

## APPEAL NO. 002394

Following a contested case hearing held on August 30, 2000, pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act), the hearing officer resolved the disputed issues by determining that, based on the report of the designated doctor, Dr. PC, the appellant (claimant) reached maximum medical improvement (MMI) on January 26, 1999, with an impairment rating (IR) of 14%. The claimant has appealed. He asserts that he did not reach MMI until May 14, 1999, as determined by his treating doctor, Dr. N, because he underwent a repair of his right inguinal hernia after Dr. PC's exam. The claimant also asserts that his IR should include not only the 14% assigned by Dr. PC for his cervical spine, right shoulder, and penile dysfunction impairments but also the 15% impairment assigned by Dr. N for his bilateral inguinal hernia impairment which would yield a total IR of 27%. The respondent (carrier) urges in response that the evidence is sufficient to support the hearing officer's determination of the claimant's MMI date and IR.

### DECISION

Affirmed.

Not disputed by the claimant are the hearing officer's factual findings that on \_\_\_\_\_, the claimant sustained a compensable injury when he was struck by the arm of a machine in the groin area; that as a result of this incident he sustained certain injuries, to wit: left and right inguinal hernias, penile dysfunction, and injury to the cervical spine and the right shoulder; that Dr. PC's report and IR consisted of 6% for the cervical spine, 5% for the penile dysfunction, 3% for the right shoulder, and 0% for both inguinal hernias; and that Dr. N disagreed with Dr. PC's rating for the hernias.

The claimant testified that when he appeared for the first scheduled examination by Dr. PC, a male doctor with the same last name performed the examination, and that the Texas Workers' Compensation Commission (Commission) arranged for him to be reexamined by Dr. PC; that with Dr. PC's permission, his wife tape-recorded Dr. PC's examination; that Dr. PC examined his shoulder range of motion with two devices but only made one measurement; and that Dr. PC examined and palpated both inguinal hernias and commented on them. Although the claimant testified to having constant ringing in the ears, to having one testicle hanging two inches lower in the scrotum than the other and being painful, and to having such erectile dysfunction after the injury that he and his wife cannot have sexual intercourse, the latter testimony being corroborated by the testimony of his wife, the claimant's appeal, as noted, focuses on the failure of Dr. PC to assign more than a 0% rating for the hernias. The claimant urges that both the MMI date and IR determined by Dr. PC are erroneous because the claimant underwent surgical repair of the right inguinal hernia approximately one month after Dr. PC's exam and thus he could not have been at MMI on the date of Dr. PC's exam, and that the pain and extent of his hernias qualified for more than a 0% rating. The claimant did not introduce any medical records reflecting that he had surgery on the right inguinal hernia.

Dr. PC's Report of Medical Evaluation (TWCC-69) dated March 5, 1999, states that the claimant reached MMI on January 26, 1999, with an IR of 1% (Dr. N noted his disagreement on the bottom of this form). In her accompanying narrative report, Dr. PC notes the results of her review of the available medical records, including diagnostic testing and the several diagnoses, and states the results of her clinical exam. She stated that the scrotum and testicles are normal and she noted no deformity, scarring or induration of the penile shaft. With regard to the left inguinal area Dr. PC noted the presence of a well-healed inguinal scar, sensitivity to palpation, and the ability to feel a small protrusion at the external inguinal ring upon coughing. As for the right inguinal area, Dr. PC noted the presence of a small bulge upon the claimant's coughing. Based on her review of the records and her examination, Dr. PC stated the diagnoses as penile dysfunction; status post repair of left inguinal hernia; biceps/superior labrum lesion; and cervical spondylosis. Dr. PC further reported that her IR assessment was made using the Guides to the Evaluation of Permanent Impairment, third edition, second printing, dated February 1989, published by the American Medical Association (AMA Guides) and that her total IR of 14% included 0% for the right and left inguinal hernias based on Table 6, Class 1, on page 188 of the AMA Guides. The transcription of the claimant's recording of Dr. PC's examination does not reflect any indication that the claimant indicated he may undergo a surgical repair of the right hernia at some future time.

