APPEAL NO. 000065

This appeal arises under the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq*. (1989 Act). On December 6, 1999, a contested case hearing was held. With regard to the issues before her, the hearing officer determined that the appellant/cross-respondent's (claimant) compensable right shoulder and cervical injury does not include or extend to his lumbar spine and that the first certification of maximum medical improvement (MMI) and impairment rating (IR) did not become final under Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 130.5(e) (Rule 130.5(e)) as having been "timely and effectively rescinded by [Dr. O]."

Claimant appeals the hearing officer's findings on the extent-of-injury issue, asserting that the decision is against the great weight and preponderance of the evidence. Claimant requests that we reverse the hearing officer's decision on this issue and render a decision in his favor. Respondent/cross-appellant (carrier) appeals the Rule 130.5(e) issue, asserting that "a valid rescission was never issued by [Dr. O]" and that under Rodriguez v. Service Lloyds Ins. Co., 997 S.W.2d 248 (Tex 1999), "no exceptions to the statutory [sic, Rule 130.5(e) is an agency rule, not a part of the 1989 Act] provision of Rule 130.5(e) exist, including the alleged rescission of the first certification." Carrier requests that we reverse the hearing officer's decision on this issue and render a decision that the certification of MMI and one percent IR has become final. Both parties filed responses to the others' appeal.

DECISION

Affirmed on both issues.

The parties stipulated that claimant sustained a compensable right shoulder and cervical injury on _____. Claimant testified through a translator that on that date he was employed by (employer) as a "tree climber and trimmer" and was cutting or pruning some tree branches. A rope was attached to a tree branch, apparently to guide it to a predetermined spot, but the branch suddenly broke, falling in another direction. Claimant was holding onto the rope when the branch broke and he was dragged or thrown into a trailer. There was substantial testimony on the mechanics of the accident. Claimant testified that the rope was tied around his waist or leg but that was disputed by the carrier. Claimant also demonstrated how he contended the rope was wrapped around his waist. The hearing officer, in her Statement of the Evidence, commented:

> The credible evidence shows that the Claimant was holding onto the rope with his hands, and it fails to establish that the rope was tied around (or connected to) the Claimant's waist.

Claimant was seen at a (clinic) and was treated for a neck and shoulder injury. Notes of October, November and December 1997 fail to mention back complaints and deal only with the neck and shoulder. Claimant also saw a Dr. G in latter 1997 but Dr. G's

records and reports do not reference a low back injury. Diagnostic tests are of the right shoulder, cervical spine and right ribs. Claimant was referred to Dr. K for cervical treatment. A January 5, 1998, report does reference right and left leg pain and weakness but makes no mention of a lumbar injury. Claimant saw Dr. RS in February 1998, but his reports only reference shoulder and neck complaints. Eventually, claimant saw Dr. JS, who, in a report dated March 8, 1999, gives a detailed account of how the rope lifted claimant "off his feet" and "propelled him into the company trailer." Dr. JS commented:

> The patient's previous lumbar disc surgery with scar tissue was aggravated by the sudden jerking of the rope around his lumbar spine and pelvis. New herniations were produced in the lumbar spine. The sudden pulling of the rope around his lumbar spine and pelvis was strong enough to lift a male adult weighing 185 to 225 pounds off of the ground and herl [sic] him through the air head long into the company trailor [sic].

However, the hearing officer commented:

> After the injury, the Claimant did not complain of a back injury to any doctors before March 8, 1999. He testified that he did lodge such complaints, but it is difficult to believe that each and every doctor he saw, to whom he allegedly made these complaints, ignored them and chose not to treat the problem or note the complaints in their records for almost two years. The Claimant, thus, failed to meet his burden of proof to show that the injury includes his lumbar spine.

Claimant, in his appeal, simply contends that the hearing officer's decision that claimant's compensable right shoulder and neck injury did not include or extend to his lumbar spine was against the great weight and preponderance of the evidence. Section 410.165(a) provides that the hearing officer, as finder of fact, is the sole judge of the relevance and materiality of the evidence as well as the weight and credibility that is to be given the evidence. It was for the hearing officer, as trier of fact, to resolve the inconsistencies and conflicts in the evidence. Garza v. Commercial Insurance Company of Newark, New Jersey, 508 S.W.2d 701 (Tex. Civ. App.-Amarillo 1974, no writ). This is equally true regarding medical evidence. Texas Employers Insurance Association v. Campos, 666 S.W.2d 286 (Tex. App.-Houston [14th Dist.] 1984, no writ). The trier of fact may believe all, part, or none of the testimony of any witness. Aetna Insurance Company v. English, 204 S.W.2d 850 (Tex. Civ. App.-Fort Worth 1947, no writ). While Dr. JS did note a lumbar injury almost one and one-half years after the injury, the hearing officer apparently rejected that evidence based on her understanding of how the accident happened. The hearing officer had the benefit of observing claimant and seeing his demonstration. We find the hearing officer's decision on this issue to be sufficiently supported by the evidence.

Claimant was apparently sent to Dr. O by the carrier for treatment of his shoulder injury. In a report dated July 6, 1998, Dr. O comments that claimant "comes in with [Ms. W]," carrier's case manager, and that he, Dr. O, is "now acting as the treating physician." It appears that Dr. O was treating claimant only for his shoulder injury. In a narrative report dated September 23, 1998, apparently attached to a Report of Medical Evaluation (TWCC-69) of the same date, Dr. O commented:

> I have incomplete records from [Dr. K] but apparently [Dr. K] saw the patient as well in reference to the cervical spine. At this point we will treat the patient only for his shoulder and will refer treatment and MMI assessment as to the cervical spine to [Dr. K], a neck specialist.
>
> The MMI and evaluation today will be based only on his right shoulder.

