APPEAL NO. 980197
FILED MARCH 11, 1998

This appeal arises pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq*. (1989 Act). On January 12, 1998, a contested case hearing was held. He (hearing officer) determined that appellant's (claimant) initial impairment rating (IR) of 10%, as provided by (Dr. J) in a report dated February 12, 1993, became final. Claimant asserts that he did not receive written notice of the initial IR, that his injury was misdiagnosed because no MRI of his neck was accomplished at the time of the IR, and adds that he was treated after the time of the initial IR but before his 1997 complaints of neck pain. Respondent (carrier) replied that notice of the first IR was provided, that claimant knew of his cervical condition at the time of the initial IR, that there was no misdiagnosis, and that added documents offered on appeal by claimant should not be considered.

DECISION

We affirm.

Claimant worked for (employer) as a truck driver. He said he was hurt in _____ when he fell while getting out of his truck, landing on his buttocks. He was treated by Dr. J. Claimant said that his lower back injury was most prominent, but he also complained about his neck, saying it was severe, although he received no treatment for the neck. He had surgery to his low back in February 1992 and Dr. J on August 19, 1992, noted that he believed claimant had reached maximum medical improvement (MMI) at that time. Later, on February 12, 1993, a year after the surgery, Dr. J signed a Report of Medical Evaluation (TWCC-69) saying that MMI had been reached on August 3, 1992, with 10% IR attributed completely to the lumbar spine.

Claimant testified that he could not recall receiving a copy of the TWCC-69. He indicated that the address indicated by the carrier for sending him a copy on March 1, 1993, was his ___ address in (State), adding that he used her address and had given that address to the employer. He said he still gets some mail at his ___ house although he no longer lives there. He agreed that in the timeframe of the TWCC-69 he had spoken by phone with the Texas Workers' Compensation Commission about receiving advanced payments of benefits and acknowledged that he knew, by telephone, that he had been assigned an IR. There was no evidence that any dispute of the IR was made prior to 1997.

Carrier's adjuster, (Ms. L), testified that although she did not personally take claimant's copy of the TWCC-69 to the post office, she is certain that it was mailed. She said that the correspondence with the TWCC-69 was not returned as unclaimed. She acknowledged on cross-examination that it was not sent certified so there was no green card showing receipt. Texas Workers' Compensation Commission Appeal No. 94354, decided May 10, 1994, stated that an IR had to be communicated in writing. Texas

Workers' Compensation Commission Appeal No. 94229, decided April 11, 1994, and Texas Workers' Compensation Commission Appeal No. 960335, decided April 5, 1996, both indicated that the written notification of the initial IR sent to the claimant's address is sufficient whether claimant understands it, reads it, or even personally gets it. In this instance claimant also could not recall if he had ever changed his address from his ___ home. With Ms. L's testimony as to the sending of the IR to claimant's (State) address, with her added comment that the communication was not returned unclaimed, and with claimant's testimony that he used that address, the hearing officer could conclude that the IR was sent to the address provided by claimant and claimant was therefore notified of the initial IR during the month of March 1993.

The hearing officer found that the claimant's neck condition deteriorated during the period from MMI in 1992 to 1997. (Dr. O), who examined the medical records for carrier, indicated that the neck condition was related to the original injury; claimant testified that he did have cervical surgery in 1997. Neither a copy of the MRI report which (Dr. G) cited for the presence of herniated discs at C5-6 and C6-7, nor a copy of the operative report showing the cervical surgery, was provided. Dr. O's report indicated that while claimant's records do show complaints back to the 1991 injury, the injury to the cervical area could have worsened with time. Therefore, the finding of fact that claimant's condition deteriorated over the past five years is sufficiently supported by the evidence.

Dr. O also commented that it was "amazing" to him that there had been no MRI of the neck at the time claimant was being treated in 1992. This comment was not considered by the hearing officer to warrant a finding that claimant's earlier care had been inadequate. Since the comment does not indicate that within reasonable medical probability claimant should have had an MRI of the neck at the time, the hearing officer would have had to infer that Dr. O's comment indicated a lack of adequate care. While a hearing officer may or may not make inferences, the Appeals Panel will not indulge in drawing an inference where none was made by the fact finder. We cannot say, on review, that Dr. O indicated that claimant's care was inadequate in 1992.

