APPEAL NO. 011599
FILED AUGUST 28, 2001

This appeal arises pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act). Following a contested case hearing held on June 27, 2001, the hearing officer determined that, consistent with the parties' stipulation, the respondent (claimant) reached maximum medical improvement (MMI) on October 9, 2000; that the claimant's impairment rating (IR) for his compensable injury of _____, is 17%, based on the report of Dr. H, the second designated doctor; and that the Texas Workers' Compensation Commission (Commission) did not abuse its discretion in appointing a second designated doctor. The appellant (carrier) contends on appeal that the Commission abused its discretion in appointing Dr. H because it failed to ask appropriate questions in its letter requesting clarification from Dr. V, the first designated doctor, and that the claimant's IR should be the 8% determined by Dr. V. The claimant's response meets the carrier's contentions and urges the sufficiency of the evidence to support the challenged determinations.

DECISION

Affirmed.

The carrier does not contend that Dr. H's IR is against the great weight of the medical evidence, as such. In fact, Dr. O reported to the carrier on March 8, 2001, that he reviewed Dr. H's report; that the report appropriately followed the Guides to the Evaluation of Permanent Impairment, third edition, second printing, dated February 1989, published by the American Medical Association (AMA Guides); and that he did not believe there was anything in the report that was contestable. Rather, the thrust of the carrier's appeal concerns the propriety of the Commission's having appointed the second designated doctor. The carrier contends that had the Commission asked the right questions of Dr. V in seeking clarification of his report, the appointment of Dr. H would not have occurred and that Dr. V's subsequent answers to the carrier's deposition upon written questions supports this assertion. The carrier concludes that Dr. H's report is not entitled to presumptive weight because Dr. H should not have been appointed.

It is not disputed that the Commission appointed Dr. V, who practiced medicine in another state where the claimant then resided, to determine the latter's IR for his October 1, 1998, low back injury. The claimant testified that he was only at Dr. V's office for 10 to 15 minutes, and that Dr. V did not examine him or measure his range of motion (ROM). Dr. V's Report of Medical Evaluation (TWCC-69) dated March 30, 2000, states that the claimant reached MMI on February 28, 2000, with an IR of 4%. Dr. V's extensive narrative report does not reflect the basis for the 4% IR. The report does state Dr. V's findings regarding lumbar ROM but does not mention either the number of measurements taken nor the use of a goniometer or other instrument nor does it contain a lumbar ROM chart (Figure 83c, AMA Guides). The report also does not reference Table 49 of the AMA Guides.

A Commission letter of July 11, 2000, to Dr. V posed five questions to Dr. V and asked him to review a June 22, 2000, letter from the claimant's current treating doctor, Dr. A, expressing disagreement with Dr. V's report for his failure to assess loss of ROM in accordance with the AMA Guides and failure to assign a 7% rating under Table 49 of the AMA Guides. Dr. V responded by writing "yes" beside the questions posed in the Commission's letter. He also wrote a letter to the Commission dated July 17, 2000, stating that he did perform ROM measurements, that he disagrees with Dr. A's 7% under Table 49 because the claimant had preexisting lumbar spine problems dating back to 1987 which require apportionment, and that he stands by his 4% rating. The Commission wrote to Dr. V on August 22, 2000, stating that he had failed to answer the last question in the Commission's July 11, 2000, letter concerning his review of Dr. A's critique. The Commission wrote to Dr. V again on November 16, 2000, advising him of the three elements of a lumbar spine rating, asking him to use the AMA Guides, and advising him that he may not apportion the IR. Dr. V responded on November 28, 2000, asking the Commission to appoint another designated doctor and stating that he would not accept anymore cases from the Texas workers' compensation system. In the meantime, Dr. A reported on November 9, 2000, that the claimant had reached MMI on that date with an IR of 21%. The first IR assigned to the claimant was the 6% rating assigned by Dr. K on October 8, 1999.

The Commission subsequently appointed Dr. H, whose TWCC-69 report and accompanying narrative report of January 24, 2001, state that the claimant has not reached MMI pending possible surgery. Dr. H requests that he be advised if the claimant has reached statutory MMI, in which case he will assign an IR. Dr. H's TWCC-69 dated February 9, 2001, states that the claimant reached statutory MMI on October 9, 2000, and that his IR is 17%.

In Texas Workers' Compensation Commission Appeal No. 93045, decided March 3, 1993, the Appeals Panel stated that "[t]he need or desirability for the Commission to select a second designated doctor should be very limited and restricted to a situation such as, for example, where an initially appointed doctor cannot or refuses to comply with the requirements of the 1989 Act." The application of this notion is illustrated in our decision in Texas Workers' Compensation Commission Appeal No. 960454, decided April 17, 1996, which reviews a number of decisions discussing, under the particular factual settings of each case, whether the Commission abused its discretion in appointing or failing to appoint a second designated doctor. With regard to the case at hand, the Appeals Panel stated in Texas Workers' Compensation Commission Appeal No. 960016, decided February 16, 1996, that "[a]n IR not calculated in accordance with the AMA Guides may not be adopted by the Commission. Texas Workers' Compensation Commission Appeal No. 951922, decided December 28, 1995." We are satisfied that the challenged determinations by the hearing officer are not so against the great weight and preponderance of the evidence as to be clearly wrong or manifestly unjust. In re King's Estate, 150 Tex. 662, 244 S.W.2d 660 (1951); Pool v. Ford Motor Company, 715 S.W.2d 629, 635 (Tex. 1986).

The decision and order of the hearing officer are affirmed.

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

MIKE HICKS
KEMPER INSURANCE
12377 MERIT, SUITE 4400
DALLAS, TEXAS 75251.

Phillip F. O'Neill
Appeals Judge

CONCUR:

Thomas A. Knapp
Appeals Judge

Michael B. McShane
Appeals Judge