

APPEAL NO. 040898
FILED MAY 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 (CCH) was held on March 31, 2004. The hearing officer resolved the disputed issues by deciding that the appellant/cross-respondent's (claimant) compensable injury of _____, does not extend to nor include an injury to his right shoulder, and that the claimant reached maximum medical improvement (MMI) on August 26, 2002, with a 19% impairment rating (IR) as determined by the designated doctor. The claimant appeals the extent-of-injury determination arguing that it is against the great weight and preponderance of the evidence. The respondent/cross-appellant (carrier) files a response, urging affirmance of the extent-of-injury determination. The carrier also filed an appeal, disputing the determinations of MMI and IR. The appeal file does not contain a response from the claimant to the carrier's appeal.

DECISION

Affirmed.

EXTENT OF INJURY

Extent of injury is a factual question for the hearing officer to resolve. It is the hearing officer, as the sole judge of the weight and credibility of the evidence (Section 410.165(a)), who resolves the conflicts and inconsistencies in the evidence (Garza v. Commercial Insurance Company of Newark, New Jersey, 508 S.W.2d 701 (Tex. Civ. App.-Amarillo 1974, no writ)), and determines what facts have been established from the conflicting evidence. St. Paul Fire & Marine Insurance Company v. Escalera, 385 S.W.2d 477 (Tex. Civ. App.-San Antonio 1964, writ ref'd n.r.e.). This is equally true of medical evidence. Texas Employers Insurance Association v. Campos, 666 S.W.2d 286 (Tex. App.-Houston [14th Dist.] 1984, no writ). In this instance, the hearing officer was not persuaded that the claimant sustained his burden of proving that he sustained an injury to his right shoulder on _____, that arose out of or was in the course and scope of his employment. Further, the hearing officer specifically found that the claimant's injury to his left shoulder on _____, was not a producing cause of any medical condition that he may currently have to his right shoulder. The Appeals Panel will not disturb the challenged factual findings of a hearing officer unless they are so against the great weight and preponderance of the evidence as to be clearly wrong or manifestly unjust and we do not find them so in this case. Cain v. Bain, 709 S.W.2d 175, 176 (Tex. 1986).

MMI AND IR

Sections 408.122(c) and 408.125(e) provide that for injuries occurring prior to June 17, 2001, where there is a dispute as to the date of MMI and the IR, the report of

the Texas Workers' Compensation Commission (Commission)-selected 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. We have previously discussed the meaning of "the great weight of the other medical evidence" in numerous cases. We have held that it is not just equally balancing the evidence or a preponderance of the evidence that can overcome the presumptive weight given to the designated doctor's report. Texas Workers' Compensation Commission Appeal No. 92412, decided September 28, 1992. We have also held that no other doctor's report, including the report of the treating doctor, is accorded the special, presumptive status accorded to the report of the designated doctor. Texas Workers' Compensation Commission Appeal No. 92366, decided September 10, 1992; Texas Workers' Compensation Commission Appeal No. 93825, decided October 15, 1993. Whether the great weight of the other medical evidence was contrary to the opinion of the designated doctor was a factual question for the hearing officer to resolve. Texas Workers' Compensation Commission Appeal No. 93459, decided July 15, 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, *supra*. This is equally true regarding medical evidence. Campos, *supra*. 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). In this case, we are satisfied that the hearing officer's MMI and IR determinations are sufficiently supported by the evidence. Accordingly, we cannot agree that the hearing officer erred in determining that the claimant reached MMI on August 26, 2002, with a 19% IR.

The carrier argued at both the CCH and on appeal that the designated doctor was not qualified to serve as designated doctor relying on Texas Workers' Compensation Commission Appeal No. 030737-s, decided May 14, 2003. We note that in Texas Workers' Compensation Commission Appeal No. 040633-s, decided May 7, 2004, we retreated from the holding in Appeal No. 030737-s, *supra*, in light of the Commission issued Advisory 2004-03, dated April 19, 2004, regarding what the words "scope of practice" mean and the clarification that "this phrase is synonymous with a doctor's licensure." Further, the evidence reflects that the designated doctor, like the treating doctor, was an orthopedic surgeon.

We affirm the decision and order of the hearing officer.

The true corporate name of the insurance carrier is **ZNAT INSURANCE COMPANY** and the name and address of its registered agent for service of process is

**NORM W. WINTERS
1101 SOUTH CAPITOL OF TEXAS HIGHWAY, BUILDING J
AUSTIN, TEXAS 78746.**

Margaret L. Turner
Appeals Judge

CONCUR:

Daniel R. Barry
Appeals Judge

Edward Vilano
Appeals Judge