APPEAL NO. 951414

On June 21, 1995, a contested case hearing (CCH) was held in (city), Texas, with (hearing officer) presiding as the hearing officer. The hearing was held under the provisions of the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq*. (1989 Act). The issues at the hearing were whether the respondent's (claimant's) hernia and head injury were a result of the compensable injury sustained on (date of injury); the date of maximum medical improvement (MMI); and the claimant's impairment rating (IR). The appellant (carrier) timely appealed the hearing officer's decision that the claimant's hernia is a result of his compensable injury, that the designated doctor's report on MMI and IR is not valid because she did not "assess" the claimant's hernia, and that another designated doctor shall be appointed for purposes of assessing MMI and IR. The claimant's appeal of the hearing officer's determination that he did not sustain a compensable head injury will not be considered because it was not timely filed. The hearing officer's decision was distributed on August 3, 1995, and the claimant's appeal was not received by the Commission until September 29, 1995, which was not within the 15-day time period for filing an appeal under Section 410.202(a).

DECISION

Affirmed in part and reversed and rendered in part.

On May 18, 1993, the claimant underwent a preemployment physical examination for a position as a groundskeeper at the cemetery operated by the employer and it was noted by the doctor that the claimant did not have a hernia and no abnormalities were noted as to the claimant's back. The claimant said he began work the next day. Although the claimant did not testify as to the date he was injured, all the medical reports reflect a date of injury of (date of injury), and the issue at the benefit review conference and at the CCH with regard to the extent of injury issue reflect a date of injury of (date of injury). The claimant testified that on the day he was injured at work he was putting up a sixteen-foot-long, heavy, steel flagpole by placing the flagpole in a hole in the ground at the cemetery when the wind knocked the flagpole back into him. He said the flagpole glanced off his head, hit his shoulder, and knocked him backwards causing him to fall and hit his lower back on a curb.

(Dr. C) examined the claimant on June 2, 1993, and diagnosed trauma to the right shoulder and back and referred the claimant to (Dr. B) who diagnosed a lumbar strain and right shoulder pain. On July 20, 1993, Dr. B noted that the claimant told him that he had strained his left groin area in the accident of (date of injury) and Dr. B diagnosed a reducible, direct hernia. An MRI scan of the claimant's lumbar spine done on July 6, 1993, revealed degenerative disc disease at the L5-S1 level. Dr. B referred the claimant to (Dr. P) who noted on July 29, 1993, that the claimant told him that he had developed left groin pain immediately after his accident of (date of injury) and that the claimant noted a groin bulge over the next several days. Dr. P diagnosed a left inguinal hernia and recommended surgical repair of the hernia. (Dr. S) examined the claimant on October 5, 1993, and he reported that it appeared that the claimant has a left indirect inguinal hernia.

On November 23, 1993, (Dr. R) reported that the claimant has a hernia and that he would have surgery for the hernia on December 3, 1993, and on December 17, 1993, Dr. R reported to the carrier that the claimant's surgery had to be cancelled because the claimant did not show up for the surgery. The claimant testified that he did not go to the hospital for surgery because the carrier had denied authorization for it; however, there is no indication in Dr. R's reports that the reason surgery was cancelled was due to the carrier's denial of that procedure. In fact, (CF), a registered nurse and case manager for the carrier, reported that Dr. R told her that the claimant refused hernia surgery because the claimant stated he was "disabled, not working, and not experiencing any discomfort." CF also indicated in her reports that hernia surgery was part of the claimant's treatment program and that the claimant had demonstrated non-compliance with his treatment program by failing to have hernia surgery.

In a Report of Medical Evaluation (TWCC-69) dated January 17, 1994, Dr. B reported that the claimant reached MMI on January 13, 1994, with a five percent IR for impairment of the lumbar spine. He noted that the claimant had not shown up for his hernia surgery. In April 1994 Dr. B referred the claimant to (Dr. H) for psychiatric evaluation and referred the claimant back to Dr. P for hernia surgery. Dr. H's diagnosis of a head injury will not be discussed as there has been no timely appeal of the hearing officer's determination that the claimant did not sustain a compensable head injury. Dr. P reported on April 27, 1994, that the claimant's hernia had gotten larger and that he was scheduled to have hernia repair on May 7, 1994. On May 20, 1994, Dr. B agreed that the claimant should have surgical repair of his hernia. Apparently the claimant did not have hernia surgery in May or at any other time. The claimant testified that "[t]he same thing happened in June when I was scheduled to go - - the carrier scheduled me again to go through surgery, and then he refused it again." The claimant did not indicate who he was referring to when he said "he refused it again," but it may be that he was referring to the carrier given his previous testimony with regard to the first scheduled surgery.

The Texas Workers' Compensation Commission (Commission) chose (Dr. W) as the designated doctor to determine MMI and IR and she reported in a TWCC-69 and narrative report dated June 21, 1994, that she had examined the claimant and that the claimant reached MMI on June 21, 1994, with a five percent IR for impairment of the lumbar spine, the same IR as had been assigned by Dr. B. She noted in her report that it was the apparent consensus that the claimant has a hernia and that surgery is recommended, but that she did not have all the medical reports so she could not comment on whether it would be reasonable to proceed with hernia repair and whether the hernia is connected to the compensable injury.

