APPEAL NO. 022066
FILED OCTOBER 3, 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 July 18, 2002. The hearing officer determined that (1) the Texas Workers' Compensation Commission (Commission) did not abuse its discretion by selecting a second designated doctor; and (2) the respondent's (claimant) impairment rating (IR) is 29%, as certified by the second designated doctor. The appellant (carrier) appeals these determinations, asserting that the hearing officer erred by not adopting the first designated doctor's certification. The claimant did not file a response.

DECISION

Affirmed.

The evidence shows that the claimant sustained a compensable injury to his low back on _____. The parties stipulated that the claimant reached maximum medical improvement (MMI) on the statutory date of October 2, 2000. On January 4, 2001, the claimant was examined by a Commission-appointed designated doctor. The designated doctor's report indicated that the claimant had a diffuse bulge at L5-S1 with concordant pain and was scheduled for spinal surgery. The designated doctor certified the claimant with a 12% IR, comprised of 5% for loss of range of motion (ROM) and 7% for an unoperated disc lesion under Table 49 (II)(C) of the Guides to the Evaluation of Permanent Impairment, third edition, second printing, dated February 1989, published by the American Medical Association (AMA Guides). The claimant underwent spinal surgery on June 5, 2001. On December 19, 2001, the Commission sent a request for clarification to the designated doctor questioning whether the claimant's surgery would give rise to a change in the previously certified IR. In response, the Commission was informed that the designated doctor had passed away. The Commission subsequently appointed a second designated doctor, Dr. B. Dr. B examined the claimant on March 6, 2002, and certified the claimant with a 29% IR, comprised of 21% for loss of ROM and 10% for a surgically treated disc lesion with residual under Table 49 (II)(e) of the AMA Guides. The carrier's peer review doctor challenged Dr. B's rating for loss of ROM, asserting that such rating was based upon a "less than adequate effort."

The carrier asserts that the Commission abused its discretion in appointing a second designated doctor because clarification of the first designated doctor's report was not needed. The carrier argues that the initial designated doctor was aware that the claimant was scheduled for spinal surgery at the time of his certification and gave the claimant the proper rating. While it is true that the designated doctor was aware of the claimant's impending surgery, we note that the initial report is silent with regard to the need for further evaluation following such surgery. In the absence of a clear indication, a dispute arose between the parties regarding the need for further evaluation, prompting the Commission to issue a request for clarification. Under the

circumstances, we cannot conclude that the Commission abused its discretion in appointing a second designated doctor.

The carrier also asserts that it was error for the Commission to request clarification of the initial designated doctor's report because spinal surgery was not contemplated prior to statutory MMI. In applying Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 130.6(i) (Rule 130.6(i)), regarding requests for clarification of the designated doctor's certification, we have said that active consideration of spinal surgery at the time of statutory MMI is no longer a prerequisite for a change in the designated doctor's opinion. *See* Texas Workers' Compensation Commission Appeal No. 021437, decided June 26, 2002. Accordingly, it was not improper for the Commission, in this case, to question whether a change in the initial IR certification was warranted.

Finally, the carrier asserts that Dr. B's IR certification is contrary to the great weight of the other medical evidence. We view the other medical records as representing differences of medical opinion which do not rise to the level of the great weight of medical evidence contrary to Dr. B's report. The hearing officer's IR determination 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).

The decision and order of the hearing officer are affirmed.

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

JEFF AUTREY
ROAN & ATREY
400 WEST 15TH STREET
AUSTIN, TEXAS 78701.

_____
Gary L. Kilgore
Appeals Judge

CONCUR:

_____
Elaine M. Chaney
Appeals Judge

_____
Veronica Lopez
Appeals Judge