APPEAL NO. 030852
FILED MAY 22, 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 was held on March 24, 2003. With respect to the issues before him, the hearing officer determined that the appellant (claimant) reached maximum medical improvement (MMI) on June 8, 2000, with an impairment rating (IR) of 12%, as certified by the designated doctor in his second report. In her appeal, the claimant asserts error in the hearing officer's having given presumptive weight to the designated doctor's second report and asks that we either adopt the 27% IR that the designated doctor certified in his third report or the 60% IR certified by her treating doctor. In its response to the claimant's appeal, the respondent (carrier) urges affirmance.

DECISION

Reversed and rendered.

The parties stipulated that the claimant sustained a compensable injury on _____; that Dr. M was selected by the Texas Workers' Compensation Commission (Commission) to serve as the designated doctor; and that the date of statutory MMI in this case is August 17, 2001. On June 8, 2000, Dr. M conducted his first designated doctor examination of the claimant. In a Report of Medical Evaluation (TWCC-69) of the same date, Dr. M certified that the claimant reached MMI on the date of the examination, June 8, 2000, with an IR of 10%. The narrative report demonstrates that the 10% IR was comprised of 4% for a specific disorder of the cervical spine, 2% for loss of cervical range of motion (ROM), and 4% for loss of right shoulder ROM.

On July 5, 2001, the Commission sent a letter of clarification to the designated doctor, which forwarded medical reports to him and asked him to consider the effect, if any, of those reports on his date of MMI and IR. On July 31, 2001, the designated doctor examined the claimant for a second time for the purpose of determining her MMI date and IR. In his TWCC-69, Dr. M again certified that the claimant's MMI date was June 8, 2000, stating that he could not change the MMI date. However, he increased her IR to 12%, which is comprised of 3% for loss of cervical ROM, 5% for loss of right shoulder ROM, and 4% for a specific disorder of the cervical spine. On October 3, 2001, the Commission sent a second letter of clarification to the designated doctor specifically asking why he had stated that he could not change the claimant's date of MMI. On October 9, 2001, the designated doctor responded that he did not change the claimant's date of MMI because by the time of his second evaluation of the claimant her condition had deteriorated despite her continued treatment and thus, he did not believe that a later date of MMI was indicated. He concluded his response by reaffirming that in his medical opinion, the claimant's MMI date is June 8, 2000, and her IR is 12%.

On October 19, 2001, the claimant underwent right shoulder surgery as treatment for her compensable injury. The claimant developed a frozen shoulder following her surgery. On October 21, 2002, the Commission sent a third letter of clarification to the designated doctor asking him to review the operative report and other medical records and to determine if they change his opinion on either MMI or IR. On November 8, 2002, the designated doctor examined the claimant for a third time. In his narrative report, Dr. M again stated that he would not change the June 8, 2000, date of MMI; however, he increased the claimant's IR to 27%. The 27% is comprised of 6% for loss of cervical ROM, 4% for a specific disorder of the cervical spine, and 17% loss of right shoulder ROM due to the frozen shoulder. The designated doctor was asked if a rating should be assigned for reflex sympathetic dystrophy (RSD) and he stated that he was not sure the claimant had RSD. On October 15, 2001, the claimant's treating doctor, Dr. D, certified that the claimant had reached statutory MMI and assigned a 60% IR, which was comprised of 7% for loss of cervical ROM, 13% for loss of ROM in the right shoulder, and 50% for RSD.

The hearing officer gave presumptive weight to the designated doctor's second report and determined that the claimant's MMI date is June 8, 2000, and that her IR is 12%. The hearing officer acknowledged Appeals Panel decisions that have interpreted Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 130.6(i) (Rule 130.6(i)) and state that a designated doctor's response to a request for clarification is to be given presumptive weight. Nevertheless, he determined that the 27% IR "cannot be adopted, because of internal conflict." The hearing officer did not further identify the nature of the internal conflict that prevented him from adopting the 27% IR. He did however state that "[f]rom the evidence, it appears that [Dr. M] was browbeaten into issuing another report, when he did not feel it appropriate to do so." Again, the hearing officer does not specifically identify the evidence that he believes demonstrates that Dr. M was "browbeaten" into changing his IR and Dr. M's continued insistence that the claimant reached MMI on June 8, 2000, even after repeated requests to reconsider the MMI date, seem to demonstrate that had Dr. M felt it "inappropriate" to change the IR he would not have done so.

