

APPEAL NO. 041741
FILED SEPTEMBER 7, 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 June 22, 2004. The hearing officer resolved the disputed issue by deciding that the appellant's (claimant) impairment rating (IR) is 10%. The claimant appealed, arguing that the evidence from his treating doctor was overwhelming and contrary to the designated doctor and contends that range of motion (ROM) measurements should have been used to determine his impairment. The respondent (carrier) responds, urging affirmance. The carrier argues that the hearing officer's findings and decision were supported by credible evidence.

DECISION

Affirmed.

The parties stipulated that the claimant sustained a compensable injury on _____; that Dr. E is the designated doctor; and that the claimant reached maximum medical improvement on July 1, 2002, as certified by the designated doctor. The sole issue in dispute was the claimant's IR. The evidence reflects that the claimant sustained a back injury. In his narrative report, Dr. E stated that the claimant would best be classified under Diagnosis-Related Estimate (DRE) Lumbosacral Category III: Radiculopathy of 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 claimant's treating doctor contends that the claimant would best be classified under DRE Lumbosacral Category IV. Dr. E disagreed, and in response to a letter of clarification, stated that "there is no objective x-ray evidence of angular motion or translation of [claimant] and the MRI scan is not suggestive of such abnormal motion." The hearing officer noted that the difference of medical opinion by the claimant's treating doctor is not sufficient to overcome the presumptive weight of Dr. E's assignment of IR.

In his appeal, the claimant argues that the ROM model should be used to determine impairment. In Texas Workers' Compensation Commission Appeal No. 030288-s, decided March 18, 2003, the Appeals Panel held that although there are instances when the ROM model may be used, "the use of the [DRE] Model is not optional and is to be used unless there is a specific explanation why it cannot be used." Dr. E stated in a clarification letter dated April 6, 2004, that the ROM model is only utilized if the physician cannot place the claimant in an appropriate DRE Category and when used is used as a differentiator, these conditions did not exist for the claimant's examination. Dr. E stood by his previous IR assessment of 10%.

Section 408.125(c), effective for a claim for workers' compensation benefits based on a compensable injury that occurs on or after June 17, 2001, provides that

where there is a dispute as to the IR, the report of the Texas Workers' Compensation 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 § 130.16(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 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% in accordance with the opinion of Dr. E.

We affirm the decision and order of the hearing officer.

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

**CT CORPORATION SYSTEMS
350 NORTH ST. PAUL, SUITE 2900
DALLAS, TEXAS 75201.**

Margaret L. Turner
Appeals Judge

CONCUR:

Thomas A. Knapp
Appeals Judge

Robert W. Potts
Appeals Judge