APPEAL NO. 032851
FILED DECEMBER 22, 2003

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 September 18, 2003. The hearing officer determined that: (1) the appellant (claimant) reached maximum medical improvement (MMI) on May 14, 2002, as certified by the claimant's treating doctor; (2) the claimant has a 10% impairment rating (IR) as certified by a designated doctor appointed by the Texas Workers' Compensation Commission (Commission); and (3) the claimant had disability from April 18, 2002, until May 14, 2002. The claimant appeals the MMI and disability determinations on sufficiency of the evidence grounds. The claimant asserts that disability continued through October 15, 2002, the date of statutory MMI. The respondent (carrier) did not file a response. The hearing officer's IR determination was not appealed and has become final. Section 410.169.

DECISION

Reversed and rendered.

MMI

The claimant worked as a welder for the employer. On _____, he sustained a compensable injury to his low back with pain in both hips and in the right leg. He received conservative treatment. The carrier's required medical examination (RME) doctor, Dr. La, certified the claimant at MMI on November 6, 2000. The claimant's initial treating doctor certified him at MMI on May 10, 2001, stating that the claimant "has not been following standard medical treatment or advice." A subsequent designated doctor's examination determined that the claimant had not reached MMI, stating that the claimant's condition had not become static or well stabilized and claimant is "suffering from treatable effects of the injury and progressive deconditioning." The claimant was seen by a second designated doctor, Dr. M, who certified the claimant reached MMI on April 18, 2002; however, Dr. M had provided treatment to the claimant within the previous year. The claimant had changed treating doctors to Dr. Lo. Dr. Lo certified that the claimant reached MMI on May 14, 2002, with no explanation. The parties stipulated that the Commission-appointed designated doctor for this injury is Dr. A. Dr. A examined the claimant on March 31, 2003, and certified him at MMI on that date. In his report, Dr. A, states:

> The patient has had extensive treatment for a non-surgical back pain condition. He as been appropriate [sic] treated in a conservative-based fashion. He has already had extensive diagnostic studies. He is apparently not a surgical candidate nor is he desiring of any surgery. The current plan is for him to undergo some pain management, which would

> not be unreasonable at this point since this patient has had every other intervention. However, I do no [sic] feel it will change his impairment rating. The only reasonable expectation with pain management will be to help him manage his pain on an independent basis with biofeedback, home exercises and conditioning, as well as weaning off medication as much as possible. I do not feel, once again, that it will change his impairment rating more than 3%. I do feel that he has reached a clinical plateau overall.
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> I do feel that he can be placed at [MMI] at this time. The recommendation, again, would be for [Texas Rehabilitation Commission] to help him if he does not wish to continue his occupation as a welder. Because of the previous dispute regarding the [MMI] date, I would place the [MMI] date as of today, which has given him more time to reach a static medical condition, and at which time it is safe to say that his condition is not going to likely change a great deal despite further intervention.

The Commission later requested clarification of the designated doctor's MMI certification, advising the doctor that the claimant reached statutory MMI on October 15, 2002. The designated doctor amended his certification to reflect that the claimant reached MMI on October 15, 2002.

The hearing officer erred in determining that the claimant reached MMI on May 14, 2002, as certified by the claimant's treating doctor. Sections 408.122(c) provides that a report of a Commission-selected designated doctor shall have presumptive weight on the issue of MMI, and the Commission shall base its determination on such report, unless the great weight of other medical evidence is to the contrary. 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 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. The hearing officer found that the designated doctor's report was against the great weight of other medical evidence "as Dr. A did not use the appropriate legal standard in ascertaining the clinical date of MMI, and every other doctor who had examined Claimant either anticipated or had determined that Claimant was at MMI at least by May 14, 2002." We cannot agree that the designated doctor applied an incorrect legal standard. The designated doctor essentially opined that further material recovery or lasting improvement could not be reasonably expected as of the date of statutory MMI. *See* 401.011(30). We view the other reports as representing a difference in medical opinion, which does not rise to the level of the great weight of medical evidence contrary to the designated doctor's report. Accordingly, we reverse the hearing officer's MMI determination and render a decision that the claimant reached statutory MMI on October 15, 2002, as certified by the Commission-appointed designated doctor.

DISABILITY

At issue is whether the claimant had disability from April 18, 2002, and continuing beyond May 14, 2002. As stated above, the claimant worked as a welder for the employer. The claimant testified that his duties required him to lift heavy materials. The carrier's RME for MMI/IR purposes, opined that the claimant could return to work without restrictions as of November 6, 2000. However, functional capacity evaluations (FCE), dated February 7, 2002, and October 17, 2002, indicated that the claimant was functioning at a light physical demand level and was unable to meet his preinjury job requirements. The claimant was found to have deficits in lifting, pulling/carrying, pushing, stooping, bending, kneeling, sitting, and crouching, with decreased muscular strength and endurance. The claimant was restricted to light duty by his treating doctor from May 14, 2002, through August 9, 2003, consistent with the FCEs. The claimant testified that he continues to experience pain and spasms in the low back and right leg. The hearing officer commented that the claimant could not return to his previous occupation as a welder. In December 2001, the claimant took real estate courses and began working as a real estate agent on or about April 1, 2002. While the claimant earned some commissions during the period in question, he testified that his wages were lower than his preinjury wage. This is corroborated by claimant's commission checks in evidence. In his discussion of the evidence, the hearing officer stated, "While the evidence indicates that the injury would prevent Claimant from returning to work as a welder, it does not show that the injury caused an inability to earn pre-injury wages after Claimant returned to work in another occupation, as a dimunition in wages may be from economic conditions in the new employment rather than the effects of the injury." Despite this statement, the hearing officer found that the claimant's compensable injury prevented him from earning his preinjury wage from April 18, 2002, until May 14, 2002.

The hearing officer erred in determining that the claimant did not have disability beyond May 14, 2002. Disability is defined as "the inability because of a compensable injury to obtain or retain employment at wages equivalent to the preinjury wage." Section 401.011(16). We have held that where a medical release is conditional and not a return to full-duty status because of the compensable injury, disability, by definition, has not ended unless the employee is able to obtain and retain employment at wages equivalent to the preinjury wage. Texas Workers' Compensation Commission Appeal No. 91045, decided November 21, 1981. Additionally, the compensable injury need not be the sole cause of the disability. Texas Workers' Compensation Commission Appeal No. 960054, decided February 21, 1996. In this case, the hearing officer believed that the "injury would prevent Claimant from returning to work as a welder" and that the claimant experienced a "dimunition of wages" following his compensable injury. Indeed, the hearing officer found that the claimant had disability while employed as a realtor, earning less than his preinjury wage. In view of the applicable law and the evidence presented, we conclude that the hearing officer's determination that disability ended on May 14, 2002, 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). Accordingly, we reverse the hearing officer's disability determination and render a

decision that the claimant had disability from April 18, 2002, through the date of the hearing.

For the reasons stated above, we reverse and render the hearing officer's decision and order on the MMI and disability issues and render new decisions as stated.

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

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

_____
Edward Vilano
Appeals Judge

CONCUR:

_____
Gary L. Kilgore
Appeals Judge

_____
Thomas A. Knapp
Appeals Judge