from the claimant to self-insured's request for review in the appeal file.

DECISION

Finding sufficient evidence to support the decision of the hearing officer and no reversible error in the record, we affirm the decision and order of the hearing officer.

The parties stipulated that the claimant sustained a compensable injury on _____; that the claimant reached maximum medical improvement (MMI) on August 25, 1999; and that as a result of an IR dispute, the Commission selected Dr. C to serve as its designated doctor. The claimant was injured when he was struck by a tool on the palm of the right hand. The claimant underwent a right thumb joint arthroplasty with volar reconstruction. Dr. G the claimant's treating doctor, certified on a Report of Medical Evaluation (TWCC-69) that the claimant attained MMI on June 30, 1999, with an 11% IR. Dr. G's IR appears to be totally based upon loss of range of motion (ROM). The claimant disputed this certification and the claimant was sent to Dr. C who certified on a TWCC-69 that the claimant was MMI on August 25, 1999,[1] with a 15% IR. Dr. C's rating consists of impairment both for specific disorder and loss of ROM. The claimant testified that he had been paid impairment income benefits based upon the 15% IR.

In a letter to the self-insured dated April 19, 2000, Dr. S criticizes Dr. C's IR assessment. Dr. S states that he agrees with Dr. C's assessment for specific disorders, but does not believe the ROM testing was correctly done. Dr. S states that the impairment for ROM appears "overstated," that there is no indication that it was performed by someone who had completed the Commission's designated doctor training, and that it did not appear to include comparative ROM testing on the contralateral unaffected extremity. The Commission sent a copy of Dr. S's report to Dr. C by letter of May 11, 2000. Dr. C responded in a letter dated May 17, 2000, that the ROM testing he used was performed by a licensed physical therapist who had completed the Commission's designated doctor's training course, that the ROM testing was valid, and that he was willing to reexamine the claimant for comparison ROM testing on the opposite--left--thumb.

[1]Which was the date of his examination.

Mr. A testified live at the hearing. He testified that he is a physician's assistant. He criticized Dr. C's rating stating that Dr. C's assessment for specific disorders was incorrect, that Dr. C had failed to compare the uninvolved contralateral extremity, and that Dr. C had improperly rounded in assessing impairment for loss of ROM. There is also a written report from Mr. A in evidence dated June 21, 2000.

The carrier put into evidence billing records showing that Dr. C treated the claimant for a subsequent workers' compensation injury from March 10, 2000, until June 14, 2000. The claimant testified that he had a subsequent back injury at work on February 24, 2000. The claimant stated that he attempted to make appointment with a doctor to treat this injury and was told that the earliest appointment available was in three months. The claimant testified that he did not know who to see for this injury, and since he had previously seen Dr. C, he made an appointment to see him. The claimant testified that he treated with Dr. C until June 2000 for this injury, but became dissatisfied with Dr. C's treatment. The claimant testified that he never discussed his _____, injury with Dr. C during the time he was treating with Dr. C for his February 24, 2000. The claimant testified that by the time the Commission had sent the clarification letter to Dr. C in May 2000, he had already informed Dr. C that he desired to change to another doctor for his February 24, 2000, injury. The claimant testified that he had never been examined by Dr. S or Mr. A for his _____, injury.

Section 408.125(e) provides:

> 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 impairment rating on that report unless the great weight of the other medical evidence is to the contrary. If the great weight of the medical evidence contradicts the impairment rating contained in the report of the designated doctor chosen by the commission, the commission shall adopt the impairment rating of one of the other doctors.

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.

Whether the great weight of the other medical evidence was contrary to the opinion of the designated doctor is basically a factual determination. Texas Workers' Compensation Commission Appeal No. 93459, decided July 15, 1993. Section 410.165(a) provides that the contested case 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 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, 702 (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, 290 (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, 161 (Tex. Civ. App.-Amarillo 1977, writ ref'd n.r.e.); Aetna Insurance Co. 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 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); Pool v. Ford Motor Co., 715 S.W.2d 629, 635 (Tex. 1986).

Applying this standard we do not find error in the hearing officer's finding that the great weight of the medical evidence was not contrary to the report of the designated doctor. The hearing officer points out that the contrary evidence brought forth by the carrier was contradictory in that Dr. S agrees with Dr. C's assessment of IR for the specific disorder while Mr. A disagrees. While both Dr. S and Mr. A agree that Dr. C should have compared the loss of ROM to the uninvolved contralateral extremity, the hearing officer cites Texas Workers' Compensation Commission Appeal No. 972420, decided January 5, 1998, that failure to do so will not necessarily invalidate a ROM assessment. *See also* Texas Workers' Compensation Commission Appeal No. 002598, decided December 18, 2000. Nor does the carrier present any evidence to show a comparison with the uninvolved contralateral extremity would have any effect on the assessment of the claimant's IR. Also, we note that the hearing officer could have considered the fact that neither Dr. S nor Mr. A examined the claimant as well as the fact that Mr. A is not a doctor in determining what weight to give their opinions. Finally, we find it incongruous that the self-insured is arguing that the 11% IR of Dr. G should be adopted when it appears to also fail to comply with the protocols set forth by Dr. S and Mr. A.

We are more troubled by the self-insured's argument concerning disqualifying association. We agree that the appearance of impropriety should be avoided. We do not think the hearing officer improperly shifted the burden of proof, however. It was agreed by the parties at the beginning of the hearing that the self-insured had the burden of proof and the order of proceeding at the hearing was based upon the carrier's bearing the burden of proof. As the carrier asserted a disqualifying association, it was incumbent on the carrier to prove such an association. As the hearing officer states in her decision, whether or not such a disqualifying association existed is a question of fact. Under the circumstances of this case, we do not find that the hearing officer's finding of no disqualifying association was incorrect as a matter of law. We find nothing in the 1989 Act or in the Commission's

rules, including Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 126.10(a)(4) (Rule 126.10(a)(4)) cited by the self-insured, which speaks to this particular situation where a designated doctor later becomes the claimant's treating doctor for an unrelated injury. The fact that the prohibitions on a designated doctor from becoming a treating doctor found in both Rule 126.10(b)(8) and in Rule 130.6(b)(2) specifically limit this prohibition to the "medical condition being evaluated by the designated doctor" indicate these prohibitions do not apply to treatment of other conditions. While we believe it would best for this situation to be avoided,[2] we cannot say that this invalidates the designated doctor's IR in the present case. This IR was promulgated months before Dr. C began treating the claimant for his February 24, 2000, injury and we find nothing in the record to suggest that it had any effect on the designated doctor's response to the clarification letter in which he continued to defend his original IR assessment. The self-insured argues that the claimant would object if it hired the designated doctor was hired as peer review advisor by the self-insured. However, it is evident that situations arise where a doctor on the designated doctor list is hired by carriers to perform required medical examinations and to do peer reviews. The rule for which the carrier argues would prohibit this practice where a designated doctor could later be asked for clarification in another case involving the same carrier.

The decision and order of the hearing officer are affirmed.

Gary L. Kilgore
Appeals Judge

CONCUR:

Susan M. Kelley
Appeals Judge

Philip F. O'Neill
Appeals Judge

[2]*See* Texas Workers' Compensation Commission Appeal No. 94424, decided May 26, 1994.