APPEAL NO. 991489

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 June 15, 1999. With respect to the issues before him, the hearing officer determined that the respondent's (claimant) compensable injury of _____, included a lumbar injury in addition to a cervical injury; that the appellant (self-insured) did not waive its right to contest compensability of the lumbar injury by failing to timely raise its contest; and that the first certification of maximum medical improvement (MMI) and impairment rating (IR) did not become final pursuant to Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 130.5(e) (Rule 130.5(e)). In its appeal, the self-insured asserts error in the hearing officer's extent-of-injury determination and in his determination that the first certification of MMI and IR did not become final under Rule 130.5(e). The appeals file does not contain a response to the self-insured's appeal from the claimant. In addition, the claimant did not appeal the hearing officer's determination that the self-insured did not waive its right to contest compensability of the lumbar injury.

DECISION

Affirmed.

The claimant testified that on _____, he was working as a sanitation worker for the self-insured. He stated that as he was throwing a container of garbage, his left hand became numb. He further testified that he took off his glove in an attempt to alleviate the numbness in his hand and he developed pain in his shoulder, upper back, low back, and down into his legs. The claimant stated that he sought medical treatment with Dr. S, to whom he was referred by the self-insured, on May 9, 1997. In a letter dated May 9, 1997, Dr. S reported a history of "beginning about two months ago" the claimant's having noticed "vague tingling and numbness feeling when he was lifting bags of trash . . . ." Dr. S diagnosed a probable cervical herniated disc and stated that the claimant's low back pain was "of a referred nature."

The claimant began treating with Dr. C, who performed cervical discectomies at C3-4 and C6-7 on September 11, 1997. On November 1, 1997, Dr. C ordered a lumbar MRI, which revealed a broad based disc bulge or early herniation at L4-5 and moderate right-sided neural foraminal narrowing at L5-S1. In a letter of February 5, 1998, Dr. C stated that he thought the claimant's lumbar spine could be treated conservatively. In a "To Whom it May Concern" letter of December 8, 1998, Dr. C stated that he first saw the claimant on August 29, 1997, and he complained of neck and back pain. In addition, Dr. C stated that he had referred the claimant to Dr. B for pain management for both his lumbar and cervical conditions. In progress notes from a July 2, 1998, visit, Dr. B noted complaints of low back pain that radiates into the claimant's legs, diagnosed a lumbar herniation, and recommended lumbar epidural injections. The self-insured introduced a July 8, 1997, report from Dr. H, who appears to have served as a second opinion doctor relative to the

cervical surgery. That report does not reference complaints of low back pain; rather, it focuses on the claimant's cervical complaints.

On March 12, 1998, Dr. W examined the claimant at the request of the self-insured. In a Report of Medical Evaluation (TWCC-69) dated March 12th, Dr. W certified that the claimant had reached MMI as of that date with an IR of 11% for cervical specific disorder impairment. Dr. W did not assign a rating for either cervical range of motion or neurological deficits. In the narrative report accompanying his TWCC-69, Dr. W noted that the claimant claimed that his low back and hip area were part of the compensable injury and that the claimant wanted those conditions rated. However, Dr. W stated:

> there is a tremendous amount of inconsistencies [sic] on physical examination both found by myself and the therapist who performed the impairment measurements. Therefore, the validity of his claims of whether the low back and hip were involved at the time of the injury are left up to you to review your records and see. If so, the [IR] will need to include those areas in the future and a repeat [IR] may be needed.

Dr. W concluded his report by repeating that "[f]urther additions to the [IR] may be needed for the patient, because of his desire to include the low back and hip. This issue will have to be resolved with the [Texas Workers' Compensation Commission]."

Initially, we will consider the self-insured's assertion that the hearing officer erred in determining that the claimant injured his lumbar spine on _____, in addition to his cervical spine. The claimant in a workers' compensation case has the burden to prove by a preponderance of the evidence that he sustained a compensable injury and the nature and extent thereof. Johnson v. Employers Reinsurance Corp., 351 S.W.2d 936 (Tex. Civ. App.-Texarkana 1961, no writ). The hearing officer is the sole judge of the relevance and materiality of the evidence and of its weight and credibility. Section 410.165. The hearing officer resolves conflicts and inconsistencies in the evidence and decides what weight to give to the evidence. Texas Employers Ins. Ass'n v. Campos, 666 S.W.2d 286 (Tex. App.-Houston [14th Dist.] 1984, no writ). To this end, the hearing officer as fact finder may believe all, part, or none of the testimony and evidence. Generally, injury and disability may be proven by the testimony of the claimant alone, if it is believed by the hearing officer. Gee v. Liberty Mut. Fire Ins. Co., 765 S.W.2d 394 (Tex. 1989). However, the testimony of a claimant as an interested party raises only an issue of fact for the hearing officer to resolve. National Union Fire Ins. Co. v. Soto, 819 S.W.2d 619, 620 (Tex. App.-El Paso 1991, writ denied). When reviewing a hearing officer's decision we will reverse such decision only if it is so contrary to the overwhelming weight of the evidence as to be clearly wrong and manifestly unjust. Cain v. Bain, 709 S.W.2d 175, 176 (Tex. 1986); Pool v. Ford Motor Co., 715 S.W.2d 629, 635 (Tex. 1986).

