APPEAL NO. 950107
FILED MARCH 3, 1995

This appeal arises pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. 401.001 *et seq*. (1989 Act). Following a contested case hearing held on December 21, 1994, the hearing officer resolved the four disputed issues by determining that the appellant's (claimant) compensable injury does not extend to a neck injury, that the first certification of maximum medical improvement (MMI) and an impairment rating (IR) assigned by claimant's treating doctor, (Dr. S), on January 17, 1994, became final under Tex. W. C. Comm'n, 28 TEX. ADMIN. CODE § 130.5(e) (Rule 130.5(e)), that claimant reached MMI on January 17, 1994, and that claimant's IR is eight percent. Claimant's appeal generally states her disagreement with these conclusions for the reasons she advanced below. The respondent (carrier) asserts that the evidence is sufficient to support the challenged determinations and seeks affirmance.

DECISION

Affirmed.

Claimant, the sole witness, testified through a Spanish language translator, that on _____, while operating a car seat foam cutting machine she felt a sharp pain in her low back which, she said, went up to her neck, that she went to the office and reported it to her supervisor, and that she was taken to (Dr. N) who examined her and released her to return to work the next day. Dr. N's report of that date stated a history of "lifting (heavy) she pulled lower back." The diagnosis was "lumbar strain" and claimant was prescribed medications and returned to work the next day with lifting and bending restrictions. Claimant further testified that she continued to work, but in pain, and thereafter missed only one day of work; that in October 1994 Dr. N referred her to (Dr. S); that she told Dr. S her back hurt and also her head, "a lot of headaches;" that she does not speak English nor did Dr. S speak Spanish but that he communicated with her in Spanish through his computer; that she has no English-speaking friends; that she underwent an MRI which revealed two "bad discs;" and that Dr. S referred her back to Dr. N for therapy. Dr. S's records reflect her visit on October 25, 1993, complaining of low back pain, that her MRI was reviewed on November 8, 1993, and showed evidence of degenerative discs at two lumbar levels, and that Dr. S's impression was right L4-5 disc herniation and disc desiccation at L5-S1. Claimant further testified that Dr. S never told her she was at MMI as of January 17, 1994, nor that he had assigned an IR of eight percent. In evidence was a Report of Medical Evaluation (TWCC-69) signed by Dr. S on January 28, 1994, stating that claimant reached MMI on "01/17/94" with an IR of "8%." Dr. S stated in his accompanying narrative report that claimant was discharged from his care on December 20, 1993, that she had evidence of degenerative disc disease at the L4-5 and L5-S1 levels and lumbar back pain, that the

risks of surgery outweighed potential benefits, and that her condition could be improved with a substantial weight loss.

Claimant further stated that on March 10, 1994, she saw (Dr. L); that she told Dr. L that "all my back was hurting," the lower back the most, and that Dr. L took her off work and told her she needed to go the Texas Workers' Compensation Commission (Commission) to change doctors. In evidence was a Commission record reflecting that claimant visited the Commission on March 9, 1994, requesting to change treating doctors to Dr. L and that her request was approved. Dr. L's Initial Medical Report (TWCC-61) diagnosed lumbar plexus disorder, paresthesia, sciatica and lumbar facet syndrome. Neither the history portion of this report nor the clinical findings made any mention of neck injury or pain. Dr. L's May 18, 1994, report mentioned claimant's being seen on May 16th "for injuries to her neck and back sustained in an Industrial accident on _____." However, the diagnosis portion of that report and a similar August 1, 1994, report contained no diagnosis of any specific cervical area injury. Dr. L wrote on September 12, 1994, that claimant "does have positive findings in her cervical area secondary to her lumbar area which is the initial injury area."

Dr. L also reported arranging to have claimant seen by (Dr. H). Dr. H's May 31, 1994, report stated that claimant complained of pain in her neck radiating into both arms as well as pain in her back radiating into her legs. He recommended a number of diagnostic tests. Dr. H's July 11, 1994, report stated that claimant indicated she experienced pain in her cervical spine radiating into both upper extremities "soon after the initial injury." Dr. H reported "right-sided C6, C7 and C8 hypesthesia" in addition to lumbar hypesthesia. An August 26, 1994, radiology report to Dr. H stated findings of a mild, non-lateralizing, ventral epidural defect at the C5-6 level with no spinal cord compression and a 2-3 mm right paracentral protrusion at C5-6. On September 13, 1994, Dr. H reported that claimant underwent upper and lower extremity SEP/DSEP/NCV studies, a cervical myelogram and a lumbar myelogram, that she has evidence of radiculopathy and disc pathology in the lumbar spine, and that she has neck pain radiating into the right shoulder. Claimant testified that Dr. H told her she needs surgery and that she desires the surgery.

