APPEAL NO. 040741
FILED MAY 21, 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 March 8, 2004. The hearing officer determined that the appellant's (claimant) impairment rating (IR) is 10%, as certified by the Texas Workers' Compensation Commission (Commission)-selected designated doctor, Dr. F. The claimant appeals this determination. The respondent (carrier) urges affirmance of the hearing officer's decision.

DECISION

Affirmed.

The evidence reflects that the first certification of maximum medical improvement (MMI) and IR was made by Dr. B, a carrier-selected doctor, on March 16, 2001. Dr. B certified that the claimant reached MMI on the same date, with a 10% IR for specific disorders of the spine as provided for by Table 49 (II)(E) of the Guides to the Evaluation of Permanent Impairment, third edition, second printing, dated February 1989, published by the American Medical Association. Dr. B noted that the range of motion (ROM) measurements were not valid and therefore, no rating was given for ROM. The claimant was initially examined by Dr. F, the designated doctor, on May 25, 2001, at which time Dr. F agreed that the claimant reached MMI on March 16, 2001, and assigned 10% IR under Table 49 (II)(E). Dr. F noted that the claimant invalidated ROM measurements. Subsequent to that examination, the Commission apparently requested clarification from Dr. F. Dr. F reexamined the claimant on September 10, 2001, and assigned the exact same rating as he had previously. In response to yet another request for clarification from the Commission, Dr. F reexamined the claimant for a third time on March 26, 2002, and gave the exact same rating as he had on the two previous occasions.

On September 17, 2003, the claimant's treating doctor certified that the claimant reached MMI as of the same date, which is beyond the statutory MMI date, with an 18% IR, comprised of 12% under Table 49 (IV)(B) and 7% for loss of ROM. The Commission then sent another request for clarification to Dr. F. In his written response, Dr. F explained that the claimant had been given three opportunities to validate ROM, but had invalidated the measurements on all three occasions. Dr. F advised that he would be willing to reexamine the claimant should the Commission so desire. On October 9, 2003, Dr. F examined the claimant for a fourth time and assigned a 15% IR, comprised of 12% under Table 49 (IV)(B) and 3% for loss of ROM. A carrier peer review doctor, Dr. Y, reviewed Dr. F's fourth IR certification and in a letter dated October 31, 2003, opined that the ROM rating should not have been awarded as it was based on an examination that occurred several years after the MMI date, and because the claimant had invalidated ROM on three prior occasions. Additionally, Dr. Y opined that

the claimant's condition warranted only a 10% IR under Table 49. Dr. F responded to Dr. Y's letter, by stating that whether to rate the claimant's condition warranted a 10% or 12% rating was debatable, and that he agreed that the claimant should not have been given a rating for loss of ROM; however, he pointed out that he was acting upon the request of the Commission in examining the claimant for a fourth time and awarding the rating for ROM, which was valid on the last examination. The hearing officer granted presumptive weight to the March 26, 2002, certification of Dr. F. The claimant appeals this determination, arguing that Dr. F's October 9, 2003, certification of 15% should be given presumptive weight.

Section 408.125(e) provides that for injuries occurring prior to June 17, 2001, where there is a dispute as to the correct 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(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. However, an IR must be based on the claimant's condition as of the date of MMI. Texas Worker's Compensation Commission Appeal No. 040313-s, decided April 5, 2004. Given that the 15% IR was assigned based on the claimant's condition as of October 9, 2003, approximately two and one-half years after the stipulated date of MMI, we cannot agree that the hearing officer erred in refusing to grant presumptive weight to the designated doctor's amended IR certification. Nothing in our review of the record indicates that the hearing officer's decision that the claimant's IR is 10% is 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 decision and order of the hearing officer are affirmed.

The true corporate name of the insurance carrier is **TWIN CITY FIRE 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.

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Chris Cowan
Appeals Judge

CONCUR:

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Elaine M. Chaney
Appeals Judge

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Thomas A. Knapp
Appeals Judge