The self-insured contends that the hearing officer's extent-of-injury determination is against the great weight of the evidence. In so arguing, the self-insured maintains that due to the delayed onset of the lumbar symptoms, expert evidence of causation was required. It cites Texas Workers' Compensation Commission Appeal No. 990453, decided April 14,

1999, and asserts that that case stands for the proposition that expert evidence of causation is required in all cases of "attenuated causation" where there is a delay in the onset of symptoms. The self-insured's argument is premised upon an overeading of Appeal No. 990453. In that case, in addition to emphasizing the delayed onset of symptoms, the Appeals Panel also noted that the claimant was released to full duty, did not seek further treatment, and worked full duty for a period of time prior to the onset of symptoms. Finally, Appeal No. 990453 emphasized that the claimant had received treatment for similar problems prior to his compensable injury. Appeal No. 990453 concluded "[u]nder these conditions . . . we conclude that this is a case where expert medical evidence was necessary to show causation." None of the factors emphasized by the Appeals Panel in Appeal No. 990453 are present in this case except the delayed onset of symptoms. As such, we cannot agree that Appeal No. 990453 mandates expert evidence of causation in this instance. To the contrary, the delay in the onset of symptoms was merely a factor for the hearing officer to consider in determining whether the claimant had sustained his burden of proving a causal connection between his low back condition and his on-the-job injury. The hearing officer was acting within his province as the fact finder in deciding to credit the evidence tending to demonstrate that the claimant's compensable injury extended to his low back and to reject the contrary evidence. The hearing officer's extent-of-injury determination is sufficiently supported by the claimant's testimony and the evidence from Dr. B and Dr. C. Our review of the record does not demonstrate that that determination is so contrary to the great weight of the evidence as to be clearly wrong or manifestly unjust. Therefore, no sound basis exists for us to reverse it on appeal. Cain; Pool.

Next, we consider the self-insured's challenge to the hearing officer's determination that the initial certification of MMI and IR did not become final under Rule 130.5(e). The hearing officer made alternative findings as to why the first certification did not become final. He found that the original rating was "prospective or conditional" in that it was "conditioned on a future determination of whether the lower back was part of the original injury." In the alternative, the hearing officer determined that the claimant had disputed the rating during Dr. W's examination and that the dispute was conveyed to the self-insured when Dr. W forwarded his narrative report and his TWCC-69. In this instance, as the hearing officer noted, Dr. W specifically stated in his narrative report that if the lumbar injury is determined to be part of the compensable injury, "the [IR] will need to include those areas in the future and a repeat [IR] may be needed." We have previously recognized that conditional certifications have not been finalized under Rule 130.5(e), when the condition is subsequently met. That is, where, as here, the certifying doctor clearly articulates that the rating is subject to change upon the occurrence of an event, Rule 130.5(e) does not operate to finalize the certification when the event has transpired. *See, e.g.,*Texas Workers' Compensation Commission Appeal No. 990799, decided June 2, 1999; Texas Workers' Compensation Commission Appeal No. 971771, decided October 22, 1997; Texas Workers' Compensation Commission Appeal No. 970522, decided April 30, 1997; and Texas Workers' Compensation Commission Appeal No. 961178, decided July 31, 1996. The self-insured cites Rodriguez v. Service Lloyds Ins. Co., 42 Tex. Sup. Ct. J. 900 (July 1, 1999) and argues that there are no exceptions to Rule 130.5(e). However, the determination that Rule 130.5(e) does not operate to finalize conditional ratings is not

premised upon there being exceptions to Rule 130.5(e). To the contrary, we have stated that conditional ratings simply are not certifications that trigger the duty to dispute. Appeal No. 971771, *supra*. As we noted in Appeal No. 990799, *supra*, "a contingent IR that indicates that it is provisional or temporary pending the occurrence of further specified treatment or surgery which ultimately occurs could be interpreted as an IR which falls by its own terms because it was provisional from the outset." We note that in both Appeal Nos. 971771 and 961178 the ratings were conditional in the sense that the certifying doctors expressly stated that they were rating only a part of the injury. The fact that Dr. W had questions as to whether the claimant had also injured his lumbar spine in the alleged injury compensable injury does not change the fact that he stated that his rating was subject to change in the event that the lumbar injury was compensable and that his rating was, therefore, conditional. Accordingly, under the guidance of Appeal Nos. 990799, 971771, 970522, and 961178, the hearing officer did not err in determining that Dr. W's certification of MMI on March 12, 1998, and his 11% IR did not become final under Rule 130.5(e). Given our affirmance of the hearing officer's determination that Dr. W's certification was not final because it was conditional, we need not reach his alternative determination that the claimant disputed the certification during his examination with Dr. W and that Dr. W conveyed the dispute to the self-insured by forwarding his narrative report.

The hearing officer's decision and order are affirmed.

_____
Elaine M. Chaney
Appeals Judge

CONCUR:

_____
Thomas A. Knapp
Appeals Judge

_____
Dorian E. Ramirez
Appeals Judge