In this instance, the Commission sought clarification from the designated doctor of the effects of the claimant's surgery on her IR. The fact that the shoulder surgery occurred after statutory MMI does not mean that it is not properly considered in determining the IR. *See* Texas Workers' Compensation Commission Appeal No. 013042-s, decided January 17, 2002, and Texas Workers' Compensation Commission Appeal No. 022618, decided November 27, 2002. Pursuant to Rule 130.6(i) the 27% IR was entitled to presumptive weight and the hearing officer should have adopted that IR unless the great weight of the other medical evidence was contrary thereto.

The hearing officer alternatively found that if the 27% IR in the designated doctor's third amended report was entitled to presumptive weight, he still would have found that the great weight of the other medical evidence was contrary thereto and adopted the 12% IR. In explaining his decision in that regard, the hearing officer noted that the November 8, 2002, report was "based on an evaluation more than a year after

statutory MMI, and included a condition of frozen shoulder that is not a permanent condition, but instead is due to a failure to properly rehabilitate the joint after surgery, that was performed after statutory MMI." As we noted above, the fact that the surgery occurred after statutory MMI is of no consequence since the Commission adopted Rule 130.6(i), which necessitated that the Appeals Panel abandon the inquiry of whether an amendment to a designated doctor's report was made within a reasonable time and for a proper purpose. Appeal No. 013042-s, *supra*. As to the assertion that the frozen shoulder should not have been rated because it was not a "permanent" condition, we note that the decision of what rating to assign for the loss of ROM in the right shoulder required that the designated doctor exercise his medical judgment. Dr. M determined that it was appropriate to assign a 17% IR for loss of right shoulder ROM, while Dr. O, who conducted a peer review of Dr. M's second and third reports, opined that a rating should not have been assigned for the loss of ROM resulting from the frozen shoulder because it was not a permanent condition. Dr. O's opinion represents nothing more than a difference of medical opinion that simply does not rise to the level of the great weight of the other medical evidence contrary to Dr. M's amended report and the 27% IR. To the contrary, we have long held that by giving presumptive weight to the designated doctor, the 1989 Act provides a mechanism for accepting the designated doctor's resolution of such differences. Texas Workers' Compensation Commission Appeal No. 001659, decided August 25, 2000; Texas Workers' Compensation Commission Appeal No. 001526, decided August 23, 2000.

Finally, the hearing officer noted in Finding of Fact No. 5 that the "narrative report indicates figures for cervical examination that are extremely unlikely, and the supporting worksheets were not attached, as they were for the previous examinations." This finding is again premised upon observations of Dr. O in the peer review of Dr. M's rating. Specifically, Dr. O noted that the claimant's cervical ROM deteriorated with each successive examination. Thus, Dr. O opined that the claimant did not give maximal effort in testing and that "there are a number of secondary gain issues." Dr. O also called into question the cervical ROM figures stating that although the designated doctor reported that he measured ROM three times Dr. O "had difficulty accepting that this lady had cervical flexion exactly 60° on three successive trials of [ROM] testing." As the hearing officer noted, the designated doctor did not include a ROM worksheet with the third amended report and, as such, the applicability of Dr. O's critique of the third report cannot be verified. However, the ROM worksheet for the second report, the report adopted by the hearing officer, was included. That worksheet shows cervical flexion ROM of 60° on three successive trials; thus, Dr. O's criticism would be applicable to the report adopted by the hearing officer. In any event, Dr. O's criticism of Dr. M's cervical ROM rating is again attributable to the fact that he believes that the ROM testing was not valid and that the claimant did not give maximal effort in cervical ROM testing. The designated doctor could have invalidated the claimant's ROM if he had questions about its reliability or if he believed that the claimant did not give a full effort in ROM testing. However, he did not do so and we cannot agree that Dr. O's opinion constitutes the great weight of the other medical evidence contrary to the designated doctor's third report. Rather, it represents a difference of medical opinion that does not rise to the

necessary level to defeat the presumptive weight given to the designated doctor's third report and his 27% IR. Appeal Nos. 001659 and 001526, *supra.*

The hearing officer's determination that the claimant reached MMI on June 8, 2000, as certified by the designated doctor, is affirmed. His determination that the claimant's IR is 12% is reversed and a new decision rendered that the claimant's IR is 27%, as certified by the designated doctor in his third amended report, which is entitled to presumptive weight pursuant to Rule 130.6(i), because the great weight of the other medical evidence is not contrary thereto. Accrued and unpaid benefits are to be paid in a lump sum with interest.

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

CORPORATION SERVICE COMPANY
800 BRAZOS, SUITE 750, COMMODORE 1
AUSTIN, TEXAS 78701.

_____
Elaine M. Chaney
Appeals Judge

CONCUR:

_____
Michael B. McShane
Appeals Panel
Manager/Judge

_____
Robert W. Potts
Appeals Judge