APPEAL NO. 001223

This appeal arises pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act). A contested case hearing (CCH) was held on May 1, 2000. The hearing officer determined that the appellant (claimant) reached maximum medical improvement (MMI) on January 5, 1999, based on the designated doctor's first report; that the claimant's impairment rating (IR) is 18% based on the parties' stipulation; and that the claimant did not have disability due to his compensable injury from January 6 through July 6, 1999. The claimant requests our review of the MMI and disability determinations. The respondent (carrier) filed a response asserting, first, that because the claimant's service of his appeal on the carrier was defective, he failed to invoke the jurisdiction of the Appeals Panel and, in the alternative, that the evidence is sufficient to support the challenged determinations. The claimant also filed a second request for review which was not timely and will not be considered.

DECISION

Affirmed.

It is well-settled that failure of service of a request for review on the respondent is not jurisdictional. *See* Texas Workers' Compensation Commission Appeal No. 92383, decided October 12, 1992 (Unpublished).

The parties stipulated that on _____, the claimant sustained a compensable neck injury; that his IR is 18% per the first report of the designated doctor, Dr. EM; and that July 6, 1999, is the date upon which statutory MMI falls in this case.

The claimant testified that his neck and low back were injured at work on _____, when he was struck by a forklift; that he had cervical spine surgery on February 18, 1998, followed by physical therapy (PT); that he was injured in a motor vehicle accident (MVA) on June 10, 1998, after which only his treating doctor continued to treat his compensable injury; and that after the MVA, when he last saw his surgeon, Dr. PS, on July 17, 1998, Dr. PS "said something about" more surgery if the PT did not work. The claimant further stated that Dr. HS, to whom he was referred by Dr. PS, determined that he reached MMI on August 10, 1998, with an IR of 10% (Dr. PS concurred); that he disputed Dr. HS's IR; that Dr. EM, the designated doctor selected by the Texas Workers' Compensation Commission (Commission), examined him and determined that he reached MMI on January 5, 1999, with an IR of 18%; that he agrees with that IR but feels his MMI date should be the statutory date, July 6, 1999, because he has been approved for additional cervical spine surgery; and that he believes he should have disability between January 6 and July 6, 1999, since he was not at MMI and had not, to his knowledge, been released by his doctor to return to work. The claimant further stated that he did not undergo the second cervical fusion procedure on February 14, 2000, the date it was scheduled, because he had only one or two more payments of supplemental income benefits due and he does not have sufficient funds to support himself

during the recovery period following additional surgery without additional income benefits.

The claimant introduced the March 9, 1999, report of Dr. B, the orthopedic surgeon who has recommended the claimant's additional cervical spine surgery, which states that he thinks that, in addition to the fusion at C6-7, the "C3-4 and C4-5 levels may need to be addressed as well." The claimant also introduced the January 20, 2000, letter from Dr. EM stating that "per our conversation today," the claimant has not reached MMI due to the upcoming surgery and that he will be able to reevaluate the claimant after the claimant has been released by his surgeon. The Commission had written Dr. EM on January 4, 2000, advising that the claimant had surgery scheduled for February 14, 2000.

The claimant has not disputed findings that Dr. EM's narrative report of January 5, 1999, does not mention further neck surgery; that the evidence does not credibly establish that further neck surgery was under active consideration on January 5, 1999; that the evidence does not credibly establish that further neck surgery was under active consideration as of July 6, 1999; that Dr. MC recommended additional neck surgery on September 23, 1999; that this surgery was scheduled for February 14, 2000; that as of the date of the CCH, the claimant has not undergone the surgery; and that Dr. EM stated that he would want to reexamine the claimant were the claimant to have additional surgery, before stating whether his opinions on the MMI date and IR would change. The claimant does dispute findings that the great weight of the other medical evidence is not contrary to Dr. EM's January 5, 1999, report and that the claimant was not unable to obtain and retain employment at wages equivalent to his preinjury wage from January 6 to July 6, 1999, due to his _____, injury.

The hearing officer is the sole judge of the weight and credibility of the evidence (Section 410.165(a)) and, as the trier of fact, 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)). The Appeals Panel, an appellate reviewing tribunal, 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 and we do not find them so in this case. 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). The claimant is entitled to all health care reasonably required by his compensable injury as and when needed. Section 408.021(a). However, the fact that additional surgical treatment has been approved by the Commission and that the claimant may at some future date undergo such surgical treatment for his neck injury does not compel a finding that he was not at MMI on January 5, 1999, as the designated doctor determined. We cannot say that the great weight of the other medical evidence is contrary to Dr. EM's report and has overcome the presumptive weight attached to Dr. EM's report concerning the MMI date. Section 408.122(c). As for the disability determination, the hearing officer commented that while the claimant showed that he had neck symptoms after January 6, 1999, the evidence did not firmly establish that he was unable to earn his preinjury wage between that date and July 6, 1999. Section 401.011(16).

The decision and order of the hearing officer are affirmed.

Philip F. O'Neill
Appeals Judge

CONCUR:

Tommy W. Lueders
Appeals Judge

Dorian E. Ramirez
Appeals Judge