APPEAL NO. 93570

On January 26, 1993, a contested case hearing was held in (city), Texas, with (hearing officer) presiding as the hearing officer. The hearing was held under the provisions of the Texas Workers' Compensation Act, TEX. REV. CIV. STAT. ANN. art. 8308-1.01 *et seq*. (Vernon Supp. 1993) (1989 Act). In Texas Workers' Compensation Commission Appeal No. 93199, decided April 29, 1993, we held that the hearing officer had misapplied the provisions of Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 130.5(e) in determining that the respondent (claimant) had reached maximum medical improvement (MMI) on January 9, 1992. We reversed and remanded the case to the hearing officer for further consideration and development of evidence, as deemed necessary and appropriate by the hearing officer, not inconsistent with our opinion. In her decision following remand of the case, the hearing officer determined that the claimant timely disputed certification of MMI under the provisions of Rule 130.5(e). The appellant (carrier) disputes the hearing officer's decision, requests reversal of the decision, and, in the alternative, contends that the case should be remanded again because no hearing was held following remand of the hearing officer's first decision. The claimant responds to the effect that the hearing officer's decision is supported by the evidence and requests that the decision be affirmed.

DECISION

The decision of the hearing officer is affirmed.

The parties stipulated that the claimant sustained a compensable injury to her wrist on June 25, 1991. She consulted (Dr. W), and then began treatment with (Dr. P), who diagnosed carpal tunnel syndrome of the right hand and performed a carpal tunnel release and removal of volar ganglion in September 1991. The parties stipulated that Dr. P was the claimant's treating doctor. The parties also stipulated that on January 9, 1992, Dr. P "determined" that the claimant had reached MMI and referred the claimant to (Dr. K), M.D., who assigned an impairment rating of six percent on February 22, 1992. In a patient note dated January 9, 1992, Dr. P stated that "she [the claimant] has reached her maximum improvement. She will be referred to [Dr. K] for an impairment rating and will be seen after she sees [Dr. K]." The claimant testified that Dr. P told her on January 9, 1992, that she had reached "maximum medical," that he could do no more for her, and that he was sending her to Dr. K "for my impairment rating." There is no indication in the record that Dr. P completed or filed a Report of Medical Evaluation (TWCC-69). The claimant further testified that she basically understood that Dr. K was going to assess her condition. The parties stipulated that the claimant saw Dr. K on February 22, 1992.

In an undated TWCC-69, Dr. K certified that the claimant reached MMI on February 22, 1992, with a six percent whole body impairment rating. The parties stipulated that Dr. K's TWCC-69 was filed with the Texas Workers' Compensation Commission (Commission) on March 2, 1992. The TWCC-69 does not indicate on its face that a copy was sent to the claimant. Also in evidence was a letter from Dr. K to Dr. P dated "February, 1991 (sic)" in which Dr. K sets out information concerning the claimant's physical examination, assessment, and impairment rating. The Commission and the carrier are

shown as having been sent copies of the letter, but not the claimant. The claimant testified that on February 25, 1992, she again saw Dr. P. She said that the carrier's nurse was also present in the office with her and Dr. P and that she heard Dr. P tell the carrier's nurse that he had Dr. K's report, and that "he was in agreement with the six percent, and that he was going to sign it and release me." The claimant said that she did not see Dr. K's report at that time nor did she ask Dr. P for a copy of the report because she did not think it was relevant as all she was trying to get was proper medical care. However, she said that she knew that Dr. P was reviewing Dr. K's report. In a patient note dated February 25, 1992, Dr. P noted the impairment rating assigned by Dr. K and indicated that the claimant was being released to see Dr. W because the claimant lived closer to Dr. W's office. The claimant saw Dr. W on March 2, 1992, and he referred her to (Dr. WI), whom the claimant saw on May 22, 1992. The parties stipulated that the carrier began paying impairment income benefits on February 23, 1992, and that the claimant received 18 weeks of impairment income benefits in 1992, based upon the six percent impairment rating assigned by Dr. K.

The claimant testified that sometime in May 1992, she went to an attorney to see if the attorney could get the carrier to give her proper medical treatment for the pain she still had in her hand and arm. The attorney wrote a letter to the employer on May 13, 1992, advising the employer that his firm was representing the claimant in her workers' compensation claim. In a letter dated May 20, 1992, an associate attorney in the law firm representing the claimant wrote a letter to the claimant stating that:

> This will confirm our telephone conversation of May 19, 1992, in which you advised that you did not want to contest maximum medical improvement status and impairment rating given you in your Workers' Compensation case.

