APPEAL NO. 990426

This appeal arises pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act). A contested case hearing (CCH) was held on February 2, 1999. The issues at the CCH were whether the first certification of maximum medical improvement (MMI) and impairment rating (IR) became final under Tex. W.C. Comm'n, 28 TEX. ADMIN. COD E § 130.5(e) (Rule 130.5(e)), and whether the claimant had disability from an injury sustained on _____. The hearing officer determined that the first certification did not become final and that the claimant had disability from March 23, 1998, to the date of the CCH. The carrier appeals, urging that the determinations of the hearing officer as to finality of the first certification and disability are against the great weight and preponderance of the evidence. The claimant responds that there is sufficient evidence to support the decision of the hearing officer and asks for affirmance.

DECISION

Affirmed.

The claimant testified that she sustained an injury to her back on _____, while lifting some boxes at work. She stated that she returned to light-duty work on or about October 19, 1997, and that she worked until she was laid off on November 19, 1997. She stated that she continued to have back pain and that it continued to worsen. Her treating doctor for the _____ injury was Dr. B, who had treated her before. In any event, she was treated conservatively and in a letter dated October 27, 1997, Dr. B indicated that the claimant was asymptomatic and that he placed MMI as October 7, 1997, with a zero percent IR. That letter was addressed to the Texas Workers' Compensation Commission (Commission). Subsequently, the Commission sent out an EES-19 letter (notice of the MMI/IR report of Dr. B) dated November 25, 1997, to the carrier and the carrier's agent with a notation on the bottom "CGR." The claimant testified that she did not get or receive a copy of Dr. B's report or the EES-19 letter until after she made inquiry and was provided a copy in September 1998. The parties stipulated that the claimant first disputed the MMI/IR of Dr. B in July 1998, apparently connected to a benefit review conference. In any event, the claimant testified that she continued to have worsening pain and went to Dr. K in March 1998. It was subsequently determined through diagnostic tests that the claimant had disc herniations at L4-5 and L5-S1 and that she was a surgical candidate.

The hearing officer states that he found the claimant to be credible and found that she did not received the first written certification until September 1998 and that she disputed the certification. Thus, Rule 130.5(e) did not apply. He further found that the first certification did not become final because of a clear misdiagnosis since the MMI/IR was rendered based on only a soft tissue injury and it was only correctly diagnosed as a signification herniation after an MRI in March 1998. As the fact finder, and the sole judge of the weight and credibility to be given the evidence (Section 410.165(a)) the hearing officer could believe the claimant that she did not receive any written notification of the first MMI/IR rating until September 1998. While there is circumstantial evidence to suggest that

the claimant was sent a copy of the EES-19 in November 1997, we are unwilling to hold that the hearing officer's factual finding was so against the great weight and preponderance of the evidence as to be clearly wrong or unjust. Cain v. Bain, 709 S.W.2d 175, 176 (Tex. 1986); Pool v. Ford Motor Company, 715 S.W.2d 629, 635 (Tex. 1986). And, although not necessary for the decision reached, there is some evidence to support his finding and conclusion that the first certification was not a valid certification and it was based on a clear misdiagnosis. There is also some precedential support for this finding and conclusion in Texas Workers' Compensation Commission Appeal No. 931115, decided January 20, 1994. Regarding disability, the claimant's testimony alone if believed can support a determination of disability. Gee v. Liberty Mutual Fire Insurance Company, 765 S.W.2d 394 (Tex. 1989).

For the reasons stated, the decision and order of the hearing officer are affirmed.

_____
Stark O. Sanders, Jr.
Chief Appeals Judge

CONCUR:

_____
Gary L. Kilgore
Appeals Judge

_____
Elaine M. Chaney
Appeals Judge