APPEAL NO. 002321

This appeal is brought pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act). A contested case hearing was held on September 12, 2000. The appellant (claimant) and the respondent (carrier) stipulated that the claimant sustained a compensable injury on _____. The hearing officer determined that the claimant did not injure his lumbar spine when he fell at work on _____; that injury to the claimant's lumbar spine did not naturally result from the compensable injury; and that the claimant did not sustain an injury to his lumbar spine in addition to his knees on _____. The hearing officer also determined that the claimant received the first certification by Dr. E; that the claimant reached maximum medical improvement (MMI) on January 19, 2000, with a three percent impairment rating (IR) no later than February 8, 2000; that neither the request to change treating doctors dated April 15, 2000, nor the letter from Dr. RW dated April 28, 2000, is sufficient to dispute the first certification of MMI and IR; that the first certification of MMI and IR was disputed by the claimant on May 15, 2000; that the claimant was not misdiagnosed nor under-treated for his injury; and that the first certification of MMI and IR became final under the provisions of Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 130.5(e) (Rule 130.5(e)). The claimant appealed, stated why he thinks those determinations are wrong, and requested that the Appeals Panel reverse the decision of the hearing officer. The carrier responded, urged that the evidence is sufficient to support the decision of the hearing officer, and requested that it be affirmed.

DECISION

We affirm in part and reverse and remand in part.

The Decision and Order of the hearing officer contains a brief statement of the evidence. Evidence related to the extent-of-injury issue will be summarized first. Some of it is also relevant to the issue of the finality of the first certification of MMI and IR. The claimant testified that on _____, he was carrying about 100 pounds of metal pieces he had fabricated; that he stepped on a large bolt; that he fell backwards; that his knees buckled underneath him; that he landed on his knees and buttocks; that his knees were swollen and he was hurting all over; that he took anti-inflammatory medication that he had with him; that other workers helped him the next two days; that he continued to work; that in December 1998, the employer sent him to a clinic where he was seen by Dr. E ; that he told Dr. E he was hurting all over; that Dr. E asked him what hurt the most; and that Dr. E concentrated on his legs because Dr. E thought he might have blood clots. The claimant said that he marked diagrams that showed that he had pain in his back, but that some of his records at the clinic had been lost and he could not produce that diagram. He testified that Dr. CW performed surgery on his right knee in September 1999; that he continued to have pain in his back, hips, and legs after the surgery; that Dr. CW told him that the pain was not coming from his knee, but was coming from his back; and that Dr. CW wrote letters to Dr. E telling him that.

In a report dated December 9, 1998, Dr. E stated that the claimant stepped on a bolt, twisted his right knee, and had pain when pushing down on pedals and with climbing stairs or ladders. Dr. E wrote "Twisted knee when stepped on bolt. Swelling went down. Hurts to start walking. Pain in back to thigh. Operates foot pedal controls with right leg. Locks in place." The hearing officer wrote that "pain in back to thigh" appears to refer to the back of the knee. A treatment report from Dr. E dated February 8, 1999, states that the diagnosis is right knee sprain and that the claimant was released to regular work as of that day. The claimant testified that his knee surgery was delayed until September 1999 because of surgery Dr. CW had and that he worked until just prior to the surgery. A pain diagram dated November 8, 1999, indicates that the claimant has aches on each side of the low back. In a letter to Dr. E dated January 4, 2000, Dr. CW wrote:

> I advised the patient I believe it is reasonable for him to be considered at MMI now with respect to his knee. He will continue doing his strengthening exercises. I believe it would be reasonable to go ahead and get a TWCC-69 [Report of Medical Evaluation] completed with respect to the knee. How the problems with his hips and back will enter into the overall equation I cannot really determine. I asked him to check with you about trying to get evaluated for that situation.

An Initial Medical Report (TWCC-61) from Dr. RW dated April 24, 2000, states that the claimant reported that he was injured when he landed on his buttocks with his knees caught underneath him and that he had frequent deep pain in his back radiating to his buttocks and legs. In a letter dated April 28, 2000, Dr. RW wrote:

> [Claimant] is under my care for lower back pain secondary to a work related injury from a fall on _____.
>
> I anticipate [MMI] in approximately 5-7 weeks at which time an [IR] will be done on the thoracolumbar spine.

A report of an MRI of the spine dated June 9, 2000, includes the following impression:

1. Large disc herniation on the right at the L5-S1 level with possible extruded or sequestered fragment as described.

2. Moderate sized disc protrusion/herniation on the right at L1-2 level as described.

3. Presumed fat-containing hemagiomata within the T12 and L3 vertebral bodies as described.

4. Right lateral disc protrusion at L4-5 as described.

In a letter dated July 10, 2000, Dr. RW stated that based on the claimant's subject complaints, current complaints of physical examination findings, and radiographic findings, it was his professional opinion that the injuries are consistent with the type of accident the claimant reported.

