APPEAL NO. 040979
FILED JUNE 16, 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) impairment rating (IR) for the (date of injury No. 2), injury is 10% and that the respondent/cross-appellant (self-insured) is not entitled to reduce the claimant's income benefits for the (date of injury No. 2), compensable injury in order to recoup the claimed overpayment made on the (date of injury No. 1), compensable injury. The claimant appeals, disputing the IR determination of the hearing officer. The self-insured responded, urging affirmance of the IR determination. The self-insured also filed an appeal, disputing the determination that it was not entitled to reduce the claimant's income benefits for the (date of injury No. 2), compensable injury in order to recoup the claimed overpayment made on the (date of injury No. 1), compensable injury. The appeal file did not contain a response from the claimant.

DECISION

Affirmed.

IMPAIRMENT RATING

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 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.

The claimant argues that the designated doctor did not conduct a thorough examination on the date he reexamined the claimant and amended his report to assess

an IR of 10%. Using 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), the designated doctor rated the claimant in Diagnosis-Related Estimate (DRE) Cervicothoracic Category II and in DRE Lumobsacral Category II, noting in both instances that upon review of the medical records and physical examination, the claimant showed clinical evidence of a neck and lumbar injury without radiculopathy or loss of motion segment integrity. The claimant argues that the medical evidence established that she had radiculopathy and that the designated doctor did not have a copy of her EMG. In his response to a letter of clarification, the designated doctor acknowledged that he did not have a copy of the EMG/NCV at the time he performed the physical reexamination and assessed a 10% IR, but noted the exam did not show any evidence of radiculopathy in her cervical spine exam and in light of the normal findings, it does not change the IR.

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 v. Commercial Insurance Company of Newark, New Jersey, 508 S.W.2d 701, 702 (Tex. Civ. App.-Amarillo 1974, no writ). This is equally true regarding medical evidence. Texas Employers Insurance Association v. Campos, 666 S.W.2d 286, 290 (Tex. App.-Houston [14th Dist.] 1984, 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 against the great weight and preponderance of the evidence as to be clearly wrong and unjust. Cain v. Bain, 709 S.W.2d 175, 176 (Tex. 1986). In this case, we are satisfied that the hearing officer's IR determination is sufficiently supported by the evidence. Accordingly, we cannot agree that the hearing officer erred in determining that the claimant's IR is 10%.

RECOUPMENT

The self-insured appealed the hearing officer's determination that it was not entitled to reduce the claimant's income benefits for the (date of injury No. 2), compensable injury in order to recoup the claimed overpayment made on the (date of injury No. 1), compensable injury. The self-insured contends that the hearing officer erred in citing Section 408.084 and Section 408.162 as specific statutory authority for allowing subrogation or offset between two claims. We note that contribution was not an issue at the CCH and no allegation or evidence was presented regarding the cumulative impact of the compensable injuries sustained by the claimant to determine a reduction of impairment income benefits (IIBs) and supplemental income benefits nor was there an issue of lifetime income benefits.

The carrier cites Texas Workers' Compensation Commission Appeal No. 951166, decided September 1, 1995, as authority for permitting a carrier to offset future IIBs from overpaid temporary income benefits (TIBs) where the claimant was simultaneously receiving overpayment based on the carrier's failure to discover that the claimant was receiving TIBs from another injury from another source at the same time. The cited case is distinguishable from the facts at issue in this case. In the instant case, the same carrier was involved in both claims and there was no other source of payment. We perceive no error in the hearing officer's determination that the self-insured is not entitled to reduce the claimant's income benefits for the (date of injury No. 2), compensable injury in order to recoup the claimed overpayment made on the (date of injury No. 1), compensable injury.

We affirm the decision and order of the hearing officer.

The true corporate name of the insurance carrier is **STATE OFFICE OF RISK MANAGEMENT (a self-insured governmental entity)** and the name and address of its registered agent for service of process is

For service in person the address is:

RON JOSSELET, EXECUTIVE DIRECTOR
STATE OFFICE OF RISK MANAGEMENT
300 W. 15TH STREET
WILLIAM P. CLEMENTS, JR. STATE OFFICE BUILDING, 6TH FLOOR
AUSTIN, TEXAS 78701.

For service by mail the address is:

RON JOSSELET, EXECUTIVE DIRECTOR
STATE OFFICE OF RISK MANAGEMENT
P.O. BOX 13777
AUSTIN, TEXAS 78711-3777.

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Margaret L. Turner
Appeals Judge

CONCUR:

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Daniel R. Barry
Appeals Judge

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Thomas A. Knapp
Appeals Judge