APPEAL NO. 033371
FILED FEBRUARY 25, 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 was held on November 3, 2003. The hearing officer determined that respondent's (claimant) compensable injury includes an injury to the lumbar spine at L4-5 after March 2003, and that claimant reached maximum medical improvement (MMI) statutorily on December 13, 2001, with a 26% impairment rating (IR) as certified by the Texas Workers' Compensation Commission (Commission)-selected designated doctor. The appeal of appellant (self-insured) asserts that the evidence does not support the decision. The appeal file does not contain a response from claimant.

DECISION

We affirm.

The hearing officer did not err in determining that claimant's compensable injury includes an injury to the lumbar spine at L4-5 after March 2003. It is undisputed that claimant sustained a compensable lumbar spine injury when he fell on _____. Conflicting evidence was presented on the disputed issue. Claimant presented testimony and evidence to show that the original injury never resolved. The self-insured asserted that claimant's _____, compensable injury had resolved, and that his current condition is due to a nonwork-related incident which occurred on (date of nonwork-related injury). We have reviewed the complained-of determination regarding extent of injury and conclude that this issue involved a fact question for the hearing officer. The hearing officer reviewed the record and decided what facts were established. We conclude that the hearing officer's determination is supported by the record and is 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).

The hearing officer did not err in determining that claimant reached MMI statutorily on December 13, 2001, with a 26% IR as certified by the designated doctor. Claimant was initially examined by the designated doctor on April 28, 2000. At that time, the designated doctor certified that claimant was not yet at MMI. On June 30, 2003, claimant was again examined by the designated doctor at which time claimant was certified to have reached clinical MMI as of January 1, 2001, with a 26% IR pursuant to the Guides to the Evaluation of Permanent Impairment, third edition, second printing, dated February 1989, published by the American Medical Association. The IR consisted of 7% from Table 49; 10% for loss of lumbar flexion; 5% for loss of lumbar extension; 3% for loss of motion in right lateral lumbar flexion; and 2% for loss of left lateral lumbar flexion.

A peer review report raised some questions about the accuracy of the designated doctor's report. The Commission sent the designated doctor a letter of clarification and

attached a copy of the peer review report to it. The designated doctor again examined claimant on August 26, 2003, for purposes of responding to the comments contained in the peer review. Attached to the designated doctor's 10-page response was an amended Report of Medical Evaluation (TWCC-69). The only change the designated doctor made to his July 7, 2003, TWCC-69 was to correct the MMI date so that it reflected the date of statutory MMI. The designated doctor went through the criticisms contained in the peer review report and defended his initial certification. He noted that he changed the MMI date to the statutory date because his initial certification of MMI was made in error. The designated doctor indicated that when he reexamined claimant, the IR as computed using that day's range of motion (ROM) measurement would be 18%, including 7% from Table 49; 7% for loss of lumbar flexion; 2% for loss of lumbar extension; 2% for loss of right lateral lumbar flexion; and 1% for loss of left lateral flexion. Despite the results of the reexamination, the designated doctor declined to amend his July 7, 2003, 26% IR, although he corrected the MMI date to reflect the statutory MMI date. The designated doctor reasoned that the initial IR certification was done properly, that ROM measurements may vary depending on certain factors, and that he saw no reason to change the IR.

Section 401.011(24) defines IR as "the percentage of permanent impairment of the whole body resulting from a compensable injury." Sections 408.122 and 408.125 of the 1989 Act provide that a report of a Commission-selected designated doctor shall have presumptive weight on the issues of MMI and IR, and the Commission shall base its determination on such report, unless the great weight of other medical evidence is to the contrary. Whether the great weight of the other medical evidence was contrary to the opinion of the designated doctor is basically a factual determination. Texas Workers' Compensation Commission Appeal No. 93459, decided July 15, 1993. There was evidence that ROM measurements can vary from day to day depending on various factors. *See* Texas Workers' Compensation Commission Appeal No. 982953, decided February 3, 1999. The designated doctor specifically explained why he awarded claimant a 26% IR. It was for the designated doctor to exercise his medical judgment in determining claimant's impairment. The designated doctor was not required to amend his certification. In his last report, the designated doctor declined to change his certification. The hearing officer did not err in according presumptive weight to the reports of the designated doctor. We have reviewed the complained-of determinations and conclude that the issues involved fact questions for the hearing officer. The hearing officer reviewed the record and decided what facts were established. We conclude that the hearing officer's determinations are supported by the record and are not so against the great weight and preponderance of the evidence as to be clearly wrong or manifestly unjust. Cain, *supra*.

We affirm the hearing officer's decision and order.

The true corporate name of the insurance carrier is **a self insured governmental entity through TPS JOINT SELF INSURANCE FUND** and the name and address of its registered agent for service of process is

CITY
(ADDRESS)
(CITY), TEXAS (ZIP CODE).

_____
Judy L. S. Barnes
Appeals Judge

CONCUR:

_____
Gary L. Kilgore
Appeals Judge

CONCURRING OPINION:

I write separately only to address the self-insured's contention that the claimant's _____, compensable injury had resolved and that the claimant's current condition is due to a nonwork-related incident which occurred on (date of nonwork-related injury). As discussed in Texas Workers' Compensation Commission Appeal No. 033368, decided February 19, 2004, the burden is on the carrier (or the self-insured in this case) to prove that the claimant's subsequent injury is the sole contributing factor to the claimant's current condition or disability. In the instant case the self-insured failed to do so and I would affirm the extent-of-injury issue on that basis.

_____
Thomas A. Knapp
Appeals Judge