APPEAL NO. 041710
FILED SEPTEMBER 1, 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 July 1, 2004. With regard to the disputed issues the hearing officer determined that the respondent/cross-appellant's (claimant) impairment rating (IR) is 25% as assessed by the designated doctor and that the claimant is not entitled to supplemental income benefits (SIBs) for the first and second quarters.

The appellant/cross-respondent (carrier) appeals the IR, contending that the IR should be 5% as assessed by its required medical examination (RME) doctor. The claimant appeals the determinations of SIBs entitlement, contending he has a total inability to work as supported by his treating doctor. The claimant responds to the carrier's appeal urging affirmance of the IR, and the carrier responds to the claimant's appeal of the SIBs issues urging affirmance.

DECISION

Affirmed.

The parties stipulated that the claimant sustained a compensable (low back) injury on _____, and reached statutory maximum medical improvement (MMI) (*See* Section 401.011(30)(B)) on August 12, 2002. Dr. H a chiropractor certified the statutory MMI date with a 22% IR 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) (AMA Guides) in a report dated September 20, 2002, however, Dr. H used the range of motion model rather than the Diagnosis-Related Estimate (DRE) model. The parties stipulated that Dr. S was the designated doctor. In a report dated January 28, 2003, Dr. S assigned a 25% IR based on DRE Lumbosacral Category V finding both radiculopathy and loss of motion segment integrity (LMSI).

Dr. T, the carrier's RME doctor performed a peer review on Dr. H's original report and subsequently did a record review dated December 1, 2003, of Dr. S's report in which he questioned whether the claimant had radiculopathy or the necessary LMSI. Based on the record review, Dr. T estimated the claimant would have a 10% IR based on "DRE-III." Subsequently Dr. T examined the claimant on April 23, 2004, and assessed a 5% IR based on "DRE II" finding the claimant's measurements do not qualify for LMSI. The hearing officer, in the Background Information, commented that Dr. T's "measurements are close enough to give some support to [Dr. S's] statements about his measurements" and indeed Dr. T testified at the CCH, that the positioning of the patient can have some influence of the measurements. The hearing officer found both Dr. T's and Dr. S's reports credible and in accordance with the AMA Guides, but that the report of Dr. S, as the designated doctor's report, carries presumptive weight

(*See* Section 408.125(e)) and that the contrary evidence does not overcome that presumption. The hearing officer's determination is supported by the evidence.

Regarding the SIBs issues, eligibility criteria for SIBs entitlement are set forth in Section 408.142(a) and Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 130.102 (Rule 130.102). The SIBs criterion at issue is whether the claimant has made a good faith effort to obtain employment commensurate with his ability to work. The claimant contends that he has a total inability to work. Rule 130.102(d)(4) provides that an injured employee has made a good faith effort to obtain employment commensurate with the employee's ability to work if the employee has been unable to perform any type of work in any capacity, has provided a narrative report from a doctor which specifically explains how the injury causes a total inability to work, and no other records show that the injured employee is able to return to work. The hearing officer was not persuaded that the claimant's treating doctor specifically explained how the injury causes a total inability to work. A Work Status Report (TWCC-73) and note dated November 25, 2003 (during the first quarter qualifying period), simply indicates surgical treatment may be required and the claimant "is still unable to return to work and has been disabled since his date of injury on _____." The claimant testified that no doctor has released him to return to work. There is no evidence that sedentary work and/or part time work was considered. Another report dated July 30, 2001, purporting to show a total inability to work was before MMI and well before the qualifying periods at issue. The hearing officer also commented that the claimant's "appearance and demeanor at the hearing belie a claim of total inability to work."

We have reviewed the complained-of determinations and conclude that the issues involved fact questions for the hearing officer. The hearing officer reviewed the record and decided what facts were established. We conclude that the hearing officer's determinations are 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).

We affirm the hearing officer's decision and order.

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

CORPORATION SERVICE COMPANY
800 BRAZOS
AUSTIN, TEXAS 78701.

_____
Thomas A. Knapp
Appeals Judge

CONCUR:

_____
Elaine M. Chaney
Appeals Judge

_____
Robert W. Potts
Appeals Judge