In December 1994 the benefit review officer (BRO) sent various medical records to Dr. W and asked her to determine whether the claimant's hernia is causally related to his injury of (date of injury). Dr. W responded to the BRO's request with a five-page narrative report wherein she set out her review of the medical reports and determined that, based on her review of the more extensive medical records, the claimant had actually reached MMI on November 30, 1993, and not June 21, 1994, as she had previously reported. The June

21, 1994, date was the date of her examination of the claimant. Dr. W noted that she had not personally examined the claimant for his hernia as the claimant had not at the time of the examination indicated that he had any problem connected with a hernia. However, she did review all the medical reports and opinions with respect to the claimant's hernia as requested by the BRO and stated: "I feel that this patient would fall within a Class 1 impairment, but based on multiple times in this patient's history where he was not complaining of the problem, I feel there would be zero percent impairment for this problem. By review of the more extensive medical records that have now been provided to me that were not provided at the time of his initial evaluation, I do not feel I would change his [IR] whatsoever from the 5 percent that was given to him." Classes of hernial impairment are set out in Table 6 of Chapter 10 of the Guides to the Evaluation of Permanent Impairment, third edition, second printing, dated February 1989, published by the American Medical Association, and Table 6 provides for a zero to five percent impairment for a Class 1 hernial impairment.

The carrier appeals the hearing officer's decision that the claimant's hernia is a result of his compensable injury on "May 18, 1993, [sic]." The date of injury in this case is (date of injury), not May 18, 1993. Although different inferences could have been reached under the state of the evidence in this case, we conclude that sufficient evidence supports a finding that the claimant sustained a hernia on (date of injury), when he was injured at work. We reform the hearing officer's findings, conclusions, and decision to reflect the correct date of injury of (date of injury).

With respect to the issues of MMI and IR, the hearing officer determined that the designated doctor's report on MMI and IR is not valid because the designated doctor did not assess the claimant's hernia and that a second designated doctor is to be appointed to determine MMI and IR. We conclude that the hearing officer's decision with respect to the issues of MMI and IR is not supported by the evidence and is against the great weight and preponderance off the evidence. It is clear from Dr. W's response to the BRO that she has considered the claimant's hernia in determining MMI and IR. Dr. W's IR of five percent is the same as the five percent IR given by Dr. B who has treated the claimant for about a year. No other IRs are in evidence. In addition, Dr. W's amended date of MMI of November 30, 1993, is more in accord with Dr. B's MMI date of January 13, 1994, than was her previous MMI date of June 21, 1994, which was reported before she had all the claimant's medical records.

Pursuant to Sections 408.122(b) and 408.125(e), Dr. W's designated doctor report has presumptive weight and the Commission must base the claimant's MMI date and IR on that report unless the great weight of the other medical evidence is to the contrary. In this case the designated doctor did in fact examine and evaluate the claimant on June 21, 1994, when she made her initial report, and in responding to the BRO's request she reviewed the extensive medical opinions concerning the claimant's medical condition, including his hernia, and, while she initially noted in her amended report that it was possible that the claimant has a small indirect inguinal hernia as a result of his injury, she actually considered the claimant as having a compensable hernia in assessing MMI and IR in her amended

report. While we have held that a designated doctor must examine the claimant, we have also held that a designated doctor may rely on tests, exams, data, and medical reports performed by others in arriving at his or her final evaluation. Texas Workers' Compensation Commission Appeal No. 93095, decided March 19, 1993. *See* also Texas Workers' Compensation Commission Appeal No. 93870, decided November 10, 1993. Dr. W also noted that the claimant had had the opportunity to proceed with surgical repair of his hernia.

We have held that the report of the designated doctor cannot be overcome by a mere balancing of the evidence or by a preponderance of the evidence, but that it takes the "great weight" of the other medical evidence to overcome the designated doctor's report. There is no medical opinion in this case that the claimant is not at MMI or that he has greater than a five percent IR. Drs. B and W agree that the claimant has a five percent IR and, when considering Dr. W's amended date of MMI, the MMI dates found by Drs. B and W are not that far apart. We point out that simply because a claimant has reached MMI does not mean an end to medical benefits for the claimant's compensable injury. Section 408.021 specifically provides that an employee who sustains a compensable injury is entitled to all health care reasonably required by the nature of the injury as and when needed.

That portion of the hearing officer's decision that determines that the claimant sustained a compensable hernia is reformed to reflect a date of injury of (date of injury), and as reformed, is affirmed. That portion of the hearing officer's decision that determines that the claimant's date of MMI and IR have not been determined and that a second designated doctor shall be appointed is reversed and a decision is rendered that the claimant reached MMI on November 30, 1993, with a five percent IR as determined by the designated doctor chosen by the Commission.

Robert W. Potts
Appeals Judge

CONCUR:

Stark O. Sanders, Jr.
Chief Appeals Judge

Judy L. Stephens
Appeals Judge