APPEAL NO. 012114
FILED OCTOBER 3, 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 July 26, 2001. On the sole issue before him, the hearing officer determined that the respondent's (claimant) impairment rating (IR) is 31%, as certified by the designated doctor, Dr. C, in his Report of Medical Evaluation (TWCC-69) dated April 30, 1999. The appellant (carrier) appealed, arguing that the designated doctor's 12% amended IR was proper and should have been accorded presumptive weight. The claimant responded, urging affirmance.

DECISION

Affirmed.

The hearing officer did not err by finding that the claimant's proper IR was 31%, in accordance with the second report of the designated doctor. Although findings of fact and conclusions of law were not made regarding the lack of contrary medical evidence, nor was the term "presumptive weight" articulated, as is the better practice, these findings and conclusions were certainly made by implication, and we will affirm.

The pertinent facts are contained in the documentary evidence, as no testimony was offered at the hearing. There are some gaps in this record. The parties agreed at the outset that the compensable injury of _____, included the claimant's left shoulder and neck. It was further agreed that the claimant reached statutory maximum medical improvement (MMI) on March 5, 1999. There was argument, but no evidence, that the claimant's treating doctor rendered an IR which was disputed.

It was agreed that Dr. C was appointed as designated doctor by the Texas Workers' Compensation Commission (Commission). On April 26, 1999 (one and one half months after statutory MMI), Dr. C certified the claimant with a 13% IR. He noted in his report that the claimant had had two shoulder surgeries. Although Dr. C took measurements for range of motion (ROM) of the cervical spine at the time of his examination, he did not award any impairment for the claimant's neck for the reason that he did not believe that the neck was part of the compensable injury; however, he said that he included the ROM percentages and schedule so that they could be administratively added in if it were held that the neck was part of the injury. He specifically noted that the ROM examination was valid and was not undermined by any Waddell's findings. This report made no mention of any suboptimal effort by the claimant.

On April 30, 1999, Dr. C issued an amended TWCC-69 which included his previous cervical spine ROM figures and resulted in an IR certification of 31%. He also included a specific 4% IR from Table 49 of the Guides to the Evaluation of Permanent Impairment, third edition, second printing, dated February 1989, published by the American Medical Association (AMA Guides). He recited that he did so after receiving instruction from the

Commission that the injury included the cervical area. In his narrative report, Dr. C noted that the claimant's restrictions were from "suboptimal effort" which, while not voluntary, was likely due to considerable pain, and might improve as the pain lessened. Strangely, this letter concludes by noting that the cervical spine was not included pending administrative determination (which was clearly not the case).

The Commission contacted Dr. C on June 29, 1999, stating that the carrier had concerns about the claimant's IR. Specifically, Dr. C was asked for his detailed ROM schedules, and whether the claimant gave optimal effort on cervical ROM testing, or whether consideration had been given for the fact that the claimant was right-hand dominant. Dr. C responded by asserting that a reduction for nonpreferred extremity was discretionary according to an Appeals Panel decision, but that if the Commission thought it should be reduced, then the overall whole body IR would be 30%. He correctly noted that the ROM schedules had been provided with his original report, but he included them again. He re-affirmed that it was his opinion that the cervical ROM testing was valid. No amended TWCC-69 was provided with this letter.

On August 3, 2000, Dr. C reexamined the claimant and issued a final TWCC-69, dated August 13, 2000, certifying a 12% IR. The sole indicator of any basis for this examination is a statement in Dr. C's narrative that he was reexamining the claimant according to a July 2000 letter from the Commission. The record was not favored with a copy of this letter. In this report, Dr. C held that the ROM measurements were invalid, but he apparently also discounted any specific IR for the cervical area. This triggered yet another contact from the Commission, from a benefit review officer soliciting an amended TWCC-69 to restore the 4% Table 49 IR. Dr. C's response was to reiterate his very first belief that the cervical condition was not related to the injury, and he declined further amendment.

Other IRs in evidence include a March 2000 TWCC-69 by Dr. J, a doctor for the carrier, assessing a 13% IR, and a February 2001 evaluation performed by another doctor hired by the claimant, Dr. CR, finding a 24% IR.

Under these facts, the hearing officer's disallowance of the August 2000 report of Dr. C was appropriate. It was likewise proper for him to credit the 31% amendment, which had been done in order to include all of the compensable injury. A designated doctor's report may be amended for a proper reason and within a reasonable amount of time; the determination as to whether the report is amended for a proper reason and within a reasonable time is essentially a question of fact. Texas Workers' Compensation Commission Appeal No. 960888, decided June 18, 1996. Clearly, amending to include the entire injury, within a few days of a first report, is a proper reason. However, once valid ROM test results are achieved consistent with the AMA Guides, substitution of invalid ROM results from a subsequent examination is not a proper basis for amending IR certification. *See* Texas Workers' Compensation Commission Appeal No. 951142, decided August 28, 1995. Dr. C's 12% IR report was well over a year after statutory MMI. It resurrects Dr. C's original opinion, set aside by the instruction to the contrary from the Commission, that the

claimant's injury does not include the cervical area.

As to the assertion that Dr. C cast doubt on the validity of the claimant's first cervical ROM testing, given an obvious typographical error in the narrative to Dr. C's 31% IR (stating both that cervical measurements were and were not included), the hearing officer was not required to credit the observation, made for the first time in that report, that the claimant's ROM was in some respect "suboptimal." The validity of those measurements was actually reasserted by Dr. C when he responded to the Commission's June 1999 letter, after he had been directly asked if the claimant's measurements had not been optimal.

As the hearing officer noted in argument on the evidence, although the word "clarify" may be used in repeated correspondence to the designated doctor, such request may well not be to seek clarification but to impact a disliked IR. We observe that the mechanism for evaluating the accuracy of the IR is set out in Section 408.125(e); the designated doctor's report is entitled to presumptive weight unless it is outweighed by a "great weight" of contrary medical evidence. This is more than a preponderance, and more than a mere difference in medical opinion.

The hearing officer obviously believed that there was no valid reason for Dr. C to revisit his report over a year after statutory MMI was achieved and a valid report was issued. The hearing officer's factual determinations that Dr. C based his 31% IR certification on valid ROM measurements obtained on April 21, 1999, and that it was not appropriate for Dr. C to remeasure ROM more than a year after obtaining valid measurements (and thus the resulting amendment was not done for a proper purpose) are supported by the record and are not so against 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).

The hearing officer's decision and order are affirmed.

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

JIM ADAMS, ESQUIRE
450 GEARS ROAD, SUITE 500
HOUSTON, TEXAS 77067.

Susan M. Kelley
Appeals Judge

CONCUR:

Elaine M. Chaney
Appeals Judge

Michael B. McShane
Appeals Judge