APPEAL NO. 011607
FILED AUGUST 28, 2001

This appeal arises pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act). A contested case hearing was held on June 8, 2001. With regard to the issues before her, the hearing officer determined that the issues of whether the respondent (claimant) reached maximum medical improvement (MMI) and what is the impairment rating (IR) were not ripe for adjudication. The hearing officer ordered that claimant be referred to a second designated doctor appointed by the Texas Workers' Compensation Commission (Commission).

The appellant (carrier) appealed the hearing officer's determination, arguing that the great weight of medical evidence supports the designated doctor's medical report that the claimant reached MMI on May 1, 1998, with an IR of 6%. The claimant did not file a response to the appeal.

DECISION

Affirmed.

The hearing officer did not err in determining that the issues of MMI and IR were not ripe for adjudication and that a second designated doctor be appointed by the Commission. 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. If the great weight of the medical evidence contradicts the IR contained in the report of the designated doctor chosen by the Commission, the Commission shall adopt the IR of one of the other doctors.

The claimant testified that on _____, he was supporting an angle iron platform with his left hand when the angle iron platform slipped out of his hand and fell, striking him across his upper back and his neck. On October 6, 1997, the Commission informed the claimant that his recommendation for spinal surgery was denied based on a two to one decision against the spinal surgery by Dr. F and Dr. P. Dr. F recommended the claimant undergo a posterior cervical fusion (we are unable to determine why the Commission did not consider this a concurrence), and Dr. P opined that due to the claimant's "heavy smoking history," he did not recommend surgery.

On May 1, 1998, the claimant was examined by Dr. D for an independent medical examination for the carrier. Dr. D certified that the claimant reached MMI on May 1, 1998, with a 6% IR based on Table 49, Section (II)(B) of the Guides to the Evaluation of Permanent Impairment, third edition, second printing, dated February 1989, published by the American Medical Association (AMA Guides). (We note that Dr. D incorrectly referenced Table 49, Section (II)(B) for specific disorders of the cervical region instead of Section (II)(C) in his

report.) This report was apparently disputed and the designated doctor procedure was begun.

On June 23, 1998, the claimant was examined by the Commission-appointed designated doctor, Dr. A. In a narrative report dated June 23, 1998, Dr. A certified that the claimant reached MMI on May 1, 1998, with a 6% IR, according to Table 49, Page 73, Section (II)(B). (We note that Dr. A also incorrectly referenced Table 49, Section (II)(B) for specific disorders of the cervical region and subsequently corrected the reference to Table 49, Section (II)(C) for specific disorders of the cervical region.) Dr. A states the claimant has "old, longstanding, preexisting degenerative changes of multiple joints of the cervical spine" and that "the [loss of] range of motion [ROM] can not be related to the accident of May 27, 1997."

On March 15, 1999, the treating surgeon, Dr. C, again recommended surgery and Dr. F and Dr. P concurred with the recommended spinal surgery. On April 23, 1999, the Commission informed the claimant that the spinal surgery had been approved. We note that there is no stipulation or agreed date of statutory MMI in the record, however, the claimant apparently reached statutory MMI in early June 1999, based on the date of injury.

On July 9, 1999, the Commission sent a letter seeking clarification to Dr. A regarding medical reports and posing specific questions. In that letter, the Commission informed Dr. A that the "neck injury is part of the compensable injury even if the claimant had a prior condition that may have been pre-existing" and requested that Dr. A explain how the 6% IR was established from Table 49, Section (II)(B). On July 14, 1999, Dr. A responded that the additional medical records supplied by the Commission on July 9, 1999, did not change the opinions expressed in his medical evaluation of June 23, 1998. In addition, Dr. A stated that:

> "Subtitle II-B was a typographical error." If we combine the 14% [loss of ROM] impairment with the 6% impairment related to Table 49, we arrive at a whole body impairment of 19%. It was and still is my opinion that only the 6% impairment of Table 49, Subtitle II-C is attributable to the compensable injury of _____.

The claimant's approved cervical surgery was delayed due to medical and other problems. On August 9, 2000, the claimant underwent spinal surgery. On November 15, 2000, the Commission sent another letter with additional medical reports to Dr. A, seeking further clarification. On November 24, 2000, Dr. A responded that the information sent to him on November 15, 2000, confirmed his opinion that the claimant reached MMI on May 1, 1998, from an injury sustained on May 27, 1997, and that the surgery "was to relieve symptoms caused by progressive degenerative changes totally unrelated to the incident" of May 27, 1997. On April 5, 2001, the treating doctor, Dr. C, examined the claimant. Dr. C certified that the claimant reached MMI on April 5, 2001, with a 22% IR on a Report of Medical evaluation TWCC-69. (No worksheets or narrative were attached explaining how this IR was calculated.)

The Appeals Panel has held in limited cases that disputes regarding the designated doctor's certification of MMI and assigned IR, that the hearing officer had an option of going back to the designated doctor a second (or third) time for clarification, or to adopt the IR of another doctor which was valid as provided for in Section 408.125, or to consider the appointment of a second designated doctor if it was determined that the designated doctor was unable or unwilling to comply with the AMA Guides. *See* Texas Workers' Compensation Commission Appeal No. 990907, decided June 14, 1999; Texas Workers' Compensation Commission Appeal No. 93932, decided November 29, 1993. A designated doctor should not be replaced by a second designated doctor absent a substantial basis to do so. Normally, the appointment of a second designated doctor is appropriate only in those cases where the first designated doctor is unable or unwilling to comply with the required AMA Guides or requests from the Commission for clarification or if he or she otherwise compromises the impartiality demanded of the designated doctor. *See* Texas Workers' Compensation Commission Appeal No. 990186, decided March 11, 1999; Texas Workers' Compensation Commission Appeal No. 961228, decided August 8, 1996.

The hearing officer determined that Dr. A did not properly follow the AMA Guides, and that Dr. A refused to consider the compensable injury in ascertaining MMI and IR. The hearing officer opined that "the feelings of the designated doctor have been made known and he has refused to give as set out by the [AMA Guides]. To make him again address the issue would be futile and would be prejudicial to the claimant as it would only delay resolution of the issue." Also, the hearing officer determined that Dr. C's certification of MMI and assigned IR could not be adopted because she could not determine how the rating was calculated. The evidence sufficiently supports that the hearing officer considered, and rejected, other medical reports, in determining whether the IR of one of the other doctors could be adopted. Section 408.125(e).

It is the hearing officer, as the sole judge of the weight and credibility of the evidence (Section 410.165(a)), who resolves the conflicts and inconsistencies in the evidence (Garza v. Commercial Insurance Company of Newark, New Jersey, 508 S.W.2d 701 (Tex. Civ. App.-Amarillo 1974, no writ)), and determines what facts have been established from the conflicting evidence. St. Paul Fire & Marine Insurance Company v. Escalera, 385 S.W.2d 477 (Tex. Civ. App.-San Antonio 1964, writ ref'd n.r.e.). This is equally true of medical evidence. Texas Employers Insurance Association v. Campos, 666 S.W.2d 286 (Tex. App.-Houston [14th Dist.] 1984, no writ). The Appeals Panel will not disturb the challenged factual findings of a hearing officer unless they are so against the great weight and preponderance of the evidence as to be clearly wrong or manifestly unjust and we do not find them so in this case. 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.

Thomas A. Knapp
Appeals Judge

CONCUR:

Gary L. Kilgore
Appeals Judge

Robert W. Potts
Appeals Judge