

APPEAL NO. 033355
FILED FEBRUARY 23, 2004

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 November 24, 2003. The hearing officer determined that the respondent (claimant) reached maximum medical improvement (MMI) per Section 401.011(30)(B); that the claimant's impairment rating (IR) is 17% as assessed by the treating doctor; and that the claimant had "disability from July 11, 2001 through statutory [MMI] on January 19, 2003."

The appellant (carrier) appeals, contending that the claimant reached MMI on July 11, 2001, with a 10% IR as assessed by the designated doctor whose report (and amended report) has presumptive weight, and that while the claimant may have disability after July 11, 2001, he would not be entitled to temporary income benefits (TIBs) after that date. The file does not have a response from the claimant.

DECISION

Affirmed.

The parties stipulated that the claimant sustained a compensable (low back) injury on _____. Dr. L was appointed as the Texas Workers' Compensation Commission (Commission)-selected designated doctor and examined the claimant on July 11, 2001. In a Report of Medical Evaluation (TWCC-69) and narrative dated July 11, 2001, Dr. L certified MMI on that date and assessed a 7% IR based on a 5% impairment from the Guides to the Evaluation of Permanent Impairment, third edition, second printing, dated February 1989, published by the American Medical Association, and 2% loss of range of motion (ROM) (1% each for right and left lateral flexion). The claimant subsequently underwent testing and spinal surgery was recommended. The second opinion spinal surgery procedure resulted in a concurrence which the carrier disputed. At a CCH dated May 23, 2002, another hearing officer determined that the carrier is liable for spinal surgery; that decision was not appealed and became final pursuant to Section 410.169. The claimant had spinal surgery on August 16, 2002. The claimant testified that the surgery has helped him, although the medical records are clear that the claimant continues to have back complaints. Apparently, some medical records (not clear which) were sent to Dr. L with a request for clarification. By letter dated October 24, 2002, Dr. L responded "I see no reason to change the MMI date or the [IR]." The Commission again wrote Dr. L a letter dated May 20, 2003, asking him to retest ROM and sending him the reports of five other doctors (not including the treating doctor). Dr. L reexamined the claimant and in a TWCC-69 and a narrative dated June 11, 2003, again certified MMI on July 11, 2001, with a 10% IR based on 10% impairment from Table 49 Section (II)(E) with 0% impairment for ROM. Dr. L explained the unchanged MMI date saying that the claimant "has not had lasting material recovery as a result of his spine surgery," that the claimant's "complaints of pain and discomfort

have not improved in severity” (disputed by the claimant’s testimony) and “so the MMI date is not changed.” The treating doctor, a chiropractor, in a TWCC-69 and narrative dated May 25, 2003, certified MMI on that date with a 17% IR based on a 10% impairment from Table 49 Section (II)(E) and 8% impairment for various loss of ROM combined for the 17% IR.

Sections 408.122(c) and 408.125(e) provide that where there is a dispute as to the date of MMI and the IR, the report of the 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. The Appeals Panel has further noted that when finding that a designated doctor’s certification of MMI or IR is contrary to the great weight of the medical evidence, the hearing officer should “clearly detail the evidence relevant to his or her consideration and clearly state why the other evidence is to the contrary.” Texas Workers’ Compensation Commission Appeal No. 950317, decided April 13, 1995. In this case, the hearing officer specifically noted that the medical records set out the need for spinal surgery, that there was a concurrence with the need for spinal surgery, that spinal surgery was in fact performed, and that there “was ample medical evidence that surgery was under taken with the goal of effectuating material recovery or lasting improvement” all within statutory MMI. See the definition of MMI in Section 401.011(30)(A). We hold that the hearing officer’s recitation of those facts meets the standard that the hearing officer clearly detail the great weight of other medical evidence contrary to the designated doctor’s report. Section 408.125(e) further goes on to provide that if the great weight of the medical evidence contradicts the IR of the designated doctor’s report “the commission shall adopt the [IR] of one of the other doctors.” The hearing officer did so by adopting the assessment of the treating doctor rather than trying to bifurcate the rating by accepting the statutory MMI date and the designated doctor’s IR. We further note that Section 401.011(23) provides that the impairment is the abnormality that exists after MMI. In this case the designated doctor’s last exam and report was before the January 19, 2003, statutory MMI date that we are affirming and therefore the designated doctor’s 10% IR was given before the MMI date.

The carrier’s appeal of the disability issue is premised on the MMI finding. The carrier, at the CCH, conceded that the claimant may have disability, as defined in Section 401.011(16) after July 11, 2001, but asserted that no TIBs were owed because pursuant to Section 408.101 the claimant is not entitled to TIBs after the July 11, 2001, MMI found by the designated doctor. In that we are affirming the hearing officer’s determination that MMI was the date of statutory MMI, January 19, 2003, we likewise affirm the hearing officer’s determination on disability.

We have reviewed the complained-of determinations and conclude that the hearing officer’s determinations are not erroneous as a matter of law and 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 **TRANSCONTINENTAL INSURANCE COMPANY** and the name and address of its registered agent for service of process is

**CT CORPORATION SYSTEM
350 NORTH ST. PAUL
DALLAS, TEXAS 75201.**

Thomas A. Knapp
Appeals Judge

CONCUR:

Chris Cowan
Appeals Judge

Margaret L. Turner
Appeals Judge