

APPEAL NO. 020125
FILED MARCH 5, 2002

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 December 13, 2001. The hearing officer determined that the respondent (claimant) reached maximum medical improvement (MMI) on November 17, 2000, based on a stipulation, and that the claimant's impairment rating (IR) is 17%. The appellant (carrier) appealed, arguing that the hearing officer's determination that the claimant's IR is 17% is against the great weight of evidence, manifestly unjust, and must be overturned. The claimant did not file a response.

DECISION

Affirmed.

The parties stipulated that on _____, the claimant sustained a compensable injury. On January 11, 2001, the designated doctor, Dr. B, certified that the claimant reached MMI on December 7, 2000, with a 15% IR. Dr. B's report dated January 11, 2001, reflects that the claimant complained of abdominal, chest, and shoulder pain, and "[r]ight shoulder limited range of motion [ROM] due to chest pain." On August 15, 2001, the carrier filed a Payment of Compensation or Notice of Refused/Disputed Claim (TWCC-21) disputing that "the injury of _____ extends to include the right shoulder." On October 10, 2001, the Texas Workers' Compensation Commission (Commission) sent a letter to Dr. B requesting that he "provide a [Report of Medical Evaluation] TWCC-69 to exclude the right shoulder in case it [sic] later determined that it is not a part of the compensable injury" and to "explain the 15% [IR]." On October 18, 2001, Dr. B provided a TWCC-69 that reflected a 10% IR, excluded the right shoulder, and responded that the 15% IR assigned was "a typographical error from the dictation regarding the percentage. . . . [and] should have been 17% [IR]." The medical reports in evidence indicate that Dr. B examined the claimant for an IR according to the Guides to the Evaluation of Permanent Impairment, third edition, second printing, dated February 1989, published by the American Medical Association (AMA Guides). Dr. B assigned a 10% IR for the thoracic nerve and 8% IR for the right upper extremity, and combined the ratings according to the combined values chart for a 17% IR. On November 7, 2001, a benefit review conference was held on the disputed issues of MMI and IR without resolve.

The carrier contends on appeal that the designated doctor's inclusion of impairment for loss of ROM in the right shoulder is erroneous since the right shoulder is not part of the compensable injury. The carrier cites Texas Workers' Compensation Commission Appeal No. 990530, decided April 26, 1999, to support its contention that the designated doctor may not rate a noninjured body part when referred pain limits ROM. We do not agree. Our review of Appeal No. 990530 indicates that the designated doctor did not properly apply the provisions of the AMA Guides in assigning an IR for specific disorders from Table 49, and that the designated doctor assigned the higher IR from "some other part of the AMA

Guides” without further explanation. In the instant case, the designated doctor’s medical report dated January 11, 2001, reflects that the claimant complained of “right shoulder limited [ROM] due to chest pain.” In addition, the Commission asked the designated doctor whether the IR would change if the lower and upper back pain for six months and disc bulging at L4-5 were found to be compensable. The designated doctor responded that the “[i]f there is documented pain and muscle spasm for six months with none to minimal degenerative changes, the rating applies according to the AMA Guides table 49 IIB, page 73.” In Texas Workers’ Compensation Commission Appeal No. 982080, decided October 14, 1998, the claimant had a sternal fracture and complained of pain to his shoulders, thoracic spine, and anterior chest area. The designated doctor included the shoulders and thoracic area in assigning an IR, although these areas were not primarily injured. The carrier contended that the shoulders were not part of the claimant’s injuries and should not be included in the IR. The Appeals Panel held that “when there is a question on proper use of the AMA Guides, we have encouraged hearing officers to make determinations on whether the designated doctor properly applied the provisions of the AMA Guides, whether the designated doctor’s report is entitled to presumptive weight, and whether the great weight of the other medical evidence is contrary to the report of the designated doctor.”

The hearing officer did not err in determining that the claimant’s IR is 17%. The report of the designated doctor is entitled to presumptive weight and the Commission is to base the IR on that report unless it is contrary to the great weight of the other medical evidence. Section 408.125(c). The hearing officer determined that the designated doctor’s IR is not contrary to the great weight of the other medical evidence, and that “the designated doctor properly responded to questions regarding the [IR] he issued on January 11, 2001 and changed a typographical error in the rating.”

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). We are satisfied that the evidence is sufficiently supportive of the challenged determination. Cain v. Bain, 709 S.W.2d 175, 176 (Tex. 1986).

The decision and order of the hearing officer are affirmed.

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

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Philip F. O'Neill
Appeals Judge

CONCUR:

Chris Cowan
Appeals Judge

Susan M. Kelley
Appeals Judge