APPEAL NO. 040697
FILED MAY 17, 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 March 4, 2004. The hearing officer decided that the respondent (claimant herein) attained maximum medical improvement (MMI) on April 9, 2003, with a 16% impairment rating (IR), and that the claimant had disability for the period beginning on April 5, 2001, and continuing through December 18, 2001, and for the period beginning on June 10, 2002, and continuing through the date of the CCH. The appellant (carrier herein) files a request for review challenging the hearing officer's MMI, IR, and disability determinations. In regard to MMI and IR the carrier argues that the hearing officer should have given presumptive weight to the first, instead of the amended, report of the designated doctor. In regard to disability, the carrier argues that the hearing officer's determination of the periods of disability was contrary to the evidence. The claimant responds that the decision of the hearing officer was supported by the evidence and should be affirmed.

DECISION

Finding sufficient evidence to support the decision of the hearing officer and no reversible error in the record, we affirm the decision and order of the hearing officer.

The parties stipulated that the claimant sustained a compensable injury on _____. The injury was described as bilateral carpal tunnel syndrome (CTS) and a cervical injury. The parties stipulated that the claimant's treating doctor certified in a report dated December 18, 2001, that the claimant reached MMI on December 18, 2001, with a 5% IR. The parties further stipulated that Dr. B, the designated doctor selected by the Texas Workers' Compensation Commission (Commission), certified in a May 24, 2002, report that the claimant reached MMI on December 18, 2001, with a 12% IR. Finally, the parties stipulated that Dr. B certified in a report dated September 12, 2003, that the claimant attained MMI on April 9, 2003, with a 16% IR. Dr. B amended his certification in response to a letter of clarification from the Commission, which was sent to him after the claimant had additional CTS surgery in May 2003 and had undergone cervical surgery in March 2003.

The carrier contends that the hearing officer erred in giving presumptive weight to the designated doctor's amended report contending that it was not amended for a proper reason. We do not need to delve into this argument as it is based upon decisions made prior to the effective date of Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 130.6(i) (Rule 130.6(i)). In Texas Workers' Compensation Commission Appeal No. 013042-s, decided January 17, 2002, we explained in detail how Rule 130.6(i) superceded our previous decisions that an amended designated doctor report would only be given presumptive weight if amended for a proper reason and within a reasonable time and recognized that Rule 130.6(i) required an amended report of a

designated doctor be given presumptive weight. Based upon Rule 130.6(i) and our decision in Appeal No. 013042-s, we perceive no error in the hearing officer's giving presumptive weight to the amended certification of the designated doctor and in finding MMI and IR based upon that certification.

We would note that even before the passage of Rule 130.6(i) we had held that surgery may be a proper reason for a designated doctor to amend an earlier certification, even after statutory MMI. *See* Texas Workers' Compensation Commission Appeal No. 992672, decided January 18, 2000. We also note that in the present case the designated doctor stated in his original certification that the IR was 12%, but that should the cervical spine be included as part of the injury that the IR would be 16%. After this certification, a CCH was held at which it was determined that the claimant's injury included a cervical spine injury and this determination was affirmed in Texas Workers' Compensation Commission Appeal No. 021525, decided August 1, 2002.

Nor do we perceive error in the hearing officer's resolution of the disability issue. Disability is a question of fact to be determined by the hearing officer. Texas Workers' Compensation Commission Appeal No. 93560, decided August 19, 1993. Section 410.165(a) provides that the hearing officer, as finder of fact, is the sole judge of the relevance and materiality of the evidence as well as of the weight and credibility that is to be given to the evidence. It was for the hearing officer, as trier of fact, to resolve the inconsistencies and conflicts in the evidence. Garza v. Commercial Insurance Company of Newark, New Jersey, 508 S.W.2d 701, 702 (Tex. Civ. App.-Amarillo 1974, no writ). When reviewing a hearing officer's decision for factual sufficiency of the evidence we should reverse such decision only if it is so contrary to the overwhelming weight of the evidence as to be clearly wrong and unjust. Cain v. Bain, 709 S.W.2d 175, 176 (Tex. 1986); Pool v. Ford Motor Co., 715 S.W.2d 629, 635 (Tex. 1986). There was clearly conflicting evidence in this case concerning disability and based upon the above standard of review, we find no basis to reverse the hearing officer's decision concerning disability.

The decision and order of the hearing officer are affirmed.

The true corporate name of the insurance carrier is **INSURANCE COMPANY OF THE STATE OF PENNSYLVANIA** 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.

_____
Gary L. Kilgore
Appeals Judge

CONCUR:

_____
Margaret L. Turner
Appeals Judge

CONCURRING OPINION:

I concur in the affirmance of the hearing officer's decision on the MMI date, IR, and disability issues. I write separately to point out that my concurrence in the affirmance of the IR decision is not based on the repeat left CTS surgery the claimant underwent in May 2003 after the date of statutory MMI (April 9, 2003). I believe that an affirmance of the IR decision may be based on several other factors, including that the designated doctor originally assigned a 12% IR for the claimant's injury to her upper extremities, but stated that the claimant's IR would be 16% if the cervical injury were included as part of the compensable injury. Subsequently, it was determined that the claimant's compensable injury includes the cervical area. The claimant then underwent cervical surgery prior to the date of statutory MMI and a repeat left CTS surgery after the date of statutory MMI. The designated doctor then reexamined the claimant and determined that the claimant had not reached MMI until the statutory date and that her IR is 16%, which included impairment for both the injury to the upper extremities and the injury to the cervical spine.

_____
Robert W. Potts
Appeals Judge