APPEAL NO. 021394
FILED JULY 24, 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 May 1, 2002. The hearing officer determined that the first designated doctor had a disqualifying association, as defined by Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 126.10(a) (Rule 126.10(a)), which necessitated the selection of another designated doctor by the Texas Workers' Compensation Commission (Commission); that the correct date the respondent (claimant) reached maximum medical improvement (MMI) is September 2, 2001, as certified by the second designated doctor; that the claimant's impairment rating (IR) is 16%, as certified by the second designated doctor; and that the claimant had disability from January 15, 2001, to September 2, 2001, as the result of the _____, compensable injury. The appellant (carrier) appeals those determinations and the claimant responds.

DECISION

Affirmed.

On _____, the claimant sustained a compensable injury. During the course of treatment for her injury, the claimant's treating physician referred her to another doctor. On November 16, 1999, the referral doctor examined the claimant and certified her at MMI, assigning an IR of 0%. The claimant was then sent to a designated doctor who first examined the claimant on December 7, 1999. He also certified MMI and assigned her an IR of 0%. However on January 18, 2001, the claimant had spinal surgery and was sent back to the designated doctor on June 27, 2001, for a reexamination. The designated doctor amended his previous certification and determined that the claimant was not at MMI. On August 24, 2001, the designated doctor again examined the claimant, certified her at MMI on that date, and assigned her an IR of 10%. Three months later, the claimant complained about a disqualifying association between the designated doctor and the doctor that she was referred to in November 1999. She testified that she knew the designated doctor and referral doctor were partners in the same medical clinic the first time she saw the designated doctor at that clinic in December 1999.

The essence of the carrier's complaint centers on the claimant's lack of timely raising the disqualifying association. It is undisputed that the designated doctor and the referral doctor shared office space and revenues from their practice. And although the carrier argues that there was in fact no actual influence, and the two doctors were unaware of each other's involvement, it is undisputed from review of the medical narrative attached to the designated doctor's report, that the designated doctor had in fact reviewed the medical records from his partner, the referral doctor, prior to issuing his opinions.

Rule 126.10(a)(4)(A)(ii) provides that a disqualifying association is any association which may include shared investment or ownership interest. Rule 126.10 became effective for all designated doctor examinations on or after July 17, 2001. Consequently, when the designated doctor examined the claimant and certified her at MMI on August 24, 2001, that rule was in effect. So at the time of this examination the first designated doctor had a disqualifying association, within the scope of Rule 126.10(a) (a shared investment or ownership interest), which necessitated the selection of another designated doctor by the Commission.

The carrier contends that because the claimant knew of the disqualifying association for at least two years and yet did not object, she waived the right to claim the first designated doctor had a disqualifying association. However, prior to the effective date of Rule 126.10(a), there was nothing clearly giving rise to a dispute and the hearing officer could believe that on the facts of this case the claimant did not waive her opportunity to raise the first designated doctor's disqualifying relationship. *See* also, Texas Workers' Compensation Commission Appeal No. 981714, decided September 11, 1998. Therefore, the hearing officer appropriately determined that the first designated doctor is disqualified to serve as the Commission-selected designated doctor in this case. (See Rule 130.6(b)(3)).

With respect to the hearing officer's other determinations, the second designated doctor certified that claimant reached MMI on September 2, 2001, and assigned the claimant an IR of 16%. The Commission shall base its determinations as to whether an employee has reached MMI and as to the IR on the designated doctor's report, "unless the great weight of the other medical evidence is to the contrary." Section 408.125(e). The hearing officer, as finder of fact, is the sole judge of the weight and credibility of the evidence. Section 410.165(a). The hearing officer's decision is 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).

Accordingly, the hearing officer's decision and order are affirmed.

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

NICHOLAS PETERS
12801 NORTH CENTRAL EXPRESSWAY, SUITE 100
DALLAS, TEXAS 75243.

_____
Roy L. Warren
Appeals Judge

CONCUR:

_____
Susan M. Kelley
Appeals Judge

_____
Robert W. Potts
Appeals Judge