Even with some indication that claimant's care may have been less than optimum, claimant in this case encounters two circumstances that affect whether the hearing officer's finding of no misdiagnosis may be overturned on appeal. Texas Workers' Compensation Commission Appeal No. 941748, decided February 13, 1995, and Texas Workers' Compensation Commission Appeal No. 970001, decided February 18, 1997, held that when the claimant knows that he has an injury in a particular area and does not dispute the initial IR within the 90 days provided, he cannot later claim misdiagnosis through lack of treatment of part of the injury. Claimant testified that he knew the neck was injured and complained of it to his doctor in 1991 and 1992. His doctor at the time, Dr. J, said in a July 26, 1991, note that claimant complained of neck pain and indicated that he (Dr. J) thought it "suggestive of cervical radiculopathy." While claimant testified that Dr. J told him the neck pain was reflective of the lumbar injury, the medical records of Dr. J, in evidence, do not indicate such a connection; as stated, Dr. J specifically mentioned the possibility of cervical radiculopathy. With claimant's testimony of his complaints of neck pain at the time and the

medical records confirming awareness of a neck problem, the facts show that claimant was aware of a neck injury at the time of the initial IR and, following the cited cases, should have disputed the IR within the 90 days provided.

In addition, Texas Workers' Compensation Commission Appeal No. 972442, decided January 7, 1998, cited, in reversing a finding of "undiagnosed medical condition and inadequate treatment," Texas Workers' Compensation Commission Appeal No. 93489, decided July 29, 1993. That appeal noted that Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 130.5(e) (Rule 130.5(e)) provided no exception to the finality of the initial IR after 90 days had passed; it nevertheless noted that if the initial IR were not valid because of "compelling medical evidence of a new, previously undiagnosed medical condition or prior improper or inadequate treatment . . . ." the initial IR may not be final. Appeal No. 972442, *supra*, also cited Texas Workers' Compensation Commission Appeal No. 94049, decided February 18, 1994, which spoke of finality "subject perhaps to some undefined egregious medical circumstance." Therefore, the medical evidence must be compelling and would be expected to point to some flagrant circumstance. Appeal No. 972442, *supra*, then pointed out in that case that the failure to seek medical care for 19 months after the initial IR was not consistent with either egregious circumstances or compelling medical evidence of inadequate treatment.

In the case under review, the claimant also attached some medical records to his appeal that show medical care in 1993 after the TWCC-69 was provided in March 1993. Since these documents existed at the time of the hearing and could have been offered into evidence, there is no reason to accept them now and remand the case for the hearing officer's consideration of these facts. *See* Texas Workers' Compensation Commission Appeal No. 92400, decided September 18, 1992. Even if these records had been timely offered and admitted, they would only show some care in 1993 with nothing shown in 1994, 1995, and 1996.

The hearing officer is the sole judge of the weight and credibility of the evidence. *See* Section 410.165. The Appeals Panel will only overturn his factual findings when they are against the great weight and preponderance of the evidence. In this case we cannot say that compelling medical evidence constituted the great weight of the evidence so as to require a reversal of the determination that neither a misdiagnosis nor inadequate treatment was shown. The hearing officer could give weight, as the findings show he did, to the long period of time after MMI until claimant presented again, at which time herniated cervical discs were diagnosed. While Dr. O's opinion provides some indication that additional studies in 1992 of the cervical spine would have been appropriate, we cannot say that the evidence was so compelling as to require a finding of fact indicating the lack of a cervical MRI in 1992 showed inadequate treatment.

Finding that the decision and order are sufficiently supported by the evidence, we affirm. *See* In re King's Estate, 150 Tex. 662, 244 S.W.2d 660 (1951).

Joe Sebesta
Appeals Judge

CONCUR:

Elaine M. Chaney
Appeals Judge

Christopher L. Rhodes
Appeals Judge