

## APPEAL NO. 990874

This appeal arises pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act). On March 16, 1999, a hearing was held. He closed the record on March 26, 1999, and determined that the respondent's (claimant) compensable injury of \_\_\_\_\_, extends to his cervical spine, that the appellant (carrier) did not waive the right to dispute the compensability of an injury to the cervical spine, that the initial impairment rating (IR) did not become final under Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 130.5(e) (Rule 130.5(e)), that claimant had disability from November 16, 1998, through March 16, 1999, the date of the hearing, and that maximum medical improvement (MMI) and IR are not determinable until after a designated doctor examines the claimant. Carrier asserts that the compensable injury does not extend to the cervical spine and therefore there is no disability; it also states that the initial IR of five percent became final under Rule 130.5(e), with an MMI date of April 20, 1998, because it was not disputed within 90 days, adding that there was no clear misdiagnosis. Claimant replied that the decision should be upheld.

### DECISION

We affirm.

Claimant worked for (employer) on \_\_\_\_\_, as a paramedic. He was injured when he was extricating a 330-pound woman from an overturned vehicle. He kept working for a period of five months before he went to a physician. He first saw his family doctor in August 1997 and then began seeing Dr. P in October 1997.

Dr. P provides a history of a pop in the right shoulder area loud enough for claimant and his partner to hear it over other noise at the time. There was pain in the upper back and right shoulder area, with numbness and tingling down the right arm. (Claimant said he worked for several months without medical care because he took over-the-counter medication and because his partner did most of the heavy work.) An MRI of the right shoulder was done, but it was normal, according to Dr. P.

Dr. P then stated on February 16, 1998, that claimant still had pain radiating down his right arm. He added that he was "concerned" about possible C7 nerve root irritation, positing that "if he continues to have problems, may consider EMG . . . and MRI scan of the cervical spine." (No time period was given as to how long problems had to continue before a cervical MRI would be ordered.) On March 23rd Dr. P may have been somewhat distracted by claimant's recent fall at work in which he hit his right shoulder. Dr. P allowed claimant to continue to work, but nothing was said in the March note about whether claimant continued to have problems and nothing was said about an EMG or MRI. Dr. P's next note appears in about two weeks instead of a month or more; it said Dr. P met with a "rehabilitation nurse," although Dr. P's notes earlier in 1998 said nothing about "rehabilitation" or physical therapy. Apparently, Dr. P did not see the claimant on this date. He mentioned a functional capacity evaluation (FCE) that was scheduled and indicated

that claimant could be at MMI, while again mentioning nothing about whether claimant "continued to have problems" and also mentioning nothing about an EMG or MRI.

Then on April 20, 1998, Dr. P signed a Report of Medical Evaluation (TWCC-69), which said that claimant reached MMI on April 20, 1998, with a five percent IR. The narrative states that on February 16, 1998, Dr. P had considered an EMG and MRI of the cervical spine "if his symptoms continued." Dr. P did not say in this narrative that claimant's symptoms had not continued, but commented that the "patient reports . . . he is feeling pretty good." (The latter comment was made about a patient who continued working for five months without medical attention after his injury.) Dr. P said claimant passed the FCE and was able to lift over 100 pounds; he assigned a five percent IR for the right upper extremity. Inexplicably, Dr. P then added that "if he continues to have discomfort, though, I would recommend an MRI scan of the cervical spine and EMG . . ." (emphasis added), and Dr. P continued further by writing that if the claimant's symptoms "were to worsen and he were to have a herniated disc, then one might consider rescinding this MMI." (Again, there was no indication how long claimant's pain had to continue before the MRI would be ordered.)

Claimant did not see Dr. P, after being found to be at MMI on April 20, 1998, until October 2, 1998. At that time claimant reported more pain, more numbness, neck pain, and trouble lifting anything from ground level. Dr. P then said he "would recommend EMG . . . as well as cervical MRI."

On November 11, 1998, Dr. P wrote a letter in which he said a cervical MRI was "finally obtained" on October 8, 1998; it revealed "an extremely large disc herniation and posterior degenerative spondylitic ridge noted at C3-4." He added that in the injury on \_\_\_\_\_, claimant "also injured his neck; however, his symptoms were so localized to the shoulder and upper back area that I felt that this was the area from which the pathology was coming, when, in fact, all along it probably was coming from his neck." Dr. P rescinded the initial IR. An EMG provided in November 1998 also was read as abnormal with suspected C7 severe radiculopathy on the right.

Claimant testified that he received a copy of the initial IR TWCC-69 by May 14, 1998, but did not receive a copy of the narrative that accompanied it. He did not dispute within 90 days. He stated that he was off work from August 27, 1997, through January 13, 1998, when he returned to work at his request. After he returned to see Dr. P in October 1998, and after the testing had been done, claimant was off work beginning November 16, 1998, because claimant's continuing to work was said by Dr. P to be "too risky." Claimant is now in the process of obtaining approval for spinal surgery, depending, in part, on whether the cervical condition is found to be part of the compensable injury.

The hearing officer is the sole judge of the weight and credibility of the evidence. See Section 410.165. In finding that the claimant compensably injured his cervical spine on \_\_\_\_\_, when removing an injured person from a wrecked car, the hearing officer was sufficiently supported not just by Dr. P's November 1998 opinion but also by medical

records which indicated pain in the same location throughout treatment with a shoulder MRI being normal and a cervical condition suspected, but untreated, for a lengthy period of time.

The hearing officer also found that the initial IR and determination of MMI by Dr. P were based on a clear misdiagnosis. The shoulder was said to be the site of injury, whereas, studies, eventually done, showed the neck was the site of injury. The facts of this case do not indicate that the claimant knew of any misdiagnosis within the 90-day period that would have expired by mid-August 1998. (As stated, no cervical MRI was obtained until October 1998--throughout the period from before the date of the initial IR to October 1998 claimant was at work, and he did not seek medical treatment after April until October 1998.) The finding of a clear misdiagnosis is sufficiently supported by the evidence, including the narrative accompanying the TWCC-69 of April 20, 1998, which shows that IR was provided for the right upper extremity. It shows no diagnosis relative to the cervical spine although it mentions that a possible cervical condition had been considered for at least two months without taking steps to rule that possibility out even though the shoulder MRI was normal. From this evidence, and the other medical records, the hearing officer could reasonably conclude, without an expert opinion apart from the notes and comments made by Dr. P himself, that a clear misdiagnosis had occurred. We observe that the evidence would also support a determination that claimant's treatment for his cervical injury was inadequate had that determination been made. See *generally* Texas Workers' Compensation Commission Appeal No. 980125, decided March 6, 1998.

Carrier agreed that disability was not disputed on its own merits but was disputed in regard to whether the cervical spine was part of the injury. Of course, if the date of MMI was April 20, 1998, any disability thereafter would not result in temporary income benefits. With the determination that the cervical injury was compensable now affirmed and with the determination that the initial IR did not become final (and that MMI was not reached on April 20, 1998), now affirmed, the determination of disability is also sufficiently supported by the findings of fact and the evidence.

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:

---

Gary L. Kilgore  
Appeals Judge

---

Alan C. Ernst  
Appeals Judge