APPEAL NO. 031336
FILED JULY 14, 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 initially held on August 22, 2002. In Texas Workers' Compensation Commission Appeal No. 022330, decided October 30, 2002, the Appeals Panel remanded the case for the claimant to be reevaluated by the designated doctor in accordance with the designated doctor's expressed desire. In our decision we indicated what information was to be given to the designated doctor.

The hearing officer complied with the remand and the designated doctor's report dated December 10, 2002, was admitted as Hearing Officer's Exhibit No. 4. A hearing on remand was continued from February 4, 2003, and concluded on April 25, 2003.

At the hearing on remand, the hearing officer determined that the claimant's date of maximum medical improvement (MMI) was December 20, 2001, and that the claimant's impairment rating (IR) was 20% as assessed by the designated doctor, whose opinion was not contrary to the great weight of the other medical evidence. The hearing officer also determined that the claimant had disability from November 17, 2000, through August 22, 2002, the date of the original CCH.

The carrier appeals not only the decision in this case, but also seeks to relitigate the claimant's cervical spinal surgery as "unapproved and unnecessary," and further asserts that the hearing officer (and the Appeals Panel) erred "in failing to apply clear Supreme Court authority to this case," (citing Lumbermens Mutual Casualty Co. v. Manasco, 971 S.W.2d 60 (Tex. 1998)). The claimant also appeals the hearing officer's decision on the basis that there should be a later MMI date with a 36% IR, as assessed by another doctor. The claimant responded to the carrier's appeal and although the carrier's cover letter states a response to the claimant's appeal is attached, only two additional copies of the request for review were attached.

DECISION

Affirmed.

The background facts and chronology of the various medical reports are set out in Appeal No. 022330, *supra*, and will not be repeated here other than to note that the designated doctor, in response to a deposition on written questions, expressed a desire to reevaluate the claimant. As we indicated in Appeal No. 022330, it was hard to determine what the "last valid certification" was under the circumstances presented.

As indicated, the hearing officer complied with the remand and the designated doctor, in his report of December 10, 2002, noted this was his third examination of the claimant, certified MMI on December 20, 2001, (as he had in a prior report), and

assessed a 20% IR based on 7% impairment from Table 49, Section II(D) (a surgically treated cervical disc lesion) of the Guides to the Evaluation of Permanent Impairment, third edition, second printing, dated February 1989, published by the American Medical Association, and 14% impairment for loss of range of motion of the cervical spine, combined to form the 20% IR.

The carrier's first point, listed as "Point of Error No. Four," seeks to incorporate its appeal and arguments from Appeal No. 022330, which basically argues that the claimant's cervical injury and the "unapproved and unnecessary [cervical] spinal surgery" was not part of the compensable injury. As we noted in Appeal No. 022330, the carrier had disputed that the compensable injury extended to the cervical spine, that a CCH conducted on March 27, 2002, had determined that the claimant's "thoracic, cervical herniated disc, and lumbar spine" were all part of the compensable injury and that decision was affirmed by the Appeals Panel in Texas Workers' Compensation Commission Appeal No. 020872, decided May 13, 2002. The hearing officer again held the cervical herniation to be part of the compensable injury. That determination is final and we decline to reconsider it now.

The carrier also argues the efficacy of Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 130.6(i) (Rule 130.6(i)); however, we also dealt with that argument in Appeal No. 022330, agreeing that Rule 130.6(i) holds that the opinion of the designated doctor has presumptive weight. It is the Texas Workers' Compensation Commission (Commission) however, that determines the extent of the injury and one of the purposes of the remand in Appeal No. 022330 was to solicit the designated doctor's opinion after he had all the reports and the Commission's determination on the extent of injury.

The carrier contends that the Appeals Panel has erred "in allowing reopening the issue of MMI and IR if there is evidence of a substantial change in condition" citing a 1994 Appeals Panel decision addressing Section 410.307, entitled "Substantial Change of Conditions." The carrier, both at the CCH on remand and on appeal, complains that the Appeals Panel has failed to address Manasco, *supra*, and Rodriguez v. Service Lloyds Insurance Company, 997 S.W.2d 248 (Tex. 1999) in this case. The reason we did not do so is because we believe those cases are not applicable to the case at hand. In Manasco, the claimant sustained a compensable back injury, was assessed a 7% IR by a designated doctor, and a hearing officer gave presumptive weight to that doctor's report at a CCH. The claimant in that case did not appeal the hearing officer's decision and "it became final by statute." (Manasco, page 62.) Some months later surgery was recommended and Manasco attempted to reopen his case before the Commission pursuant to Section 410.307 under a substantial change of condition. The Texas Supreme Court held that he could not do so holding that "section 410.307 is a rule of evidence that applies only in the judicial review of a properly appealed [IR] decision." (Manasco, page 63.) The carrier quotes Manasco as saying:

> If the Legislature had wanted to provide an open-ended means to challenge an impairment rating, it could have done so; instead, the Legislature provided a narrow exception to allow a claimant to present

> evidence of substantial change of condition that is discovered for the first time during the appeal process. Courts should not interpret a statute to provide broader rights than the Legislature intended.

We believe that quote is taken out of context and cite the paragraph which follows the quote in Manasco at page 64:

> The clear wording of section 410.307 dictates that Manasco's attempt to reopen his impairment rating must fail. Manasco failed to appeal the impairment rating decided by the contested case hearing officer on September 22, 1993. Thus, he failed to exhaust administrative remedies, and the September 22, 1993 impairment rating of seven percent became final. See TEX. LAB. CODE § 410.169. Because Manasco failed to exhaust administrative remedies, he was not entitled to judicial review of his impairment rating. He cannot use a second set of administrative proceedings to bootstrap a belated appeal for judicial review of the unappealed impairment rating. Allowing claimants to do so would distort the Workers' Compensation Act beyond its intent.

We believe Manasco is a case which stands for the exhaustion of administrative remedies and where Section 410.307 may be used. In the instant case the claimant has disputed, and presently continues to dispute, both his MMI and IR. Manasco does not apply because in this case the claimant has not failed to exhaust his administrative remedies, he has continued to dispute the MMI date and IR and that dispute is not based on Section 410.307, but rather on attempts to get the designated doctor to rate the entire injury. Similarly, we do not believe Rodriguez applies to this case because Rodriguez dealt with creating exceptions to Rule 130.5(e).

In this case, the hearing officer gave presumptive weight to the designated doctor's December 10, 2002, report and found that report was not contrary to the great weight of the other medical evidence. The hearing officer did not err in doing so and his determinations are supported by the evidence. This is also true of the hearing officer's determination on the disability issue.

We have reviewed the complained-of determinations and conclude that the hearing officer's determinations are 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).

We affirm the hearing officer's decision and order.

The true corporate name of the insurance carrier is **UNITED STATES FIDELITY AND GUARANTY COMPANY** and the name and address of its registered agent for service of process is

CORPORATION SERVICE COMPANY
800 BRAZOS
AUSTIN, TEXAS 78701.

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Thomas A. Knapp
Appeals Judge

CONCUR:

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Judy L. S. Barnes
Appeals Judge

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Michael B. McShane
Appeals Panel
Manager/Judge