Dr. O went on to state:

> I talked [to Ms. W] who came in later. Again this impairment is based only on the shoulder. We have not seen the MR scan of the neck. I explained to [Ms. W] that if the MR scan of the neck has not been done with the problems with his neck voiced on exam and by history, a MR scan would be helpful as would EMG's and NCV's to determine his disability in reference to the neck.

It appears relatively undisputed that Ms. W provided translation for claimant, who speaks no English. Dr. O, in the TWCC-69, certified claimant was at MMI on September 23, 1998, with a one percent IR "based on his shoulder." Although there is some dispute about whether and when claimant received written notice of this report, the hearing officer found that claimant "is deemed to have received it [a Texas Workers' Compensation Commission (Commission) EES-19 letter with the MMI and IR certification] on October 13, 1998." In a follow-on note, dated October 8, 1998, apparently sent to carrier, Dr. O again commented:

> The disability rating sent on [claimant] was based only on his shoulder.
>
> I have been asked to give a disability rating based on his neck as well.
>
> We will need to resent [sic] the disability on his shoulder until we can combine the two together. He is to return to see us with his MR scan so we can proceed with determining his disability rating based on his neck.

The hearing officer made an unappealed finding of fact that a fair and reasonable reading of Dr. O's October 8, 1998, report "reflects that when he wrote 'resent' he meant 'rescind.'" In a report dated December 9, 1998, Dr. O comments that claimant again "comes in today with [Ms. W]" and goes on to state:

> I explained to [Ms. W] that I am going to refer him back to [Dr. K] for evaluation of his neck. Once [Dr. K] feels that he has done all that he can do for the patient's neck then we will assess him as achieving MMI. At the present time we will assess no MMI for the whole person even though I think the shoulder had achieved MMI but we have to wait until he has achieved MMI for his neck to evaluate the whole person.

Undisputedly, there was a conversation between Dr. O, Ms. W and claimant at that time. Claimant testified that this is when he first learned that Dr. O had assessed a one percent IR and that he disputed that IR to Ms. W at that time and that Ms. W had told him the one percent IR had been premature and was a mistake. Ms. W had not been listed as a witness and was unavailable to testify. The hearing officer found:

FINDING OF FACT

> 9. On December 9, 1998, which was still within 90 days after the issuance of the first certification, [Dr. O] examined the Claimant with [Ms. W], who is the Carrier's agent, present. [Ms. W] translated to facilitate communication between the Claimant and [Dr. O] at this visit. [Dr. O] explained to [Ms. W] that the Claimant's neck condition was to be evaluated by [Dr. K], and even though the Claimant's shoulder condition appeared to have plateaued, [Dr. O] was not going to issue any assessment of MMI or IR regarding the Claimant at that time until the Claimant's whole person (i.e., his shoulder and his neck IR) could be assessed. [Ms. W], in turn, explained this to the Claimant, and she told the Claimant that [Dr. O's] issuance of the September 23, 1998, certification had been premature and a mistake.

Rule 130.5(e) provides that the first IR assigned to an employee is considered final if the rating is not disputed within 90 days. Carrier basically argues that the only way to keep Dr. O's one percent IR from becoming final was for claimant to dispute it within 90 days, citing Rodriguez, *supra* to say that "no exceptions to the statutory provisions of Rule 130.5(e) exist, including the alleged rescission of the first certification." Although there are a number of different theories that could have been advanced as to why Dr. O's certification was not valid (*see* Texas Workers' Compensation Commission Appeal No. 941098, decided September 29, 1994), or that claimant orally disputed the one percent IR with Ms. W on December 9, 1998 (*see* Texas Workers' Compensation Commission Appeal No. 951493, decided October 18, 1995, which held that the first IR may be orally disputed with the Commission or carrier's adjuster), or claimant's suggestion that the "rescission in and of itself, can also be viewed as a 'dispute'" for purposes of Rule 130.5(e), the hearing officer decided the case on the basis that Dr. O had rescinded the first certification within 90 days. The Appeals Panel has frequently held that the first certification doctor may rescind a first certification if it is rescinded within 90 days of when it was assessed. Texas Workers' Compensation Commission Appeal No. 990056, decided February 24, 1999; Texas

Workers' Compensation Commission Appeal No. 970021, decided February 20, 1997; and Texas Workers' Compensation Commission Appeal No. 982923, decided February 2, 1999. We agree with the hearing officer in reading Rodriguez, *supra*, which finds no exceptions to Rule 130.5(e) to read that if a certification is timely rescinded there is nothing to become final and this does not constitute an "exception." As the hearing officer notes, if the doctor rescinds his certification, there is nothing to become final and nothing to dispute.

Upon review of the record submitted, we find no reversible error and we will not disturb the hearing officer's determinations unless they are so against the great weight and preponderance of the evidence as to be clearly wrong or unjust. In re King's Estate, 150 Tex. 662, 244 S.W.2d 660 (1951). We do not so find and, consequently, the decision and order of the hearing officer are affirmed.

Thomas A. Knapp
Appeals Judge

CONCUR:

Joe Sebesta
Appeals Judge

Philip F. O'Neill
Appeals Judge