APPEAL NO. 990845

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 March 12, 1999. With respect to the issues before her, the hearing officer determined that the _____, compensable neck injury was a producing cause of the respondent's (claimant) neck problems after March 11, 1998; that the claimant had disability as a result of his compensable injury from March 20, 1998, to January 11, 1999; that the first certification of maximum medical improvement (MMI) and impairment rating (IR) assigned by Dr. M did not become final pursuant to Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 130.5(e) (Rule 130.5(e)); and that MMI and IR are not ripe for adjudication until such time as a designated doctor is appointed. The appellant (carrier) appeals each of those determinations, contending they are not supported by sufficient evidence and requesting that we reverse and render a decision in its favor on each issue. In his response, the claimant urges affirmance.

DECISION

Affirmed.

The parties stipulated that the claimant sustained a compensable neck injury on _____, in the course and scope of his employment at (employer). The claimant testified that he was taking inventory on that date and was required to climb eight-foot stacks of Coca-Cola packages to count them. He stated that he had to physically pull himself up the stack and that at the end of the day he had neck pain. He testified that initially his neck was stiff and then he developed pain, which became progressively worse and radiated into his shoulders and arms.

The claimant testified that he began treating with Dr. M on the recommendation of either the carrier or the employer. In treatment notes of February 12, 1997, Dr. M diagnosed C6 radiculopathy, noting that "[b]ecause of the amount of objective findings, I do not think that the safest course at this point is to return the patient to work." Instead, Dr. M released the claimant to light-duty work. In a report of April 15, 1997, Dr. M noted that the claimant was doing extremely well until the weekend before the appointment when he experienced an increase in symptoms after going on a car trip. Dr. M concluded "[b]ased on my examination, I think the patient has had some recurred aggravation of his muscular sprain to the neck. I certainly see nothing more ominous in this condition." In a Report of Medical Evaluation (TWCC-69) of the same date, Dr. M certified that the claimant reached MMI on April 15, 1997, with an IR of zero percent. The claimant testified that he continued to experience pain and tingling in his neck, shoulders and arms after the April 15th visit with Dr. M and that he attempted to manage his symptoms with pain medications and muscle relaxers that were prescribed by Dr. M. The claimant returned to Dr. M on August 16, 1997, with complaints of increasing pain in his right arm for the last three to four days. Dr. M noted a history of the claimant experiencing "excruciating pain" in his neck and down his right shoulder and arm after attempting to lift himself out of bed when he was having sexual

relations with his wife. Dr. M stated that his examination revealed "fairly marked weakness" in the claimant's right arm, which he described as "something new." Dr. M noted that he had not performed previous diagnostic studies on the claimant's neck and ordered a cervical MRI. The August 31, 1997, cervical MRI revealed very severe central cervical spine spondylosis with severe central canal stenosis at C4-5 and C5-6, a large left paracentral and foramina soft disc herniation at C5-6, and multi-level bilateral severe neural foraminal stenosis due to bony spondylosis involving the left C6-7, bilateral C5-6, bilateral C4-5, and left C3-4 foramina. A post-myelogram CT scan of October 2, 1997, confirmed the MRI findings. In progress notes of September 5, 1997, Dr. M noted that the MRI had revealed extensive disease and referred the claimant to Dr. W for a neurosurgical consultation. In his November 11, 1997, progress notes, Dr. M notes that Dr. W has suggested that the claimant needs surgery and that Dr. M would initiate the spinal surgery second opinion process. In a letter of January 20, 1998, the Texas Workers' Compensation Commission (Commission) notified the claimant that the carrier's second opinion doctor had concurred in the need for spinal surgery. In a letter of February 3, 1998, Dr. M stated that he had discussed the claimant's condition at length with Dr. W and that Dr. W "feels that the condition is so significant and of such unusual magnitude that the surgery ought to be done by a surgeon more well versed in this particular type of surgery." Dr. W recommended Dr. HM. The claimant testified that Dr. HM performed surgery on his neck on March 20, 1998.

The claimant stated that in March 1997 he began working for Restaurant in a maintenance position. He continued to work in that position until March 1998. The claimant testified that on March 11, 1998, while he was working for Restaurant he developed severe pain in his neck while he was cleaning the french fry machine. He saw Dr. M on that date and in progress notes from that visit, Dr. M noted that the claimant had developed pain while cleaning the machine. Dr. M stated that "[t]his appears to be an exacerbation of his clinical condition," noting that he is scheduled for surgery on March 20, 1998.

On March 11, 1998, Dr. M also wrote a letter to the carrier which states:

> I have reviewed the records of [claimant]. It has become apparent, based on the subsequent condition of the patient, that the TWCC-69 submitted on 4-15-97 in fact has proven to be premature in that the patient's neck condition was more serious than originally thought and includes primary stenosis and a superimposed herniated disc. This has been accepted by the insurance company as related to the original injury. I do not feel that the patient based on all the evidence at this point has reached [MMI], and in fact is scheduled for surgery. I, therefore, request the permission of the [Commission] to rescind the previously submitted form TWCC-69.

In a letter of August 4, 1998, Dr. M responded to questions from the claimant's attorney as to whether the incidents of increased pain after going on a car trip, lifting out of bed, and cleaning some machinery resulted in new injuries to the claimant's neck. Dr. M opined:

> I feel that each and every one of these incidents or episodes simply represented aggravations that are indeed expected in each and every type of problem such as [claimant] has had and do not feel that they represent new [or] separate injuries.

