APPEAL NO. 001426

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 May 25, 2000. With respect to the issues before her, the hearing officer determined that the respondent's (claimant) compensable injury is a producing cause of the claimant's condition of sclerosis, laminotomy defect, instability of the spine, and disc collapse at L5-S1 and that the first certification of maximum medical improvement (MMI) and impairment rating (IR) assigned by Dr. S on March 5, 1999, did not become final under Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 130.5(e) (Rule 130.5(e)). In its appeal, the appellant (carrier) contends that each of those determinations are against the great weight of the evidence. In her response to the carrier's appeal, the claimant urges affirmance.

DECISION

Affirmed.

The parties stipulated that the claimant sustained a compensable injury on _____. The claimant testified that she worked as a nursing assistant taking care of elderly patients. She stated that on _____, she lifted a patient out of a wheelchair to put the patient to bed and she felt a "pop" in her low back, followed by intense pain that went down into her legs. The claimant acknowledged that she has had two prior low back surgeries, the second of which occurred approximately 10 years prior to the _____ injury; however, she stated that she recovered from those surgeries and was able to return to the heavy work as a nursing assistant for about nine and one-half years before she sustained the compensable injury at issue in this case.

As noted above, the carrier stipulated that the claimant sustained a compensable low back injury. The claimant subsequently has been diagnosed with sclerosis, laminotomy defect, instability of the spine, and disc collapse at L5-S1. At issue in this case is whether there is a causal connection between those conditions and the claimant's compensable injury. Several doctors have expressed opinions on whether such a causal connection exists. In a September 29, 1999, "To Whom it May Concern" letter, Dr. MS noted that the carrier was contending that the claimant's current low back problems were related to her two previous back surgeries and responded:

> This is obvious lunacy to anyone with any common sense. The patient worked at the nursing home and did heavy labor for two to three years prior to _____. Obviously she could not have done this work if she were suffering from a previous back problem resulting from her previous two back surgeries.

In a December 22, 1999, "To Whom it May Concern" letter, Dr. MS addressed the carrier's contention that the claimant's current back problems are the result of an ordinary disease of life and the claimant's obesity, stating that such assertions were "rubbish." In addition, Dr. MS stated:

> Sclerosis and instability of the spine can be ordinary diseases of life when someone is 85 years old, but not when they are 49 and not to the extent that her x-ray shows and not when it is focal to the area that she was injured in. It is not diffuse throughout her spine and therefore is [not] related to just simple diseases of life.

In a January 18, 2000, "To Whom it May Concern" letter, Dr. JS noted that the claimant had worked for several years in a physically demanding position following her previous surgeries and opined that "there is no way that the patient could have these symptoms due to the surgery that predates her injury by 12 years." Rather, Dr. JS stated that the claimant's injury of _____, "is very obviously the cause of her symptoms and need for further treatment and diagnostic workup."

The Texas Workers' Compensation Commission (Commission) selected Dr. B to serve as a required medical examination doctor to provide an opinion as to whether the challenged conditions were causally related to the compensable injury. In a report dated February 2, 2000, Dr. B stated:

> It does appear obvious that the patient had a preexisting degenerative disc disease of the lumbar spine although this was asymptomatic for 12 years. It is obvious that the patient had a work-related injury on _____ which caused her asymptomatic back condition from previous spinal surgery to become symptomatic and hence is a compensable injury. Hence, I do feel the patient's injury dated _____ is responsible for the present condition and that her current medical treatment is related to the original injury dated _____.

The carrier had Dr. C perform a records review in this case. In a report dated November 18, 1999, Dr. C opined that "the current diagnoses of laminotomy defect, L5-1 disc collapse, and L5-1 degenerative disc disease and sclerosis are pre-existing and not causally related to the _____ compensable event, but rather to the prior injury." The carrier also had _____ Manage Care perform a records review. In a report from that review Dr. P concluded that "it appears that the injury of _____, was a soft tissue injury superimposed upon a previously operated spine. Within reasonable medical probability all effects of this injury would heal within six months. There is no documentation of any condition attributable to _____ whose effects would support continued medical care."

Concerning the issue of whether the first certification of MMI and IR by Dr. S became final pursuant to Rule 130.5(e), the parties stipulated that Dr. S assigned the first certification of MMI and IR on March 5, 1999, and that the claimant received her first written notice of Dr. S's certification on March 16, 1999. Mr. H, the claimant's husband, testified that on the day after they received Dr. S's certification, he called Ms. D, the adjuster assigned to the claimant's claim, and disputed it. Mr. H described himself as "pretty hot" and stated that he told Ms. D that "we didn't agree" with Dr. S's certification.

Mr. H stated that he also inquired about the possibility of suing Dr. S for malpractice in the course of that conversation.

The claimant testified that she received a telephone call from Dr. MS's office stating that he needed to talk to her before he signed something. She stated that she saw Dr. MS on May 7, 1999, and that they discussed Dr. S's certification of MMI and IR at that time. The claimant further testified that Dr. MS told her that Dr. S's certification was "ridiculous" and that she agreed that it was. She stated that Dr. MS told her he "would take care of it," which the claimant believed meant he was going to dispute the certification on her behalf. A May 4, 1999, note in Dr. MS's records reflect that on that date someone in Dr. MS's office called the claimant and "explained we'd gotten some paperwork that [Dr. MS] was supposed to sign, but he wanted to see her first." The claimant had an appointment with Dr. MS on May 7, 1999, and on that date Dr. MS completed the bottom portion of the Report of Medical Evaluation (TWCC-69) prepared by Dr. S expressing his disagreement with the MMI date certified. Thereafter, Dr. MS faxed a copy of that form to the Commission. Dr. MS later wrote a memorandum stating that he had served as the claimant's agent in disputing Dr. S's rating on May 7, 1999.

