APPEAL NO. 931110

Pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq*. (1989 Act) (formerly V.A.C.S. Article 8308-1.01 *et seq*.), a contested case hearing (CCH) was held in (city), Texas, on November 4, 1993, (hearing officer) presiding as hearing officer. He determined that an amended or modified impairment rating (IR) of 18% was disputed by the respondent (carrier) within 90 days of receiving it and that no final determination as to IR can be made as a designated doctor had not been appointed by the Texas Workers' Compensation Commission (Commission). In his decision, the hearing officer returns the matter to the Disability Determination Officer (DDO) to act to resolve the claimant's IR. Appellant (claimant) urges that the hearing officer's determination that the carrier did not receive a copy of the amended or modified IR until July 1993, was contrary to the evidence, that the hearing officer did not appreciate the import of either the claimant's or the insurance adjuster's testimony. No response has been filed.

DECISION

Not finding the hearing officer's findings and conclusions to be so against the great weight and preponderance of the evidence as to be clearly wrong or manifestly unjust, we affirm.

That the claimant suffered a serious back injury resulting in surgery was not in dispute. In November 1992, his treating doctor, (Dr. H), referred him to (Dr. K) for an IR and subsequently agreed with Dr. K's report and rendered a Report of Medical Evaluation (TWCC Form-69) with a 10% IR (range of motion (ROM) ratings were invalid). According to the carrier, they initiated impairment income benefits (IIBS) based upon this report. Pursuant to the claimant's request, Dr. K re-evaluated the claimant around December 20th and modified his rating up to 18% reflecting ROM ratings. Dr. H, based upon Dr. K's modification, amended or modified his IR to 18%. An IR can be amended or modified within a reasonable period of time for proper reason. *See generally* Texas Workers' Compensation Commission Appeal No. 931071, decided January 6, 1994. The critical matter in the case was whether this modification or amendment to the IR was received by the carrier at any time before July 1993 thereby starting the 90 day period to dispute the rating. Texas Workers' Compensation Commission Rule 130.5(e), Tex. W. C. Comm'm, 28 TEX. ADMIN. CODE § 130.5(e).

An adjuster employed by the carrier who was assigned to the claim sometime in early 1993 testified that he had searched the carrier's records and computer files and that the earliest they received any form showing an 18% impairment was July 12, 1993, and that they had paid IIBS based upon the 10% rating they received in December 1992. He also described the normal course of business in handling mail by the carrier. After they received notice of the 18% modified IR, they filed a dispute of the rating with the Commission. A hearing officer's exhibit, which appeared to be a Commission computer printout, indicated that the Commission received a report of the 18% impairment by Dr. K on July 13, 1993. There was no evidence in the record that the Commission received a copy of the 18% IR prior to that entry date.

The claimant testified that he was given copies of the modified or amended reports by Dr. H and Dr. K and was told that copies would be sent to the Commission and the carrier. The claimant also submitted an affidavit from an employee of Dr. H and an employee of Dr. K. Each affidavit indicates that a copy of Dr. K's report of the "recalculation" of the IR was mailed to the carrier. A handwritten note of Dr. H dated "9-7-93" states "[t]his is to certify that we sent an addendum of the report of medical evaluation on (claimant) to TWCC, insurance carrier, and patient back in December of 1992."

Based upon this state of the evidence, the hearing officer determined that the carrier did not receive any notice of the 18% modified IR until July 1993 and that consequently it timely disputed the IR and that an IR could not be assigned until a designated doctor was properly appointed. Obviously, the issue involved a question of fact. The hearing officer is the fact finder (Section 410.168(a)) and is the sole judge of the relevance and materiality of the evidence and of the weight and credibility to be given the evidence. (Section 410.165(a)). We have repeatedly held that we will not substitute our judgment for that of the hearing officer in factual determinations because we have no sound basis to disturb his decision unless it is so against the great weight and preponderance of the evidence as to be clearly wrong or manifestly unjust. Texas Workers' Compensation Commission Appeal No. 931097, decided January 14, 1994; Texas Workers' Compensation Commission Appeal No. 93994, decided December 8, 1993; Texas Workers' Compensation Commission Appeal No. 92232, decided July 20, 1992. Here, there were certainly conflicts and inconsistencies in the evidence and it is the responsibility of the hearing officer to resolve them. Garza v. Commercial Insurance Co. of Newark, N. J., 508 S.W.2d 801 (Tex. Civ. App.-Amarillo 1974, no writ). Texas Workers' Compensation Commission Appeal No. 92657, decided January 15, 1993. There was no evidence before the hearing officer to indicate that the Commission received notice of the modified 18% IR prior to July 13, 1993. Dr. H's note of "9-7-93" states copies were sent to the "TWCC, insurance carrier, and patient." The claimant testified that he was given copies by Dr. H. The affidavits indicate only that copies were mailed to the insurance carrier, although they do not necessarily exclude other copies having been mailed out. Also, we note the evidence is not clear as to who assigned the first IR, Dr. H based upon Dr. K's report or Dr. K, and therefore, which one was modified for purposes of starting the 90 day clock provided for in Texas Workers' Compensation Commission Rule 130.5(e). The hearing officer could also consider the circumstances surrounding the action on the part of the carrier in inferring that they were unaware of the modification until July 1993, their actions being consistent with not receiving any notice earlier. In any event, we cannot say that the hearing officer's findings and conclusions are so against the great weight and preponderance or overwhelming weight of the evidence as to be clearly wrong or manifestly unjust. Cain v. Bain, 709 S.W.2d 175 (Tex.1986).

We do not find merit in the claimant's assertion that the hearing officer erred in appreciation of his testimony and that of the carrier's adjuster. We can not conclude from the hearing officer's comment in his Statement of Evidence on the testimony of the claimant to the effect that he received copies of the 18% IR and did not mail a copy or tell the insurance carrier about them, that he, the hearing officer, was somehow placing an

obligation on the claimant to make official notification. The hearing officer's findings of fact do not indicate any such requirement and only state that the carrier did not have any notice of the modified or amended IR until July 1993. And, we do not find any basis to determine that the testimony of the carrier's adjuster could not be believed. The claimant cites the adjuster's testimony which at one point suggests he was the adjuster for the claim all along and states at another point, that he was assigned the claim in early 1993. Any conflicts in the testimony of a witness is for the hearing officer to resolve and he can believe all, part, or none of the testimony of any witness. Cobb v. Dunlap, 656 S.W.2d 550 (Tex. App.-Corpus Christi 1983, writ ref'd n.r.e.)

For the foregoing reasons the decision is affirmed. The matter of the claimant's final IR requires further action by the Commission.

Stark O. Sanders, Jr.
Chief Appeals Judge

CONCUR:

Lynda H. Nesenholtz
Appeals Judge

Thomas A. Knapp
Appeals Judge