APPEAL NO. 010348

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 January 16, 2001. The hearing officer determined that the respondent (claimant) had an impairment rating (IR) of 42% and a maximum medical improvement (MMI) date of May 23, 2000. Additionally, the hearing officer determined that the claimant need not be sent to a second designated doctor for another IR evaluation; that the Texas Workers' Compensation Commission (Commission) did not abuse its discretion in appointing Dr. C to perform a required medical examination; and that Dr. C's report is medical evidence. The appellant (carrier) appeals and argues that the great weight of the evidence is so against the hearing officer's determination of the MMI date and IR as to be clearly wrong or manifestly unjust. The claimant responds and requests that the Appeals Panel affirm the decision and order of the hearing officer.

DECISION

Affirmed.

We initially address the argument the claimant makes in his response to the carrier's request for review. The claimant argues that the Commission abused its discretion in appointing Dr. C after receiving the designated doctor's report; thus, the claimant did not want the hearing officer to consider Dr. C's report as medical evidence. First, the carrier's timely appeal does not include a challenge to the hearing officer's decision with respect to the appointment of Dr. C, nor does it challenge the claimant's abuse of discretion argument. Secondly, while the claimant's response includes a discussion on the issue, his timely response was not timely as an appeal. Therefore, the Appeals Panel will not address these arguments as they have not been properly preserved and certified here.

The hearing officer did not err in concluding that the claimant had an IR of 42% and an MMI date of May 23, 2000. The statutory requirements regarding disputes of a claimant's IR and MMI are found in Sections 408.122 to 408.125 of the 1989 Act. If the Commission appoints a designated doctor, his or her evaluation of a claimant's IR/MMI is given presumptive weight unless "the great weight of the other medical evidence is to the contrary."

In this case, the claimant sustained a compensable injury on _____. The Commission appointed Dr. H as the designated doctor. Upon examination of the claimant on May 23, 2000, Dr. H found that the claimant had reached MMI and that his IR was 41%. On June 26, 2000, the Commission sent a letter to Dr. H requesting clarification whereupon, in a letter dated August 21, 2000, Dr. H amended the claimant's IR to 42%. Within Dr. H's report, he described the claimant's injuries and his performance in a range of motion examination; assessed the claimant's activities of daily living; performed a palpation examination; and wrote that he followed the appropriate Guides to the Evaluation

of Permanent Impairment, third edition, second printing, dated February 1989, published by the American Medical Association as directed by the 1989 Act.

The carrier introduced the report of Dr. C, who determined that the claimant's IR was 16% and who agreed with Dr. H that the claimant reached MMI on May 23, 2000. The carrier also introduced reports made by two peer review doctors whose IRs and MMI dates were significantly divergent from those of Dr. C and Dr. H.

Pursuant to Section 410.165(a) of the 1989 Act, the hearing officer is the sole judge of the weight and credibility of the evidence. The hearing officer resolves the conflicts and inconsistencies in the evidence and determines what facts have been established from the conflicting evidence. Garza v. Commercial Insurance Company of Newark, New Jersey, 508 S.W.2d 701 (Tex. Civ. App.-Amarillo 1974, no writ); 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.). This is equally true regarding medical evidence. Texas Employers Insurance Association v. Campos, 666 S.W.2d 286 (Tex. App.-Houston [14th Dist.] 1984, no writ). This tribunal will not upset 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. 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). We do not find them so here.

For these reasons, we affirm the hearing officer's decision and order.

Philip F. O'Neill
Appeals Judge

CONCUR:

Judy L. S. Barnes
Appeals Judge

Robert W. Potts
Appeals Judge