

APPEAL NO. 041392
FILED JULY 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 24, 2004. After an extent-of-injury issue was added, the CCH was recessed and continued until May 19, 2004. The hearing officer resolved the disputed issues by deciding that the appellant's (claimant) compensable injury does not extend to or include his ribs or his right leg and that the claimant's impairment rating (IR) is 6%. The claimant appealed, disputing both the extent-of-injury determination and the IR determination. The respondent (carrier) responded, urging affirmance.

DECISION

Affirmed.

The parties stipulated that on _____, the claimant sustained a compensable injury; that the carrier only accepted compensability of the injury to his cervical spine and thoracic spine; and that the claimant reached maximum medical improvement on February 24, 1999.

EXTENT OF INJURY

Whether or not the claimant's _____, compensable injury extended to include his ribs and right leg was in dispute. Extent of injury is a factual determination for the hearing officer to resolve. The hearing officer, as finder of fact, is the sole judge of the relevance and materiality of the evidence, as well as the weight and credibility that is to be given to the evidence. Section 410.165(a). The hearing officer noted that the medical evidence is insufficient to support the ribs or right leg as part of the February 1997 injury. Although there is conflicting evidence on this issue. We conclude that the hearing officer's decision is supported by sufficient evidence and that it is not 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 (Tex. 1986).

IMPAIRMENT RATING

The parties stipulated that Dr. C was the designated doctor. The evidence reflects that the designated doctor examined the claimant on March 15, 2001, and assessed a 6% IR using the Guides to the Evaluation of Permanent Impairment, third edition, second printing, dated February 1989, published by the American Medical Association (AMA Guides). In his report dated March 15, 2001, the designated doctor noted that the claimant was assigned 4% for six months of documented pain for the cervical spine and 2% for the thoracic. The designated doctor further noted that he "was unable to complete [the claimant's] thoracic measurements due [to] lack of effort but flexion was inconsistent after six attempts as were the measurements for the

cervical spine. In addition, there were no neurologic deficits. This was a difficult examination secondary to the extreme symptom magnification and submaximal effort.” The record reflects that the claimant had spinal surgery on September 11, 2001. The designated doctor responded to a letter of clarification which informed him that the claimant underwent spinal surgery, stating that this will change the claimant’s impairment. The designated doctor reexamined the claimant on March 7, 2003, and assessed an impairment rating of 13% using the AMA Guides. The 13% IR was based on 4% per Table 49, Section IIB, page 73 (unoperated with medically documented injury and a minimum of six months of medically documented pain, recurrent muscle spasm or rigidity associated with non-to-minimal degenerative changes on structural tests), 6% for range of motion (ROM) deficits for a total of 10% for the cervical spine. The thoracic spine was assigned 2% per Table 49, Section IIB, page 73, and 1% for ROM deficits for a total of 3%. The designated doctor then combined the thoracic and cervical ratings for a total whole person impairment of 13%.

Section 408.125(e) provides that for injuries occurring prior to June 17, 2001, where there is a dispute as to the IR, the report of the 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(ii)) 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 *a/so* Texas Workers’ Compensation Commission Appeal No. 013042-s, decided January 17, 2002. The hearing officer determined that the claimant’s correct IR is 6% and found that the Texas Workers’ Compensation Commission (Commission) did not have a valid reason to return the claimant to the designated doctor in March 2003 for a reevaluation of the impairment due to any effect of cervical surgery on the claimant’s IR, therefore, the designated doctor did not have a valid basis to reevaluate the claimant.

Rule 130.1(c)(3), which became effective March 14, 2004, provides that “[a]ssignment of an [IR] for the current compensable injury shall be based on the injured employee’s condition as of the MMI date considering the medical record and the certifying examination.” Despite the seeming inconsistency between Rule 130.1(c)(3) and Rule 130.6(i), it appears that in adopting Rule 130.1(c)(3), the Commission intended to limit the circumstances where amendments to the IR will be given presumptive weight to those changes in the claimant’s condition that occur prior to the date of MMI. Texas Workers’ Compensation Commission Appeal No. 040994, decided June 14, 2004. In the instant case, the first certification of the designated doctor was based on an examination that took place after the date of statutory MMI but prior to the claimant’s surgery. For this reason, it was not error for the hearing officer to determine that the claimant’s IR is 6% as determined by the designated doctor on March 15, 2001.

We affirm the decision and order of the hearing officer.

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

**LEE F. MALO
12222 MERIT DRIVE, SUITE 700
DALLAS, TEXAS 75251.**

Margaret L. Turner
Appeals Judge

CONCUR:

Daniel R. Barry
Appeals Judge

Elaine M. Chaney
Appeals Judge