APPEAL NO. 030593
FILED APRIL 28, 2003

This appeal arises pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq*. (1989 Act). A contested case hearing (CCH) was held on February 10, 2003. The appellant/cross-respondent (claimant) appeals the hearing officer's determinations that the respondent/cross-appellant (carrier) did not waive the right to dispute the claimant's impairment rating (IR) and that the claimant is not entitled to second or third quarter supplemental income benefits (SIBs). The carrier responds, urging affirmance of those determinations.

The carrier appeals the hearing officer's determinations that the claimant's IR is 22% as assigned by the Texas Workers' Compensation Commission (Commission)-selected designated doctor; that the claimant is entitled to first quarter SIBs; and that the carrier waived the right to dispute the claimant's entitlement to first quarter SIBs. The claimant responds, urging affirmance of those determinations.

DECISION

Affirmed.

IMPAIRMENT RATING

A. Carrier Did Not Waive the Right to Contest IR.

The claimant contends that the hearing officer erred in determining that the carrier did not waive the right to dispute the claimant's IR. Previously we have determined that a carrier waives its right to dispute the IR by not raising the issue until after it had already paid impairment income benefits (IIBs) and had begun to pay SIBs. *See*, Texas Workers' Compensation Commission Appeal No. 960321, decided April 2, 1996, and the cases cited therein. In this case the hearing officer determined that the carrier "has continually complained about the 22% rating" and that the carrier "did not waive the right to seek a determination of IR." In Appeal No. 960321, *supra,* we found, based on the statute and implementing rules, that a carrier's failure to dispute the IR at "natural junctures," that is, at the time IIBs were due, when there was a material change in the claimant's condition, or when the entitlement to first quarter SIBs is being adjudicated. The carrier is precluded from disputing IR as part of its dispute over entitlement to later quarter SIBs. The Dispute Resolution Information System (DRIS) notes in this case indicate that on June 20, 2001, the carrier contacted the Commission to dispute the designated doctor's assignment of 22% IR. On July 13, 2001, the DRIS notes acknowledge receipt of a Request for Benefit Review Conference (BRC) (TWCC-45). Apparently on July 24, 2001, a letter requesting clarification was sent to the designated doctor and on August 7, 2001, he amended his IR assignment to 9%. DRIS notes from November and December 2001 indicate that the carrier is denied that the claimant's injury extends to the cervical and thoracic spine so another BRC was

scheduled. The extent-of-the injury issue was resolved at a CCH and affirmed on appeal and is currently pending in district court. At the CCH on the issues before us, the adjuster for the carrier testified that he has continually disputed the 22% IR and that he has asked that letters requesting clarification be sent to the designated doctor. The DRIS notes from October 1, 2002, indicate that after the case went through the dispute process, the designated doctor changed the IR back to 22% to include the cervical and thoracic spine and the adjuster called wanting to know what happened to the dispute of IR. The case was again set for a CCH and the DRIS notes reflect that the carrier's attorney called the Commission on December 20, 2002, to inform the Commission that the adjuster had filed a dispute regarding IR and that it should have been discussed at the BRC. Consequently, the hearing officer added the IR issue at the CCH. We conclude that the hearing officer's determinations that the carrier has continually complained about the 22% rating and that the carrier "did not waive the right to seek a determination of IR" is sufficiently supported by the record and 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).

B. Claimant's IR is 22%.

The carrier contends that the hearing officer erred in adopting the IR assigned by the designated doctor. Section 408.125(e) provides that where there is a dispute as to the IR, the report of the Commission-selected designated doctor is entitled to presumptive weight unless it is contrary to the great weight of the other medical evidence. Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 130.6(i) (Rule 130.6(i)) provides that the designated doctor's response to a request for clarification is also considered to have presumptive weight, as it is part of the designated doctor's opinion. *See also*, Texas Workers' Compensation Commission Appeal No. 013042-s, decided January 17, 2002. Whether the great weight of the other medical evidence was contrary to the opinion of the designated doctor was a factual question for the hearing officer to resolve. We perceive no error in the hearing officer's determination that the claimant's IR is 22%, in accordance with the opinion of the designated doctor.

SIBs ENTITLEMENT

A. Carrier Waived the Right to Dispute the First Quarter.

The carrier contends that it did not waive the right to contest SIBs entitlement in this case. Rule 130.108(c) provides that a carrier waives its right to contest entitlement to first quarter SIBs if it does not request a BRC within 10 days of its receipt of the notice of determination of entitlement (EES-22) from the Commission. The hearing officer did not make an express finding regarding the date the carrier received the EES-22. However we note the EES-22 was dated on May 13, 2002, and DRIS notes from the Commission indicate that the adjuster called the Commission to inquire about the EES-22 letter on May 15, 2002. The DRIS notes also indicate that the Commission received a request for BRC from the carrier to contest entitlement to SIBs on July 29, 2002. There is evidence to support the hearing officer's determination that the carrier

did not timely request a BRC within 10 days of receiving the EES-22 to dispute the claimant's entitlement to first quarter SIBs. Cain, *supra*.

B. Claimant Is Not Entitled to Second or Third Quarter SIBs.

At the hearing, it was undisputed that the claimant had not returned to work and had not documented a job search during the relevant qualifying periods. The claimant was basing his entitlement to SIBs for the disputed quarters on an assertion of total inability to work. Rule 130.102(d)(4) provides that an injured employee has made a good faith effort to obtain employment commensurate with his ability to work if the employee has been unable to perform any type of work in any capacity, has provided a narrative report from a doctor which specifically explains how the injury causes a total inability to work, and no other records show that the injured employee is able to return to work. The hearing officer found that the treating doctor's medical reports were insufficient to constitute a narrative report which specifically explained how the claimant's compensable injury caused a total inability to work for the period of time under review. The hearing officer additionally explained why he found the doctor's medical reports not to be credible and therefore failed to constitute a sufficient medical record which specifically explained how the compensable injury prevented the claimant from returning to any type of employment. A review of the record does not indicate that the hearing officer improperly applied the applicable rule.

Whether a claimant is entitled to SIBs based on having no ability to work is a factual determination for the hearing officer to resolve. The hearing officer is the sole judge of the relevance, materiality, weight, and credibility of the evidence presented at the hearing. Section 410.165(a). The record in this case presented conflicting evidence for the hearing officer to resolve. In considering all the evidence in the record, we cannot agree that the findings of the hearing officer are so against the great weight and preponderance of the evidence as to be manifestly wrong or unjust. In re King's Estate, 150 Tex. 662, 244 S.W.2d 660 (1951).

We affirm the hearing officer's decision and order.

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

ROBERT L. WALLACE
1717 EAST LOOP, SUITE 333
HOUSTON, TEXAS 77029.

_____
Roy L. Warren
Appeals Judge

CONCUR:

_____
Elaine M. Chaney
Appeals Judge

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Edward Vilano
Appeals Judge