The claimant said that she did not recall having the phone call referred to in the letter, but would not say that she never received the letter from the attorney. She further testified that she could not recall telling her attorney that she had been seen by Dr. K or that he had done a report on her.

The parties stipulated that the claimant first saw Dr. WI on May 22, 1992. On that date, Dr. WI wrote that she had evaluated the claimant for persistent pain in her right wrist, diagnosed "status post carpal tunnel repair with secondary myofascial pain and possible reflex sympathetic dystrophy," and recommended physical therapy. The claimant testified that Dr. WI told her that she had not reached MMI.

The parties stipulated that the claimant "initiated dispute resolution on some date occurring on or before June 15, 1992." In a letter dated June 3, 1992, the associate attorney in the law firm representing the claimant wrote to the Commission as follows:

Please accept this as [the claimant's] "Notice of Dispute" regarding the medical evaluation by [Dr. K] that [the claimant] had reached maximum medical improvement on or about February 25, 1992. This notice is given pursuant to Rule 130.6 of the TWCC "New Law" Adopted Rules and is based on the medical assessment of [Dr. WI and Dr. WI's address] after a medical examination on or about June 29, 1992 (sic).

In a letter dated June 18, 1992, Dr. WI wrote that the claimant had improved somewhat but still had pain, and wanted her to be evaluated at a hospital's pain management center (the Center). The claimant was seen by (Dr. T), on August 25, 1992, and the parties stipulated that Dr. T was the claimant's second treating doctor. The claimant testified that Dr. T told her that she had not reached MMI and that her medical condition had improved with treatments by Dr. WI and Dr. T.

The Commission sent the claimant a letter dated June 23, 1992, which stated "The Commission is in receipt of a report of medical evaluation from [Dr. K] dated 2-22-92 stating you have reached maximum medical improvement with 6% whole body impairment." Attached to the letter is Dr. K's TWCC-69. The claimant testified that she received the Commission letter on June 23, 1992, and that was the first time she saw Dr. K's report.

On July 16, 1992, the claimant's attorney wrote her stating that the Commission had denied a request for a benefit review conference (BRC) and a request for a designated doctor "due to the lapse in 90 days." The attorney said that there was nothing further that could be done for the claimant and that the attorney would be releasing the claimant's case within the next 10 days and returning her file to her. However, a BRC was held on October 10, 1992 to resolve the issue of whether an injured employee can dispute the first certification of MMI after 90 days. The claimant testified that she first received word that her attorney was withdrawing in early summer, but she didn't know the exact date. She said neither her attorney, nor anyone else, told her about impairment ratings or MMI until the ombudsman explained her rights to her on an unspecified date.

In a letter to the claimant dated October 8, 1992, Dr. WI stated that she did not think the claimant had achieved MMI and that the claimant was only now beginning to get treatment for her reflex sympathetic dystrophy. In a letter to the Commission dated October 8, 1992, Dr. T stated that the claimant has not reached MMI, and that the claimant was to undergo extensive physical therapy and intravenous regional blocks to help decrease the joint pain as well as the superimposing reflex sympathetic dystrophy.

Rule 130.5(e) provides that "[t]he first impairment rating assigned to an employee is considered final if the rating is not disputed within 90 days after the rating is assigned." "Impairment" means any anatomic or functional abnormality or loss existing after MMI that results from a compensable injury and is reasonably presumed to be permanent. Article

8308-1.03(24). MMI means the earlier of: (A) the point after which further material recovery from or lasting improvement to an injury can no longer reasonably be anticipated, based on reasonable medical probability; or (B) the expiration of 104 weeks from the date income benefits begin to accrue. Article 8308-1.03(32). Article 8308-4.26(d) provides in part that after the employee has been certified by a doctor as having reached MMI, the certifying doctor shall issue a written report to the Commission, the employee, and the insurance carrier certifying that MMI has been reached, stating the impairment rating, and providing other information required by the Commission. Rule 130.1(a) requires a doctor who determines during the course of treatment that an employee has reached MMI to complete and file the medical evaluation report required by that rule. We noted in Texas Workers' Compensation Commission Appeal No. 92394, decided September 17, 1992, that the threshold issue of the existence of MMI cannot be neatly severed from the assessment of an impairment rating, and that the issues of MMI and impairment are somewhat inextricably tied together.

