APPEAL NO. 050649
FILED MAY 3, 2005

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 7, 2005. The hearing officer determined that the appellant's (claimant) compensable injury of _____, does not extend to and include the right shoulder; that Dr. F, findings are entitled to presumptive weight in that Dr. F was properly appointed as the second designated doctor in accordance with Section 410.0041 and Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 130.5 (Rule 130.5); and that the claimant's impairment rating (IR) is 9%, as certified by Dr. F. The claimant appealed the hearing officer's determinations based on sufficiency of the evidence grounds. The respondent (carrier) responded, urging affirmance.

DECISION

Affirmed in part; reversed and rendered in part.

BACKGROUND INFORMATION

The parties stipulated that the claimant sustained a compensable injury on _____; that (Dr. C) was the first designated doctor; and that Dr. F was the second designated doctor. It is undisputed that the claimant reached maximum medical improvement on July 13, 2003, and that the claimant's IR was assessed under 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 this case, Dr. C was appointed as the designated doctor, and he examined the claimant on July 18, 2003, and he assessed that the claimant's IR was 19% based on 5% whole person impairment for the cervical spine under Diagnosis-Related Estimate Cervicothoracic Category II, 12% whole person impairment for "decreased grip strength due to residual ulnar and medical nerve weakness" under Table 3, and 4% whole person impairment for the upper extremity for "loss of shoulder strength." The peer review doctor, (Dr. S) disagreed with Dr. C's IR assessment and stated that the claimant's injury was in the form of carpal tunnel syndrome, and that the cervical spine and right shoulder were not casually related to the claimant's injury but resulted from a motor vehicle accident (MVA) sustained on July 26, 2001. The Texas Workers' Compensation Commission (Commission) sent Dr. C the peer review doctor's letter for his review. Thereafter, Dr. C amended his report to reflect a 12% IR, after reviewing Dr. S's report which included information that the claimant was involved in a MVA. It is undisputed that Dr. S referenced (Dr. P) medical report that erroneously referred to a MVA from another individual that had the same name as the claimant's. Due to the erroneous information, Dr. S corrected his peer review report to reflect that the claimant was not involved in a MVA on July 26, 2001, however he stated that the claimant was involved in two separate MVAs on October 27, 2000, and October 19, 2002. On February 18, 2004,

the Commission appointed a second designated doctor based on the claimant's request that the first designated doctor's opinion was "tainted" by erroneous information from Dr. S that was inappropriately sent to him for his review. Thereafter, Dr. F was appointed the second designated doctor, and he assigned two separate IRs, one that included the right shoulder and the other that did not include the right shoulder. At a prior CCH, the hearing officer in that case determined and the Appeals Panel affirmed, that the claimant's compensable injury included the cervical spine. Based on the extent-of-injury determination, Dr. F assigned two separate IRs, one that included the right wrist, right shoulder, and cervical spine, and the other that included the right wrist, and cervical spine. At the agreement of the parties, the hearing officer in this case requested a letter of clarification from the first designated doctor, Dr. C, regarding the claimant's IR. In a letter of clarification dated February 16, 2005, Dr. C amended his report to reflect the claimant's correct information. Dr. C stated that he had received "erroneous information, which my prior supplemental report was based upon. Also, it states that the compensable injury does include the cervical spine." Dr. C assessed that the claimant's IR was 16% based on 5% whole person impairment for the cervical spine, and 12% whole person impairment due to ulnar and median nerve weakness residuals.

EXTENT OF INJURY

The extent-of-injury issue presented a question of fact 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). It is for the hearing officer to resolve the inconsistencies and conflicts in the evidence and to decide what facts the evidence has established. Garza v. Commercial Insurance Company of Newark, New Jersey, 508 S.W.2d 701 (Tex. Civ. App.-Amarillo 1974, no writ). The hearing officer reviewed the record and medical evidence and decided what facts were established. An appeals-level body is not a fact finder, and does not normally pass upon the credibility of witnesses or substitute its own judgment for that of the trier of fact, even if the evidence would support a different result. National Union Fire Insurance Company of Pittsburgh, Pennsylvania v. Soto, 819 S.W.2d 619, 620 (Tex. App.-El Paso 1991, writ denied). 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 weight and preponderance of the evidence as to be clearly wrong or manifestly unjust, and we do not find it to be so in this case. Cain v. Bain, 709 S.W.2d 175, 176 (Tex. 1986). The hearing officer's extent-of-injury determination is affirmed.

