APPEAL NO. 032737
FILED DECEMBER 8, 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 September 24, 2003. The hearing officer determined that the appellant's (claimant) impairment rating (IR) is 10% as assessed by the designated doctor whose opinion was not contrary to the great weight of other medical evidence, and that the Texas Workers' Compensation Commission (Commission) did not abuse its discretion in failing to appoint a second designated doctor.

The claimant appeals, contending that the designated doctor's report is flawed because it contains contradictory observations and that the examination was inadequate. The claimant contends that the Commission abused its discretion in failing to appoint a second designated doctor. There is no response in the appeal file from the respondent (carrier).

DECISION

Affirmed.

The parties stipulated that the claimant sustained a compensable low back injury on _____, that the claimant reached maximum medical improvement (MMI) on September 13, 2002, and that Dr. S is the Commission-appointed designated doctor. It is also undisputed that the claimant had spinal surgery consisting of a right L5-S1 hemilaminotomy with excision of herniatied L5 disc on September 21, 2000, and a second spinal surgery consisting of a decompression lumbar laminectomy L4 with foraminotomy of L4-5 left and revision decompressive laminectomy of L5 with foraminotomy of L5-S1 and release of peri-neurofibrosis on March 26, 2002. The parties agreed that the Guides to the Evaluation of Permanent Impairment, fourth edition (1st, 2nd, 3rd, or 4th printing, including corrections and changes as issued by the American Medical Association prior to May 16, 2000) (AMA Guides) is the proper version of the AMA Guides to be used.

The claimant's treating doctor evaluated the claimant on September 13, 2002, and assessed a 25% IR using the range of motion (ROM) model of the AMA Guides. In Texas Workers' Compensation Commission Appeal No. 030288-s, decided March 18, 2003, the Appeals Panel held that although there are instances when the ROM model may be used, "the use of the Diagnosis-Related Estimate (DRE) Model is not optional and is to be used unless there is a specific explanation why it cannot be used." The treating doctor explained that because of the complexity of the claimant's case, the DRE model "does not accurately assess a patient who has undergone surgery and various other procedures, as [the claimant] has." Although the treating doctor makes reference to using the ROM model as a "[d]ifferentiator," rather clearly the doctor made no effort to use the DRE Model or explain how the ROM model was used as a differentiator, other

than say the DRE model, in his opinion, does not accurately assess the claimant's impairment. The treating doctor's assessment does not meet the requirements of the AMA Guides.

The carrier disputed the treating doctor's assessment and Dr. S was appointed the designated doctor. In a report dated November 5, 2002, Dr. S certified MMI and assessed a 10% IR based on DRE Lumbosacral Category III: Radiculopathy. The claimant, both at the CCH and on appeal, disputes the designated doctor's assessment because she doesn't think Dr. S gave her "a proper exam," "was not very organized," allegedly talked about her accent, and "discrepancies" in her return to work restrictions (not at issue in this case). The treating doctor wrote a rebuttal report, which was sent to the designated doctor who, in a letter of clarification dated December 11, 2002, responded in some detail to all of the treating doctor's comments. By letter of June 26, 2003, the Commission sent some additional information (apparently including some MRI studies) to the designated doctor. Dr. S responded, again explaining in detail how he arrived at his assessment.

Regarding the issue of whether the Commission abused its discretion in failing to appoint a second designated doctor and the hearing officer's determination that the designated doctor had performed a complete and accurate medical evaluation and had responded timely to the clarification requests, the hearing officer's determination is supported by the evidence. In Texas Workers' Compensation Commission Appeal No. 011607, decided August 28, 2001, the Appeals Panel noted that it has held that a designated doctor should not be replaced by a second designated doctor absent a substantial basis to do so, and that normally the appointment of a second designated doctor is appropriate only in those cases where the first designated doctor is unable or unwilling to comply with the required AMA Guides or requests from the Commission for clarification, or if he or she compromises the impartiality demanded of the designated doctor.

We review the hearing officer's determination on this issue on an abuse-of-discretion standard, meaning a review of whether the decision maker reached his decision without reference to guiding rules or principles. Morrow v. H.E.B., Inc., 714 S.W.2d 297 (Tex. 1986). We cannot conclude that the hearing officer abused his discretion on this issue and accordingly affirm the hearing officer's determination that the Commission did not abuse its discretion in failing to appoint a second designated doctor.

On the IR issue, the designated doctor assessed a 10% IR based on DRE Lumbosacral Category III: Radiculopathy. Section 408.125(e) provides that the report of the designated doctor shall have presumptive weight unless the great weight of other medical evidence (not lay testimony) is to the contrary. In Texas Workers' Compensation Commission Appeal No. 030488, decided March 31, 2003, the Appeals Panel noted that it has held that a designated doctor's report should not be rejected absent a substantial basis for doing so.

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 **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**.

_____
Thomas A. Knapp
Appeals Judge

CONCUR:

_____
Gary L. Kilgore
Appeals Judge

_____
Edward Vilano
Appeals Judge