In Texas Workers' Compensation Commission Appeal No. 92670, decided February 1, 1993, we stated the following in regard to the application of Rule 130.5(e) to a treating doctor's certification of MMI and assignment of impairment rating:

> We may, however, interpret agency rules to the facts at hand. Rule 130.5 does not expressly refer to MMI. But an impairment rating cannot be assigned, and made final, absent a certification of MMI. *See* Article 8308-4.26(d). It would be inconsistent to interpret the rule to bind a claimant or carrier to the percentage of impairment, but allow an "end run" around this finality through an open-ended possibility of attack on the MMI. Such an interpretation would read the rule out of existence. Therefore, in this case, the impairment rating and MMI certification are intertwined, and either became final together, or not. *See* Texas Workers' Compensation Commission Appeal No. 92561, decided December 4, 1992.

In the instant case, the carrier urged that the claimant did not dispute Dr. K's February 22, 1992 certification of MMI until June 3, 1992, which was more than 90 days after the certification. The claimant urged that she did not know about Dr. K's certification of MMI and assignment of impairment rating until June 23, 1992, when she received the Commission's letter of June 23, 1992, and that she "protested" MMI within 90 days of that date. In the hearing officer's first decision in this case, which we reversed and remanded, the hearing officer concluded that the claimant reached MMI on January 9, 1992, because the claimant "took exception" to Dr. P's certification of MMI over 90 days after "such status was certified." In reversing and remanding the hearing officer's decision, we pointed out that the 90 day provision in Rule 130.5(e) applies to the first impairment rating assigned to the employee and held that the hearing officer misapplied the provisions of that rule when she ran the 90 day period from the date of Dr. P's "determination" of MMI because Dr. P

had not assigned the claimant an impairment rating. We also noted that, notwithstanding the parties' stipulation that Dr. P "determined" that the claimant reached MMI on January 9, 1992, there was no indication that he "certified" that the claimant reached MMI or completed and filed a report of medical evaluation. We held that the hearing officer should have applied Rule 130.5(e) to Dr. K's certification of MMI and impairment rating of February 22, 1992, because Dr. K's assessment of an impairment rating was the first impairment rating assigned to the claimant. Thus, we reversed and remanded the case to the hearing officer for further consideration and development of evidence, as deemed necessary and appropriate by the hearing officer, on the application of Rule 130.5(e) to the first impairment rating assigned to the claimant.

The hearing officer's key findings and conclusion in her decision following remand of the case are:

FINDINGS OF FACT

No. 11. The claimant first had notice of Dr. K's determinations between May 1, 1993 (sic) and May 19, 1993 (sic), when her agent, [claimant's attorney], received notice of those determinations. (Given the evidence in the case, we are certain that the hearing officer meant to use the year 1992 and not 1993 in this finding and the finding is so reformed to reflect the dates "May 1, 1992 and May 19, 1992.)

No. 12. The claimant initiated dispute resolution through her agent [claimant's attorney] on June 3, 1992.

No. 13. June 3, 1992, is within ninety (90) days of May 19, 1992. (We observe that June 3, 1992 was also within 90 days of May 1, 1992, which was the earliest date found in Finding of Fact No. 11.).

CONCLUSION OF LAW

No. 3. The preponderance of the evidence establishes that the claimant initiated dispute resolution proceedings within ninety (90) days of receiving actual notice of the determinations of Dr. K that she had reached MMI and had a percentage of whole body impairment of six percent (6%), pursuant to Rule 130.5(e).

In Texas Workers' Compensation Commission Appeal No. 93423, decided July 12,

1993, we stated:

> We have observed that, notwithstanding the language in Rule 130.5(e), the 90 day time period in which to dispute the first impairment rating assigned to an employee does not necessarily run from the date the rating is actually assigned by the doctor. Texas Workers' Compensation Commission Appeal No. 92542, decided November 30, 1992, and Texas Workers' Compensation Commission Appeal No. 92693, decided February 8, 1993. The rationale, as explained in Appeal 92542, *supra*, is "that it would require some stretch of the imagination to find that claimant could dispute a doctor's report before he was aware that it was rendered." Consequently it is when the claimant has actual knowledge of the MMI certification or impairment rating that becomes the more critical matter, rather than when the rating is assigned.