Initially, we will consider the carrier's challenges to the hearing officer's determination that the claimant's compensable injury "is a producing cause of Claimant's current condition of sclerosis, laminotomy defect, instability of the spine, and disc collapse at L5-S1." The carrier contends that the hearing officer "applied the incorrect causative standard." After carefully reviewing the record we cannot agree that the hearing officer's use of the phrase "producing cause" demonstrates that she applied an incorrect legal standard in determining that the claimant had sustained her burden of proving the causal connection between her current condition and the compensable injury. Rather, we believe that the hearing officer's use of the "producing cause" language is attributable to the fact that the issue was phrased using that term. We further note that the carrier did not raise an objection to the use of the phrase "producing cause" in stating the issue. We perceive no error.

The carrier next argues that the medical evidence in this case does not rise to the level of reasonable medical probability. We likewise find no merit in this assertion. As noted above, there was conflicting evidence on the issue of the causal connection between the claimant's sclerosis, laminotomy defect, spinal instability, and disc collapse at L5-S1 and the compensable injury. It was a matter for the hearing officer as the sole judge of the weight and credibility of the evidence under Section 410.165(a) to resolve those conflicts and to determine what facts had been established. The hearing officer was acting within her province as the fact finder in giving more weight to the evidence from Dr. MS, Dr. JS, and Dr. B then to the contrary evidence from Dr. C and Dr. P. Our review of the record does not demonstrate that the hearing officer's extent-of-injury 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 that determination on appeal. Pool v. Ford Motor Co., 715 S.W.2d 629, 635 (Tex. 1986); Cain v. Bain, 709 S.W.2d 175, 176 (Tex. 1986).

The carrier also argues that the hearing officer erred in considering the causation opinions from Dr. MS, Dr. JS, and Dr. B because they do not satisfy the requirements for admissibility of expert evidence in Merrell Dow Pharm., Inc. v. Havner, 953 S.W.2d 706 (Tex. 1997) and E. I. du Pont de Nemours & Co. v. Robinson, 923 S.W.2d 549 (Tex. 1995). The carrier did not raise a Havner and Robinson objection to those reports at the hearing. Accordingly, it has failed to preserve error for purposes of appeal. Nonetheless, we note that Section 410.165(b) provides that a hearing officer "shall admit" a signed report from a health care provider and that based upon that provision we have previously determined that Havner and Robinson do not provide a basis for excluding opinions in an administrative workers' compensation proceeding. To the contrary, the factors advanced by those cases can be considered by the fact finder in making his or her credibility determinations. *See* Texas Workers' Compensation Commission Appeal No. 000651, decided April 11, 2000; Texas Workers' Compensation Commission Appeal No. 991964, decided October 25, 1999.

Lastly, we consider the carrier's assertion that the hearing officer erred in determining that the first certification of MMI and IR did not become final under Rule 130.5(e) because it was timely disputed by both the claimant's husband with the carrier and by Dr. MS with the Commission. The carrier contends that the hearing officer erred in finding that Mr. H's conversation with the adjuster on the day after the claimant received Dr. S's certification was sufficient to constitute a valid dispute because the record does not contain evidence establishing that Mr. H was acting as his wife's agent at the time he called the adjuster. We cannot agree with the carrier's starting premise that the record does not contain evidence from which the hearing officer could draw an inference that Mr. H was acting on behalf of his wife, the claimant, in contacting the adjuster. Indeed, the record is replete with references of instances in which Mr. H contacted the carrier, the Commission, and Dr. MS's office on behalf of the claimant. Nonetheless, we also cannot agree that proof of agency was required in order for Mr. H to effectively dispute the first certification of MMI and IR for his wife.

The hearing officer also determined that Dr. MS, the claimant's treating doctor, timely disputed the first certification of MMI and IR by completing the bottom portion of the TWCC-69 completed by Dr. S reflecting his disagreement with the same on May 7, 1999, and thereafter faxing a copy of the form to the Commission. The claimant testified that on May 7, 1999, she and Dr. MS discussed Dr. S's rating and agreed that it was "ridiculous." In addition, the claimant testified that Dr. MS agreed to take care of it for her. Dr. MS's records reflect that someone in Dr. MS's office called the claimant on May 4, 1999, because Dr. MS wanted to talk to her before he signed some paperwork; that the claimant had an appointment with Dr. MS on May 7, 1999; and that Dr. MS completed the bottom portion of the TWCC-69 on that date. From this evidence the hearing officer could and did determine that Dr. MS was acting on behalf of the claimant in disputing Dr. S's rating when he faxed a copy of the TWCC-69 to the Commission within the 90-day dispute period of Rule 130.5(e).

The hearing officer's determination that the first certification of MMI and IR did not become final under Rule 130.5(e) because it was timely disputed is supported by the

evidence as noted above indicating that both Mr. H and Dr. MS timely disputed the certification. Nothing in our review of the record reveals that the hearing officer's determination in that regard is so contrary to the great weight and preponderance of the evidence as to compel its reversal on appeal. Pool, *supra*; Cain, *supra*.

The hearing officer's decision and order are affirmed.

Elaine M. Chaney
Appeals Judge

CONCUR:

Susan M. Kelley
Appeals Judge

Robert E. Lang
Appeals Panel
Section Manager/Judge