APPOINTMENT OF A SECOND DESIGNATED DOCTOR

An abuse of discretion is the standard to use in reviewing a decision to appoint a second designated doctor. Texas Workers' Compensation Commission Appeal No. 960454, decided April 17, 1996. An abuse of discretion occurs when a decision is made without reference to any guiding rules or principles. *See* Morrow v. H.E.B., Inc., 714 S.W.2d 297 (Tex. 1986); *See also* Texas Workers' Compensation Commission Appeal No. 931034, decided December 27, 1993.

In Texas Workers' Compensation Commission Appeal No. 011607, decided August 28, 2001, the Appeals Panel held that normally the appointment of a second designated doctor is appropriate only in those cases where the first designated doctor is unable or unwilling to comply with the required AMA Guides or requests from the Commission for clarification, or if he or she otherwise compromises the impartiality demanded of the designated doctor. In Texas Workers' Compensation Commission Appeal No. 002043, decided October 6, 2000, the Commission was found to have abused its discretion when it appointed a second designated doctor because, when it appointed him, it had not established that the first designated doctor would either be completely unavailable or unreasonably delayed in his ability to reexamine the claimant. If a designated doctor cannot or refuses to comply with the requirements of the 1989 Act, a second designated doctor may be appointed. Texas Workers' Compensation Commission Appeal No. 961436, decided September 5, 1996. In the instant case, the hearing officer found that Dr. F's appointment was done for a proper purpose and that it was not an abuse by the Commission. The hearing officer commented that the "appointment of the second designated doctor was proper and compatible with the concerns of the Benefit Review Officer and the parties."

In Texas Workers' Compensation Commission Appeal No. 022492, decided November 13, 2002, the Appeals Panel noted that a second designated doctor is rarely appropriate and should be limited to situations where, for example, the first designated doctor cannot or refuses to properly apply the AMA Guides, particularly after being asked for clarification or additional information concerning the report. In this instance, the evidence reflects that the first designated doctor provided a letter of clarification in which he acknowledged the erroneous information regarding the claimant's MVA, and he amended his report to reflect the correct information. Dr. C assessed that the claimant's IR was 16%, based on 5% cervical spine and 12% for ulnar and medial nerve weakness.

We reverse the hearing officer's determination that Dr. F's findings are entitled to presumptive weight in that Dr. F was properly appointed as the second designated doctor in accordance with Section 410.0041 and Rule 130.5, and render a new decision that Dr. F was not properly appointed as the second designated doctor in accordance with Section 410.0041 and Rule 130.5

IR

Consequently the only reports to be considered to determine the claimant's IR are from the treating doctor and first designated doctor. 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. Rule 130.6(i) provides that the designated doctor's response to a

Commission request for clarification is considered to have presumptive weight as it is part of the doctor's opinion

Given that we have reversed the hearing officer's determination that the second designated doctor was properly appointed, we also reverse the hearing officer's IR determination based on the second designated doctor's assessment and render a new decision that the claimant's IR is 16%, based on the first designated doctor's amended report.

We affirm the hearing officer's extent-of-injury determination.

We reverse the hearing officer's determination that Dr. F was properly appointed as the second designated doctor and that the claimant's IR is 9%, as certified by Dr. F, and render a new decision that Dr. F was not properly appointed as the second designated doctor and that the claimant's IR is 16%, as certified by Dr. C, the first designated doctor.

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

CT CORPORATION
350 NORTH ST. PAUL STREET
DALLAS, TEXAS 75201.

_____
Veronica L. Ruberto
Appeals Judge

CONCUR:

_____
Thomas A. Knapp
Appeals Judge

_____
Margaret L. Turner
Appeals Judge