In evidence was a TWCC-21 dated "2/8/94" which stated in part: "CLAIMANT MMI 12/21/93 WITH 8% IMPAIRMENT BY TREATING DR. PAID ACCRUED IIB." This TWCC-21 further reflected that a copy was mailed to claimant on "2/8/94." Another TWCC-21 dated "2/17/94" and reflecting it was mailed to claimant on that date stated in part: "MMI 1-17-94 INSTEAD OF 12-20-93. WE WILL APPLY THESE 4 WEEKS TOWARD IIB. IIB WILL EXPIRE 6-6-94." Claimant testified, variously, that she did not remember receiving the several TWCC-21 forms (Payment of Compensation or Notice of Refused/Disputed Claim) in evidence as "they all look alike," and that she did receive several of them "but they're all the same." She said she began to receive income benefits in January 1994, that "possibly" some paper came with the first check, that she did not

inquire of the Commission or the carrier as to why she was receiving the checks, and that she was continuing to work. She also stated that she did not cash the checks until advised by Dr. L that it was all right to do so, and that Dr. L told her she was receiving the checks because she was off work. In evidence was a TWCC-21 dated "6/15/94" reflecting that claimant was paid impairment income benefits (IIBS) from "12-21-94" to "6-13-94" with the last payment being made on June 7th. Claimant testified that the first time she became aware she had been assigned an eight percent IR was at the Commission about one week before she signed a letter written for her on June 20, 1994, by a Commission Ombudsman which disputed the IR. A Commission record states that claimant visited the Commission on June 20, 1994, that the carrier was stopping her checks based on the expiration of the IIBS period, and that it was explained to claimant that her 90-day period to dispute Dr. S's eight percent IR and MMI date had passed. In evidence was claimant's June 20th letter requesting a benefit review conference because the carrier was disputing that her neck was part of her injury and further stating that she disputed Dr. S's MMI date and IR.

Claimant challenges the finding that she did not suffer a neck injury when she injured her lumbar spine asserting that she reported neck pain to each medical provider but that her inability to speak English and her serious low back injury caused the doctors to overlook treating her neck. Claimant had the burden to prove with a preponderance of the evidence that she sustained a compensable neck injury and the issue presented the hearing officer with a question of fact to resolve. The hearing officer stated that she was not persuaded that claimant established that she injured her neck on _____, given claimant's account of the mechanism of the injury and the absence of complaints of neck pain in the medical records until May 1994. The hearing officer is the sole judge of the weight and credibility of the evidence (Section 410.165(a)) and we will not disturb the hearing officer's findings unless they are so against the great weight and preponderance of the evidence as to be manifestly unjust. In re King's Estate, 150 Tex. 632, 244 S.W.2d 660 (1951). We are satisfied that the challenged finding is sufficiently supported by the evidence. It is for the hearing officer to resolve the conflicts and inconsistencies in the evidence, including the medical evidence. Texas Employers Insurance Association v. Campos, 666 S.W.2d 286 (Tex. App.-Houston [14th Dist.] 1984, no writ).

The hearing officer found that Dr. S's TWCC-69 certified that claimant reached MMI on January 17, 1994, with an IR of eight percent; that such was the first certification rendered and was valid; that claimant received notice of the Dr. S's certification of MMI and the IR not later than February 28, 1994, but did not dispute it until June 20, 1994; and that claimant did not dispute the first certification of MMI and her IR within 90 days. Based on these findings the hearing officer concluded that Dr. S's certification of MMI and the IR became final, that claimant reached MMI on January 17, 1994, and that her IR is eight percent. Claimant asserts on appeal that she has not reached MMI for three reasons: (1) Dr. S's MMI date and IR did not become final under Rule 130.5(e) because Dr. S failed to

mail his TWCC-69 to the Commission and the parties not later than seven days after the examination as required by Rule 130.1(h) (*see* Rule 130.2(b)(2)); (2) Claimant has not reached statutory MMI (Section 401.011(30)(B)); and (3) Claimant "is scheduled for a low back surgery by [Dr. H]." Claimant's appeal of the IR issue is succinctly stated: "No MMI so no rating."

As noted, claimant's position on the Rule 130.5(e) issue is based on the assertion that Dr. S's certification was invalid because Dr. S failed to file his report not later than seven days after the examination. Claimant's appeal states in part: "The doctor filed his TWCC 69 outside seven days. Pursuant to Appeals Panel #92132 the doctor must comply with Rule 130.1 or the certification is invalid." Assuming that the claimant was not attempting to mislead the Appeals Panel in citing this case, we do find claimant's reliance on that case to be seriously misplaced since the decision quite plainly refutes claimant's contention. In Texas Workers' Compensation Commission Appeal No. 92132, decided May 18, 1992, the sole disputed issue was whether temporary income benefits were owed the employee after his treating doctor certified that MMI had been reached with a zero percent IR. The Appeals Panel affirmed the decision of the hearing officer who determined that MMI had not been properly certified because the TWCC-69 omitted any narrative history of the medical condition and the most recent clinical findings and thus failed to comply with Rule 130.1. Not only was there no issue in that case concerning the finality of the IR under Rule 130.5(e), but the Appeals Panel, while finding the MMI certification wanting because a large portion of the TWCC-69 was left blank, stated:

> In our opinion, the failure of a health care provider to timely submit required reports does not in and of itself cause the report to lose value or credibility as an expert opinion, or, in the case of a TWCC-69, to fail as a `certification' of MMI and/or an evaluation of impairment. The sanction against a health care provider for failure to submit a certification of MMI timely is found in Art. 8308-10.07(c)(3) [now Section 415.003(7)]. Consequently, we disagree with the hearing officer's decision insofar as she indicates that the failure of the doctor to mail an MMI certification to parties or the Commission within 7 days negates the substantive effect of such report as a proper `certification.'

We find no merit in claimant's assertions of error respecting the hearing officer's determinations of these issues. They are sufficiently supported by the evidence.

The decision and order of the hearing officer are affirmed.

Philip F. O'Neill
Appeals Judge

CONCUR:

Thomas A. Knapp
Appeals Judge

Tommy W. Lueders
Appeals Judge