APPEAL NO. 041466
FILED AUGUST 4, 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 May 25, 2004. The hearing officer determined that the appellant's (claimant) impairment rating (IR) is 7% as certified by Dr. R, the first designated doctor.

The claimant appeals, contending that the 21% IR assessed by the second designated doctor should be given presumptive weight because it is more in line with the 20% IR assessed by her treating doctor. The respondent (carrier) responds, urging affirmance.

DECISION

Affirmed.

The parties stipulated that the claimant sustained a compensable (low back) injury on _____, that Dr. R was the first designated doctor, and that the claimant reached statutory maximum medical improvement (MMI) (*see* Section 401.011(30)(B)) on May 5, 2001. It is undisputed that the Guides to the Evaluation of Permanent Impairment, third edition, second printing, dated February 1989, published by the American Medical Association is the proper edition to be used.

A carrier required medical examination (RME) doctor certified MMI with a 0% IR on December 7, 1999. Dr. R was appointed the designated doctor and on February 2, 2000, stated that the claimant was not at MMI. Spinal Surgery was denied under the second opinion spinal surgery process by letter of May 18, 2000. Another carrier RME doctor in an addendum report, certified MMI on March 27, 2001, with an 11% IR based on 7% impairment from Table 49, 4% impairment for loss of range of motion (ROM), and 1% impairment for neurological deficit, combined to form the 11% IR. The stipulated date of statutory MMI was May 5, 2001.

Dr. G the treating doctor in a report dated May 14, 2001, certified the date of statutory MMI with a 16% IR based on a 7% impairment from Table 49, 6% impairment for loss of ROM, and 3% impairment for neurological deficit. Dr. R reexamined the claimant on July 5, 2001, certified MMI on that date, and assessed a 7% IR based on Table 49. Dr. R invalidated ROM due to "submaximal effort" and did not comment on any neurological deficit.

Subsequently, the claimant had spinal surgery (a decompression laminectomy at L4-S1) on May 21, 2002. Dr. G certified MMI and assessed a 20% IR in a report dated December 9, 2002. The Texas Workers' Compensation Commission (Commission) wrote Dr. R by letter dated February 5, 2003, asking him if the claimant's surgery of May 21, 2002, changed his mind on the MMI date (the letter did not mention the IR). On

May 25, 2003, the claimant had a second spinal surgery (fusion at L4-S1). By a letter dated June 27, 2003, Dr. R replied to the Commission request for clarification agreeing that the May 2002 surgery would change the MMI date to May 21, 2003. Subsequently for an unknown reason the Commission appointed a second designated doctor who in a report dated January 24, 2004, certified the statutory MMI date and assessed a 21% IR.

The hearing officer gave presumptive weight to Dr. R's July 5, 2001, report and based on that report determined that the claimant's IR was 7%. The claimant's appeal cites the second designated doctor's report and the treating doctor's two reports as being the great weight of medical evidence contrary to the first designated doctor's opinion. The carrier in urging affirmance cites some older (and largely inapplicable) Appeals Panel decisions and Commission Advisory 2003-10B, signed February 24, 2004, paragraph 4 that the "[IR] is based on the employee's condition on the date of [MMI] or the date of statutory [MMI], whichever is earlier."

Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 130.1(c)(3) (Rule 130.1(c)(3)) effective March 14, 2004, provides that assignment of an IR "shall be based on the injured employee's condition as of the MMI date considering the medical record and the certifying examination." Texas Workers' Compensation Commission Appeal No. 040313-s, decided April 5, 2004, discusses the preamble of Rule 130.1(c)(3) and the intention of the Commission that IR assessments "must be based on the injured employee's condition as of the date of MMI." Consequently the only reports to be considered, that were rendered at about the time of MMI, are the carrier's RME addendum report with an 11% IR, Dr. G's 16% IR, and the first designated doctors report of 7% IR. Section 408.125(e) provides that the report of the designated doctor chosen by the Commission shall have presumptive weight, and the Commission shall base the IR on that report unless the great weight of the other medical evidence is to the contrary, and that if the great weight of the medical evidence contradicts the IR contained in the report of the designated doctor chosen by the Commission, the Commission shall adopt the IR of one of the other doctors. We note that the biggest difference in the reports is that the carrier RME and Dr. G both rated the claimant's loss of ROM while the designated doctor invalidated ROM based on submaximal effort. That distinction is a matter of medical judgment.

The hearing officer did not err in according Dr. R's 7% IR presumptive weight and adopting that rating. Her determination is supported by the evidence 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's decision and order are affirmed.

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

CORPORATION SERVICE COMPANY
800 BRAZOS, COMMODORE 1, SUITE 750
AUSTIN, TEXAS 78701.

_____
Thomas A. Knapp
Appeals Judge

CONCUR:

_____
Judy L. S. Barnes
Appeals Judge

_____
Elaine M. Chaney
Appeals Judge