The February 28, 1999, report of Dr. W, board certified in general surgery and thoracic surgery, reflected that he reviewed the claimant's medical records as well as Dr. PC's report. Concerning Dr. PC's hernia ratings, Dr. W stated that for the left and right inguinal hernias, it was noted that a successful repair was performed on the left hernia and that no recurrent hernia defect was discovered by Dr. PC; that a small right hernia defect had been discovered belatedly and only caused symptoms for several months after the original injury; and that Dr. PC noted a small hernia defect on the right. Dr. W further reported that Class 1 of Table, Classes of Hernial Impairment, specifically states that if there is a slight protrusion at the site of the defect, the claimant should be assigned a "0-5% Impairment of the Whole Person," and that "[a] 0% impairment would seem appropriate for the right inguinal hernia as it was only belatedly discovered and has not required any operative repair."

Dr. N's TWCC-69 dated December 10, 1999, states that the claimant reached MMI on May 14, 1999, with an IR of 15%. Dr. N's narrative report of December 10, 1999, states that Table 6, Class 2 gives 15% of the whole person IR and that "[f]rom the hernia point of view, it is a 15% [IR]."

In addition to the two dispositive legal conclusions, the claimant disputes findings that on January 26, 1999, he was examined by Dr. PC, the designated doctor, for purposes of an impairment evaluation; that the designated doctor certified on January 26, 1999, that the claimant reached MMI as of January 26, 1999, with a 14% IR; that the designated doctor's report and rating consisted of 0% for both inguinal hernias; that his treating doctor has a difference of opinion as to the value that should be assigned for the inguinal hernias;

and that the certification of the designated doctor is not contrary to the great weight of the other medical evidence.

Section 401.011(30) defines MMI, in pertinent part, to mean the earliest date after which, based on reasonable medical probability, further material recovery from or lasting improvement to an injury can no longer reasonably be anticipated. Section 401.011(23) defines impairment as any anatomic or functional abnormality or loss existing after MMI that results from a compensable injury and is reasonably presumed to be permanent. Section 408.122(c) provides that the report of the designated doctor has presumptive weight and that the Commission shall base its determination of whether the employee has reached MMI on the report unless the great weight of the other medical evidence is to the contrary. Section 408.125(e) provides that if the designated doctor is chosen by the Commission, the report of the designated doctor 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.

The ultimate determination of an injured employee's MMI date and IR must be based on medical evidence, not lay evidence. See, e.g., Texas Workers' Compensation Commission Appeal No. 92394, decided September 17, 1992. The Appeals Panel has frequently noted the important and unique position occupied by the designated doctor under the 1989 Act. See, e.g., Texas Workers' Compensation Commission Appeal No. 92555, decided December 2, 1992. We have just as frequently stated that a "great weight" determination amounts to more than a mere balancing or preponderance of the medical evidence and that a designated doctor's report should not be rejected absent a substantial basis to do so. Texas Workers' Compensation Commission Appeal No. 93039, decided March 1, 1993.

The claimant had the burden to prove that the MMI date and IR determined by the designated doctor are contrary to the great weight of the other medical evidence. Johnson v. Employers Reinsurance Corporation, 351 S.W.2d 936 (Tex. Civ. App.-Texarkana 1961, no writ). The hearing officer is the sole judge of the weight and credibility of the evidence (Section 410.165(a)), resolves the conflicts and inconsistencies in the evidence (Garza v. Commercial Insurance Company of Newark, New Jersey, 508 S.W.2d 701 (Tex. Civ. App.-Amarillo 1974, no writ)), and determines what facts have been established from the conflicting evidence. St. Paul Fire & Marine Insurance Company v. Escalera, 385 S.W.2d 477 (Tex. Civ. App.-San Antonio 1964, writ ref'd n.r.e.). As an appellate reviewing tribunal, the Appeals Panel will not disturb the challenged factual findings of a hearing officer unless they are so against the great weight and preponderance of the evidence as to be clearly wrong or manifestly unjust and we do not find them so in this case. Cain v. Bain, 709 S.W.2d 175, 176 (Tex. 1986); In re King's Estate, 150 Tex. 662, 244 S.W.2d 660 (1951). The hearing officer could conclude that Dr. PC determined that the claimant had no impairment from the right inguinal hernia, notwithstanding that the claimant, as he stated, had surgery on the right hernia subsequent to Dr. PC's examination. The mere fact that medical treatment, including surgery, may occur subsequent to the determination that MMI has been reached does not, per se, invalidate the MMI date nor mandate an increased IR.

We note that Table 6 on page 188 of the AMA Guides does not reflect that any percentage of impairment must be assigned based upon the surgical repair of a hernia.

The decision and order of the hearing officer are affirmed.

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Philip F. O'Neill  
Appeals Judge

CONCUR:

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Gary L. Kilgore  
Appeals Judge

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Judy L. Stephens  
Appeals Judge