The burden is on the claimant to prove by a preponderance of the evidence the extent of an injury. Texas Workers' Compensation Commission Appeal No. 94248, decided April 12, 1994. The hearing officer is the trier of fact and the sole judge of the relevance and materiality of the evidence and of the weight and credibility to be given to the evidence. Section 410.165(a). The trier of fact may believe all, part, or none of any witness's testimony because the finder of fact judges the credibility of each and every witness, determines the weight to assign to each witness's testimony, and resolves conflicts and inconsistencies in the evidence. Taylor v. Lewis, 553 S.W.2d 153 (Tex. Civ. App.-Amarillo 1977, writ ref'd n.r.e.); Texas Workers' Compensation Commission Appeal No. 93426, decided July 5, 1993. 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). An appeals level body is not a fact finder, and it does not normally pass upon the credibility of witnesses or substitute its own judgment for that of the trier of fact even if the evidence would support a different result. National Union Fire Insurance Company of Pittsburgh, Pennsylvania v. Soto, 819 S.W.2d 619, 620 (Tex. App.-El Paso 1991, writ denied). Only were we to conclude, which we do not in this case, that the hearing officer's determination that the claimant did not sustain an injury to his lumbar spine in addition to his knees on _____, is so against the great weight and preponderance of the evidence as to be clearly wrong or unjust, would there be a sound basis to disturb that determination. In re King's Estate, 150 Tex. 662, 244 S.W.2d 660 (1951); Pool v. Ford Motor Co., 715 S.W.2d 629, 635 (Tex. 1986). Since we find the evidence sufficient to support that determination of the hearing officer, we will not substitute our judgment for his. Texas Workers' Compensation Commission Appeal No. 94044, decided February 17, 1994.

We next summarize evidence related to the issue of whether the first certification of MMI and IR by Dr. E became final. The letter from Dr. RW dated April 28, 2000, is set forth earlier in this decision. The Employee's Request to Change Treating Doctors (TWCC-53) contains the following reasons for changing treating doctors:

> I've reached MMI, but I still have pain in leg and swollen. Can't sit or ride any length or distance. Records were lost at L.O.M. [(clinic)] as well as [carrier]. (Feel more comfortable with [Dr. RW]. He has most of medical records & x-rays.)

The claimant testified that at the end of February or the first part of March 2000 he spoke with Ms. P, the adjuster who was handling his claim. He said that they discussed the IR and discussed a settlement around seven percent. The claimant said that he told Ms. P he was going to protest the IR because it included only the right knee, that she told him to do so, and that she told him he had to contact the Texas Workers' Compensation

Commission (Commission) to dispute the report of Dr. E. He testified that he contacted people at the Commission; that some ladies at the Commission told him he needed to request a change of treating doctors to dispute the IR; that he requested to change treating doctors as part of the dispute; that he was also told to get a letter from Dr. RW by May 1, 2000, to dispute the IR; and that Dr. RW disputed the report on his behalf. A Commission Dispute Resolution Information System (DRIS) entry dated May 15, 2000, states:

> Inquiry code: GRI GENERAL REQUEST FOR INFO
> Text: CLMT CALLED IN RE DISPUTE–STATED HIS DR HAD WRITTEN LTR DISPUTING THE BODY PARTS WHICH WERE NOT INCLUDED IN THE MMI/IR REPORT BY [Dr. E] DATED 012500 AND REC'D BY TWCC 020100. CLAIMANT FILED A -53 TO DISPUTE–EXPLAINED ALL THAT A -53 DOES IS CHANGE TRT DRS–CLMT STATED HE WAS TOLD THAT IF HE GOT IT IN BY MAY 1ST HE'D BEAT DEADLINE. PULLED FILE, NO LTR FRM DR' CLMT DISPUTING. NO DRIS INDICATING DISPUTE–CALLED CLMT BACK, PHONE BUSY. BEYOND 90 DAYS.

The letter of Dr. RW dated April 28, 2000, is subject to different interpretations. However, the determinations that neither the TWCC-53, requesting a change of treating doctors, nor the letter from Dr. RW acted to dispute the first certification and that the claimant was not misdiagnosed nor under-treated for his injury are not so against the great weight and preponderance of the evidence as to be clearly wrong or unjust and they are affirmed.

In his appeal, the claimant wrote about his discussion in February or March 2000 with the adjuster concerning protesting the IR. In the statement of the evidence, the hearing officer wrote:

> On February 8, 2000, Claimant called the Commission inquiring about his rating.
>
> Claimant did not take any action to dispute the rating with the Commission until May 15, 2000.

In Texas Workers' Compensation Commission Appeal No. 93810, decided October 26, 1993, the Appeals Panel stated that an adjuster testified that on June 8, 1992, he was orally informed of the claimant's disagreement with the first certification of MMI and IR and reversed a determination that the claimant had not disputed the first certification and rendered a determination that the claimant disputed the first certification on June 8, 1992, and remanded for the hearing officer to determine if that dispute was made within 90 days of the claimant having received written notice of the first certification. In the case before us, the hearing officer mentions the claimant's contacts with the Commission, but does not address whether the claimant disputed the first certification of MMI and IR by contacting the adjuster. We reverse the finding of fact that the first certification was disputed on May 15, 2000, and the conclusion of law and the part of the decision that the first certification

of MMI and IR became final under the provisions of Rule 130.5(e). We remand for the hearing officer to make a finding or findings of fact and a conclusion of law and to render a decision to determine whether or not the first certification of MMI and IR became final under the provisions of Rule 130.5(e).

Pending resolution of the remand, a final decision has not been made in this case. However, since reversal and remand necessitate the issuance of a new decision and order by the hearing officer, a party who wishes to appeal from such new decision must file a request for review not later than 15 days after the date on which such new decision is received from the Commission's Division of Hearings, pursuant to Section 410.202. *See* Texas Workers' Compensation Commission Appeal No. 92642, decided January 20, 1993.

Tommy W. Lueders
Appeals Judge

CONCUR:

Kathleen C. Decker
Appeals Judge

Philip F. O'Neill
Appeals Judge