APPEAL NO. 990746

This appeal is considered in accordance with the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act). On March 11, 1999, a contested case hearing was held. The issues concerned whether the impairment rating (IR) assigned to the appellant (claimant), by his treating doctor, became final pursuant to Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 130.5(e)(Rule 130.5(e)) because he did not dispute it within 90 days, and whether his current back condition was the result of his compensable injury on or about _____.

The hearing officer held that claimant's first IR became final because he did not dispute it within 90 days, and did not prove that he had a substantial change in condition of his compensable injury that would work to obviate the finality of the first IR. She further held that the current back problem was not the result of the compensable injury.

The claimant has appealed, arguing that he disagrees with numerous findings of fact and conclusions of law, based upon the evidence which he states proves the contrary of what was found by the hearing officer. The respondent (carrier) responds by reciting facts in favor of the decision.

DECISION

Affirmed.

The claimant worked for (employer), and, on _____, he said he felt his back "snap" as he pulled himself up onto a forklift. He was unable to get up for work the next day and sought treatment by his doctor, Dr. M, through January 12, 1998, at which point he returned to work. Claimant said that he had an MRI in December 1997 showing a small herniation which did not compress on the nerve. Claimant said his back was never totally well, and he got progressively worse while working. The evidence shows he went back to his regular job and worked at least 40 hours a week and sometimes in excess of that. Claimant maintained he always had to have others assist him, and could no longer do offshore work due to physical demands of that task.

The claimant was released back to work by Dr. M after he had performed a functional capacity evaluation (FCE) which assessed that he was capable of heavy level work. The FCE report recommended that he have concurrent physical therapy for three weeks because he continued to have discomfort. Claimant said that his employer did not allow him to go to physical therapy; there was no evidence, however, that Dr. M implemented this recommendation with a prescription of physical therapy or that it was denied by the carrier. From the claimant's testimony, it appeared as though he expected that the employer would follow up on this recommendation in some form or fashion. Around the time the claimant was released, Dr. M performed an IR examination and certified that claimant reached maximum medical improvement (MMI) on January 5, 1998, with a zero percent impairment.

The claimant maintained that he believed he needed a zero percent impairment in order to go back to work. He did not dispute the IR when he received it. According to the claimant, he became progressively worse. However, he did not seek medical treatment until after July 1998, when he said he bent down to lift a watermelon and hurt his back again. Claimant maintained he told persons working for his employer that this was the same back injury he had before. A transcribed statement from a senior clerk for the employer, Ms. D, stated that claimant told her he hurt his back at home when he picked up a watermelon, ands speculated that he might have picked it up "crooked."

Dr. M had an MRI done in October 1998 which showed a small central herniation and small annular tear mildly compressing the left S1 ridge. He also had spondylosis at various levels. Claimant was off work on sick leave, and maintained that his employer would not refer him to a doctor, for his back. He saw Dr. M again in October 1998. He testified that Dr. M has told him he will need surgery. Claimant said he was fired, although a statement from a supervisor for the employer indicated that claimant was laid off.

Certification of MMI and notification of an IR and the communication of such under Rule 130.5(e) requires a writing to begin the 90-day time frame. Texas Workers' Compensation Commission Appeal No. 94354, decided May 10, 1994. In Texas Workers' Compensation Commission Appeal No. 981614, decided August 28, 1998, the Appeals Panel said that "[a] substantial change of condition is not in and of itself a reason for not applying Rule 130.5(e) 'especially where the change in condition is not tied to a clear misdiagnosis at the time the initial IR was assigned,'" citing Texas Workers' Compensation Commission Appeal No. 960854, decided June 13, 1996. Finality may be obviated if there is compelling medical evidence of misdiagnosis or inadequate treatment.

In this case, the evidence supports the hearing officer's findings on both issues. Claimant not only returned to work but did so at the heavy level, and worked a full week. The hearing officer was not bound to accept as credible claimant's assertion that others actually performed his job. Although the issue concerning the "current condition" appears to be one primarily concerning medical care (over which the Medical Review Division has ultimate jurisdiction), it was tied to income benefits through the "90 day" issue. The hearing officer could decide from this evidence that the watermelon incident at home constituted an independent, intervening incident which became the sole cause of the subsequent infirmity, and the decision is supported based upon the totality of the evidence in this case.

The decision of the hearing officer will be set aside only if the evidence supporting the hearing officer's determination is so weak or against the overwhelming weight of the evidence as to be clearly wrong or manifestly unjust. Atlantic Mutual Insurance Company v. Middleman, 661 S.W.2d 182 (Tex. App.-San Antonio 1983, writ ref'd n.r.e.). We cannot agree that this was the case here, and affirm the decision and order.

_____
Susan M. Kelley
Appeals Judge

CONCUR:

_____
Philip F. O'Neill
Appeals Judge

_____
Dorian E. Ramirez
Appeals Judge