The carrier introduced a report of Dr. X, who conducted a records review. Dr. X opined that the claimant's injury of _____, was a strain that had resolved by April 1997. Dr. X concluded that the "[p]roblems in August of 97 are not related at all. Surgery not due to injury in _____."

Initially, we will consider the carrier's assertion that the hearing officer's determination that the claimant's compensable injury was a producing cause of his neck condition after March 11, 1998. That issue presented a question of fact for the hearing officer to resolve. The hearing officer is the sole judge of the weight, credibility, relevance, and materiality of the evidence. Section 410.165(a). She resolves conflicts and inconsistencies in the evidence and determines what facts have been established. Texas Employers Ins. Ass'n v. Campos, 666 S.W.2d 286 (Tex. App.-Houston [14th Dist.] 1984, no writ). As an appellate body, we will not reverse the hearing officer's factual determinations unless they are so contrary to the great weight and preponderance of the evidence as to be clearly wrong or manifestly unjust. Pool v. Ford Motor Co., 715 S.W.2d 629, 635 (Tex. 1986); Cain v. Bain, 709 S.W.2d 175, 176 (Tex. 1986).

The carrier argues that the claimant's _____, injury was a neck sprain/strain and that it resolved as of April 15, 1997, when Dr. M certified MMI and assessed a zero percent IR. In support of this position, the carrier introduced the report of Dr. X, who opined that the 1997 strain injury had resolved and that the claimant sustained a new injury at home in August 1997, which necessitated the surgery. However, Dr. M opined that the claimant did not sustain new injuries in the incidents where he experienced increased pain. It was the hearing officer's responsibility, as the fact finder, to resolve those conflicts in the evidence. She did so by giving more weight to the opinion of Dr. M that the incidents and episodes at home in August 1997 and at work on March 11, 1998, were "aggravations" and that they did not represent "new and separate injuries." The hearing officer was acting within her province as the fact finder in so assigning the weight to be given to the evidence. Our review of the record does not reveal that the hearing officer's determination that the compensable injury was a producing cause of the claimant's condition after March 11, 1998, was so against the great weight of the evidence as to compel its reversal on appeal. The carrier's challenge to the disability determination is premised upon the success of its argument that the compensable injury was not a producing cause of the claimant's neck condition after March 11, 1998. Given our affirmance of that determination, we likewise affirm the hearing officer's determination that the claimant had disability from March 20, 1998, to January 11, 1999.

Next, we consider the carrier's assertion that the hearing officer erred in finding that Dr. M's April 15, 1997, certification of MMI and zero percent IR did not become final under Rule 130.5(e). The hearing officer noted that Dr. M's certification was "premature since the Claimant's neck condition was much more serious than originally thought" and that it did not

become final because "it was rendered on a misdiagnosis." The carrier cites Texas Workers' Compensation Commission Appeal No. 961764, decided October 16, 1996, and Texas Workers' Compensation Commission Appeal No. 951987, decided January 9, 1996, in support of its argument that Dr. M's certification of MMI and zero percent IR have became final. Neither case necessitates reversal of the hearing officer's determination in this instance. In both Appeal No. 961764 and Appeal No. 951987, diagnostic testing had been performed and the condition that was the basis of the IR had been diagnosed at the time the first certification of MMI and IR was assigned and then the course of treatment changed. That is not what happened here. In his August 1997 report, Dr. M acknowledged that no diagnostic testing had been performed on the claimant prior to the certification of MMI and IR. In addition, Dr. M stated in his letter, attempting to rescind his certification, that it was premised upon a misunderstanding of the seriousness of the claimant's neck condition. In Texas Workers' Compensation Commission Appeal No. 962408, decided January 13, 1997, and Texas Workers' Compensation Commission Appeal No. 960831, decided June 17, 1996, the Appeals Panel considered cases that were strikingly similar to this case. In each case, a doctor had certified MMI and IR prior to the performance of any diagnostic testing and subsequent diagnostic testing revealed that the injuries were more significant at the time of the certification than the doctor had originally believed. In Appeal Nos. 962408 and 960831, the hearing officer determined that the first certification of MMI and IR did not become final under Rule 130.5(e) and the Appeals Panel affirmed those determinations. Under the guidance of Appeal Nos. 962408 and 960831, where, as here, there is an absence of diagnostic testing prior to the certification coupled with uncontroverted medical evidence of a more serious condition revealed by diagnostic testing conducted after the certification and evidence of no new injuries in the intervening period, there is sufficient evidence to support the hearing officer's determination that the first certification of MMI and IR did not become final under Rule 130.5(e). That determination is not so against the great weight and preponderance of the evidence as to be clearly wrong or manifestly unjust; therefore, we will not disturb it on appeal. Because we affirmed the hearing officer's determination that Dr. M's certification of MMI and IR did not become final, we likewise affirm her determination that the claimant's MMI date and his IR cannot be determined until a designated doctor is appointed.

The hearing officer's decision and order are affirmed.

Elaine M. Chaney
Appeals Judge

CONCUR:

Joe Sebesta
Appeals Judge

Tommy W. Lueders
Appeals Judge