APPEAL NO. 000042

Following a contested case hearing held on December 21, 1999, pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act), the hearing officer, resolved the disputed issues by concluding that the appellant's (claimant) impairment rating (IR) is 12% and that the respondent (carrier) is entitled to contribution from the cumulative effects of prior compensable injuries in the amount of four-twelfths or one-third of the impairment income benefits (IIBS). Claimant has appealed the IR determination, asserting that his IR is 16%. The carrier's response urges the correctness of the challenged determination.

DECISION

Affirmed.

There is no dispute that Dr. S signed a Report of Medical Evaluation (TWCC-69) on "07/26/1999" which certified that claimant reached maximum medical improvement (MMI) on "07/16/1999" with an IR of 12%. Although the box for "carrier selected" required medical examination doctor is checked on this form, the carrier represented at the hearing that Dr. S was a doctor to whom claimant was referred by Dr. O, who apparently was claimant's treating doctor. Dr. O signed the TWCC-69 at the bottom of the form on "8/9/99" and checked a box indicating his agreement with both the certification of MMI and the assigned IR. Claimant acknowledged having received this form.

Also in evidence is a Notification Regarding Maximum Medical Improvement and/or Impairment Rating (TWCC-28) dated August 10, 1999, prepared by a carrier adjuster and addressed to claimant. This TWCC-28 states, among other things, that the carrier received a report of Dr. S, copy attached, which states that claimant had reached MMI and which assigned a whole body IR of 12%. This form goes on to advise claimant that based on this report, he will receive 36 weeks of IIBS and that if he disagrees with the MMI or IR findings, he can dispute same with the Texas Workers' Compensation Commission within 90 days of receiving notice of the IR. Claimant acknowledged having received this form.

Also in evidence is a Payment of Compensation or Notice of Refused or Disputed Claim (TWCC-21) dated "8-10-99" which states the following: "MMI 7-16-99 with 12% [IR] and agreed to by treating Dr. Taking credit for 1 week TIBS [temporary income benefits] overpayment and applying to IIBS, total IIBS paid to date: 4 weeks." Claimant acknowledged having received this form.

Claimant's answer to carrier Interrogatory Question No. 13 states: "I agree that I did not dispute [Dr. S's] [IR] within 90 days and neither did the carrier. I contend that he awarded me a 16% [IR]."

Claimant testified that he read the documents to state that his IR from Dr. S was 12%. He said he did not become aware his IR should be 16% until after talking to his attorney.

The narrative report of Dr. S's July 16, 1999, examination of claimant bears the apparent initials of Dr. S and states, "Dictated but not read." This report also details how Dr. S determined that claimant's right knee, which was "status post arthroscopy 5/14/99," was rated by him, using the Guides to the Evaluation of Permanent Impairment, third edition, second printing, dated February 1989, published by the American Medical Association (AMA Guides), at 39% for the lower extremity. The report goes on to state that, based on Table 42, "Relationship of Impairment to Lower Extremity of Impairment to Whole Person, 39% translates to a 12% whole person impairment. [Claimant] is at MMI and has a 12% impairment total body due to right lower extremity impairment."

Table 42 of the AMA Guides, introduced by claimant, reflects that a 39% lower extremity impairment equates to a 16% whole person impairment and that a 29% lower extremity impairment equates to a 12% whole person impairment.

Claimant contended at the hearing, and reurges on appeal, that since Dr. S assigned a 39% rating to claimant's injured right lower extremity, and since Table 42 reflects that 39% converts to 16% and not 12%, the actual rating that became final pursuant to Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 130.5(e) (Rule 130.5(e)) is 16%, not 12%. The carrier's position was and remains that the asserted calculation error was required to be disputed within the 90-day period provided by Rule 130.5(e) which states that "[t]he first [IR] assigned to an employee is considered final if the rating is not disputed within 90 days after the rating is assigned."

The hearing officer found that Dr. S issued the first IR for claimant's compensable injury on _____; that Dr. S assigned an IR of 12% with a date of MMI of July 16, 1999; that the IR assigned by Dr. S was not disputed within 90 days; and that Dr. S's IR and date of MMI became final.

Claimant contends on appeal that he had no duty to dispute the 12% IR because 12% was not the IR, but rather 16%, an IR with which he agrees. Claimant states that Dr. S made a simple error in reading the chart and that he is aware of no Appeals Panel decision which would support ignoring Dr. S's error, an unconscionable result. The carrier relies on our decision in Texas Workers' Compensation Commission Appeal No. 94049, decided February 18, 1994, in which the Appeals Panel determined that the errors of the doctor assigning the first IR in failing to account for abnormal range of motion and neurological deficits in the IR did not invalidate the IR and toll the 90-day period under Rule 130.5(e).

In Texas Workers' Compensation Commission Appeal No. 961334, decided August 23, 1996, the Appeals Panel reversed and rendered that various "flaws" on the face of the TWCC-69 did not invalidate the first assigned IR. In Texas Workers' Compensation

Commission Appeal No. 962037, decided November 27, 1996, the Appeals Panel reversed and rendered a new decision that error in the use of the AMA Guides did not invalidate the first assigned IR. In Texas Workers' Compensation Commission Appeal No. 991805, decided October 6, 1999, the Appeals Panel reversed and rendered a new decision that the doctor's error in the use of the Combined Values Chart in the AMA Guides did not invalidate the first assigned IR. *Compare* Texas Workers' Compensation Commission Appeal No. 992419, decided December 16, 1999.

The hearing officer is the sole judge of the weight and credibility of the evidence. (Section 410.165(a)). We are satisfied that the previously stated hearing officer's findings are not so against the great weight and preponderance of the evidence as to be clearly wrong or manifestly unjust. Cain v. Bain, 709 S.W.2d 175, 176 (Tex. 1986); In re King's Estate, 150 Tex. 662, 244 S.W.2d 660 (1951).

The decision and order of the hearing officer are affirmed.

Philip F. O'Neill
Appeals Judge

CONCUR:

Robert W. Potts
Appeals Judge

Alan C. Ernst
Appeals Judge