As previously noted, the hearing officer found that the claimant first had notice of Dr. K's determinations in May 1992 and determined that the claimant initiated dispute resolution on June 3, 1992, which was within 90 days of when she first had notice of Dr. K's determinations. Although the June 3rd letter appears to dispute only MMI, we have previously held that a carrier's TWCC-21 which disputed the method of certification of MMI was a timely dispute of MMI and impairment rating under Rule 130.5(e). The evidence in this case was conflicting on the matter of when the claimant had actual knowledge of Dr. K's determinations. Although there is evidence that the claimant was in Dr. P's office when Dr. P told the carrier's nurse that "he was in agreement with the six percent," there was no testimony that anyone told the claimant that the "six percent" had to do with her impairment rating or that she was shown a copy of Dr. K's report. Also, there was no evidence that Dr. K's report was sent to the claimant prior to June 23, 1992. The carrier asserted that the claimant was aware of Dr. K's determinations at least by February 25, 1992, when she overheard the conversation between Dr. P and the carrier's nurse and the claimant testified that she did not know about Dr. K's determinations until June 23, 1992, when she received the letter from the Commission. There was evidence that the claimant's attorney was aware of Dr. K's report in May 1992 and that Dr. K's determinations were communicated to her by her attorney in May 1992. The hearing officer is the judge of the weight and credibility to be given to the evidence. Article 8308-6.34(e). When presented with conflicting evidence, the trier of fact may believe one witness and disbelieve others and may resolve inconsistencies in the testimony of any witness. McGalliard v. Kuhlmann, 722 S.W.2d 694 (Tex. 1986). The trier of fact is privileged to believe all, part, or none of the testimony of any one witness. Burelsmith v. Liberty Mutual Insurance Company, 568 S.W.2d 695 (Tex. Civ. App.-Amarillo 1978, no writ). Having reviewed the record, we conclude that there is sufficient evidence to support the above cited findings and conclusion of the hearing officer and that such findings and conclusion are not so against the great weight and preponderance of the evidence as to be clearly wrong or manifestly unjust. In Re King's Estate, 150 Tex. 662, 224 S.W.2d 660 (1951). The carrier also disputes other

findings made by the hearing officer concerning the fact that the claimant's doctors did not explain the "significance" of Dr. K's findings to the claimant. We do not consider these findings to be of critical importance to the decision in light of Finding of Fact No. 11 which squarely addresses the question of when the claimant first had notice of Dr. K's determinations; therefore, error, if any, in Findings of Fact Nos. 6, 7, and 9 would not present reversible error.

The carrier contends in the alternative that if we do not reverse and render a decision in its favor, that we reverse and remand the case to the hearing officer for a hearing because the hearing officer failed to "remand" the case in contradiction of Rule 142.18(a) which provides that: "When the appeals panel reverses a hearing officer's decision and remands the case for further consideration, the commission shall set the hearing to be held within 30 days of the date of the appeals panel's decision." In the instant case, the record does not reflect that any additional hearing was held when the case was remanded to the hearing officer. The hearing officer simply determined the remanded issue based on the evidence adduced at the first hearing. In the particular circumstances presented in this case, we do not find reversible error in the hearing officer's failure to hold a hearing on remand. There are two reasons for our holding of no reversible error. First, at the first hearing the carrier urged the hearing officer to "adopt" Dr. K's determinations because the claimant had not timely disputed those determinations under Rule 130.5(e) and litigated the timeliness of dispute issue from the standpoint of Dr. K's report. The claimant asserted that she had timely disputed Dr. K's report. Instead of basing the 90 day time period on the report of Dr. K as urged by the carrier, the hearing officer ran the 90 day time period from Dr. P's "determination" of MMI, which we held to be a misapplication of law. We remanded the case for the hearing officer to apply Rule 130.5(e) to Dr. K's report as Dr. K assigned the claimant her first impairment rating. Thus, at the first hearing the parties had already developed the evidence concerning the timeliness of the dispute of Dr. K's determinations and all that was really left to do was for the hearing officer to make findings of fact and conclusions of law based on the evidence already developed in the record. Second, in our remand decision we basically left it to the discretion of the hearing officer as to whether more evidence should be developed when we stated that "[t]he decision of the hearing officer is reversed and the case is remanded for further consideration and development of evidence, as deemed necessary and appropriate by the hearing officer, not inconsistent with this opinion." Apparently, the hearing officer did not deem it necessary and appropriate to further develop the evidence. Her determination not to do so is supported by the fact that Rule 130.5(e) was litigated with reference to Dr. K's report at the first hearing. In the present case, we conclude that the hearing officer's consideration of all the evidence of record met the mandates of the remand. *See*, *e.g.*, Texas Workers' Compensation Commission Appeal No. 93530, decided August 10, 1993.

The decision of the hearing officer is affirmed.

Robert W. Potts
Appeals Judge

CONCUR:

Lynda H. Nesenholtz
Appeals Judge

Thomas A. Knapp
Appeals Judge