APPEAL NO. 001094

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 6, 2000. The hearing officer concluded that the respondent's (claimant) compensable injury resulted in and caused occipital headaches, cervical disc injury, and lumbar disc injury; that the claimant developed gastrointestinal distress as a result of the treatment he received for the compensable injury and that injury is also compensable; and that the first certification of maximum medical improvement (MMI) and impairment rating (IR) assigned by Dr. G on October 29, 1997, was timely disputed by the claimant and did not become final under Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 130.5(e) (Rule 130.5(e)). The appellant (self-insured) appeals these conclusions and four findings of fact for evidentiary insufficiency relating to the extent of injury and Rule 130.5(e) issues. The claimant asserts, in response, that the evidence is sufficient to support the challenged determinations.

DECISION

Affirmed.

The parties stipulated that the claimant sustained sprain/soft tissue injuries to the cervical and lumbar spine on _____, and that the issue of disability is not ripe for adjudication. The self-insured's representative stated at the outset of the hearing that the self-insured had accepted soft tissue injuries to the claimant's cervical and lumbar spinal regions but contested any disc injuries. Further, the self-insured does not challenge a finding that the claimant developed gastrointestinal distress as a result of pain management treatment that he received for occipital headaches and cervical and lumbar spine injuries.

The claimant testified that on _____, while employed by the self-insured as a fireman, a fire call was received at the fire station; that because his bunker trousers were wet from a prior call in rain conditions, his legs could not clasp the pole to slow his descent from the second floor; and that he just "shot" down the 16-foot pole, landing on his heels, and falling back onto his buttocks with his hands outstretched behind him. He said he got up, went out on the call, and completed an accident report when he returned. The claimant said his initial soreness resolved but that about three months later, while on a trip with his family, he began to feel "really bad" with neck muscle aching and headaches; that on August 1, 1997, he saw Dr. S, his family doctor, who initially diagnosed sinusitis; that he was thereafter referred to various doctors for various treatments and tests, some of which were paid for by the self-insured and some by his group health insurance; and that after a discogram in May 1998 revealed cervical and lumbar disc defects, he underwent cervical spine fusion surgery by Dr. T in July 1998 which "drastically improved" his neck condition and that he returned to work about four months later.

The claimant further testified that the self-insured had him examined by Dr. G on October 27, 1997; that he was told in Dr. G's office that he was at MMI and had a zero percent IR; that he received Dr. G's report about a week later and was "extremely disillusioned" with it; that Dr. G's exam was a "sham exam" and Dr. G never even touched his low back; that Dr. G did not have the x-ray and MRI films; that he called the adjuster, Ms. C, on November 6, 1997, to complain about the report and "contest the entire system," including the MMI date and IR; and that he asked her, "how can he [Dr. G] have me at MMI on this." He also said he wrote Ms. C on November 14, 1997, to reiterate his disagreement with Dr. G's report. The claimant agreed that his letter did not use the actual words "dispute" in regard to the MMI and IR. The claimant's November 14th letter to Ms. C references their phone conversation of November 6, 1997, and states, among other things, that as he expressed to her in the phone conversation, he is "confused" as to how Dr. G "was able to render a declaration that [MMI] has been reached for the referenced back injury." The claimant also stated that during the phone conversation, Ms. C "seemed taken back [sic] and accusatory that [he] was alleging an injury to his back."

Dr. H reported on September 24, 1997, that the claimant suffered a condition that is directly and solely associated with an on-the-job injury he sustained on _____; that the claimant had a compressive-type trauma which led to his future symptoms; and that it is not uncommon for a delayed onset of symptoms with these types of trauma.

Dr. G's Report of Medical Evaluation (TWCC-69), signed on "10/29/97," states that the claimant reached MMI on that date with an IR of "0%." Dr. G's October 29, 1997, narrative report concludes with the following: "From a strictly medical standpoint it would appear as though he has reached a point of [MMI]. I do not anticipate any long term residual impairment at least as described in the AMA guidelines [Guides to the Evaluation of Permanent Impairment, third edition, second printing, dated February 1989, published by the American Medical Association] for disability."

Dr. T reported on May 15, 1998, that the claimant still complains of significant neck and back pain; that the claimant feels he injured his back and neck when he had the uncontrolled slide down the fire station pole on _____; that while early MRIs showed no change, subsequent MRIs have confirmed the presence of objective disc degeneration at C5-6 and C6-7 and lumbar disc disruption at L5-S1; and that "[t]his is completely compatible with his injury because it might take three months or more for MRI changes to become evident following a back or neck disc injury." Dr. T further stated that it is his opinion that the claimant's "persistent symptoms and present objective findings are directly related to his work-related injury of 5-9-97." Dr. T wrote on June 10, 1998, that the claimant's painful cervical degenerative disc disease is "almost certainly post-traumatic at the C5-6 and C6-7 levels associated with Clay-Shoveler's fracture of the spinous process of C7."

Dr. NW, an orthopedic surgeon, reviewed Dr. G's report, Dr. T's records, and certain other of the medical records. Dr. NW stated in his February 14, 2000, report, that with the claimant's onset of symptoms being related to a significant trauma with essentially a fall

from 16 feet, it "is a fairly clear both temporal [sic] as well as objective pathology correlation with the injury of 5-9-97, being the cause of the subsequent complaints in the cervical and lumbar area."

Dr. D, who reviewed the medical records for the self-insured, concluded as follows in her report of August 6, 1998: "In summary, it is apparent this claimant's condition is unrelated to any traumatic incident, and his symptoms are not the result of the incident at the fire station on _____. His condition has been misdiagnosed and treatment has been inappropriate."

Dr. N, who reviewed the medical records for the self-insured, concluded in his report of August 13, 1998, that the diagnoses of the _____, injury were cervical and lumbar strain and that the degenerative changes seen in the April 1998 MRI "were not necessarily related to the May 1997 injury."

Dr. G wrote on October 28, 1999, that he felt the claimant did sustain injury on _____, when he slid down the pole, and that it was "a musculoskeletal strain syndrome superimposed on some preexisting degenerative disc changes in the back."

The claimant had the burden to prove that he sustained the claimed injury. The Appeals Panel has stated that in workers' compensation cases, a disputed issue of injury can, generally, be established by the lay testimony of the claimant alone. Texas Workers' Compensation Commission Appeal No. 91124, decided February 12, 1992. However, the testimony of a claimant, as an interested party, only raises issues of fact for the hearing officer to resolve and is not binding on the hearing officer. Texas Employers Insurance Association v. Burrell, 564 S.W.2d 133 (Tex. Civ. App.-Beaumont 1978, writ ref'd n.r.e.).

The hearing officer is the sole judge of the weight and credibility of the evidence (Section 410.165(a)), resolves the conflicts and inconsistencies in the evidence (Garza v. Commercial Insurance Company of Newark, New Jersey, 508 S.W.2d 701 (Tex. Civ. App.-Amarillo 1974, no writ)), and determines what facts have been established from the conflicting evidence (St. Paul Fire & Marine Insurance Company v. Escalera, 385 S.W.2d 477 (Tex. Civ. App.-San Antonio 1964, writ ref'd n.r.e.)). As an appellate reviewing tribunal, the Appeals Panel will not disturb the challenged factual findings of a hearing officer unless they are so against the great weight and preponderance of the evidence as to be clearly wrong or manifestly unjust. Cain v. Bain, 709 S.W.2d 175, 176 (Tex. 1986); In re King's Estate, 150 Tex. 662, 244 S.W.2d 660 (1951).

Addressing the injury issue in closing argument, the self-insured's representative told the hearing officer that this case comes down to "a battle of the experts." As such, the hearing officer could credit the opinions of Dr. H, Dr. T, and Dr. NW which supported the claimant's contention that he injured cervical spine and lumbar spine discs when he hit the floor at the bottom of the fire station pole, albeit such injury may have been in the nature of an aggravation of underlying degenerative disc disease. We do not find the disputed findings relating to this issue to be against the great weight of the evidence.

As for the remaining issue on appeal, 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 after the rating is assigned. Not appealed are findings that the claimant received a copy of Dr. G's evaluation no later than November 6, 1997, and telephoned the claims adjuster on that date, voicing his complaint concerning Dr. G's report; that on November 14, 1997, the claimant sent a letter to the self-insured outlining his numerous complaints concerning Dr. G's exam and report; and that Dr. G's medical evaluation dated October 29, 1997, was the first IR issued in this case. The self-insured does challenge the finding that the claimant's telephone conversation with the claims adjuster on November 6, 1997, followed by the letter of November 14, 1997, are sufficient to put the self-insured on notice that the claimant does not agree with the medical evaluation and IR of Dr. G.

The Appeals Panel stated in Texas Workers' Compensation Commission Appeal No. 93666, decided September 15, 1993, that it is a question of fact as to what constitutes a notice of dispute for the purposes of Rule 130.5(e). The Appeals Panel has also held that a claimant may verbally convey his or her dispute to the carrier. *See, e.g.*, Texas Workers' Compensation Commission Appeal No. 93810, decided October 26, 1993. Again, we are satisfied that the challenged finding on the Rule 130.5(e) issue is sufficiently supported by the evidence.

The decision and order of the hearing officer are affirmed.

Philip F. O'Neill
Appeals Judge

CONCUR:

Gary L. Kilgore
Appeals Judge

Dorian E. Ramirez
Appeals Judge