APPEAL NO. 93666

Pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. 401.001 *et seq.* (1989 Act), a contested case hearing was held in (city), Texas, on June 18, 1993, (hearing officer) presiding as hearing officer. He concluded that the respondent (claimant) timely disputed a first certification of maximum medical improvement (MMI); that the claimant had not reached MMI by virtue of abandoning medical treatment; and that claimant had disability from (date of injury), the date of the injury, until June 15, 1993, the date her treating physician certified MMI. The appellant (carrier) challenges the sufficiency of the evidence to support the relevant findings and conclusions. The claimant did not respond to this request for review.

DECISION

We affirm the decision of the hearing officer.

That the claimant sustained a slip and fall injury in the course and scope of her employment on (date of injury), is not disputed. She was first treated by an emergency room physician, (Dr. GO), who referred her to (Dr. GE). Dr. GE first examined the claimant on June 3, 1992, and diagnosed cervical strain, cervical spondylosis and right shoulder strain. He proposed physical therapy and recommended that the claimant remain off work. He confirmed this diagnosis at a second visit on June 10, 1992, and again urged physical therapy "without which this condition may become chronic." He authorized claimant's return to limited work on July 11, 1992, and to full time work on August 11, 1992. By letter of June 9, 1992, the carrier through its agent, the Texas Medical Foundation, refused to authorize payment for physical therapy. The claimant was again evaluated by Dr. GE on July 1, 1992. Though she continued to express feelings of pain in her right shoulder, Dr. GE urged her return to work. Dr. GE found her last examination on July 29, 1992, inconclusive and reported that "only the diagnosis of `Pain right shoulder' can be made." He determined in an unsigned TWCC-69, (Report of Medical Evaluation) that she had reached MMI on July 30, 1992, with a zero percent impairment rating (IR). (The efficacy of an unsigned TWCC-69 is not raised on appeal.)

By notice of September 21, 1992, the carrier advised the Texas Workers' Compensation Commission (Commission) and the claimant that it was terminating temporary income benefits (TIBS) effective September 18, 1992, based on Dr. GE's finding of MMI. On September 28, 1992, the Commission received the following handwritten letter, dated September 25, 1992, from the claimant:

I, (claimant), am requesting to be sent to another physician. I would like for (Dr. GA) (address) to examine me.

In her testimony, claimant said she did not recall seeing Dr. GE's report of MMI and IR prior to writing this letter. An official report of a September 24, 1992, telephone conversation between the claimant and the Commission ombudsman, who later assisted

the claimant at the hearing, recorded that the ombudsman discussed with the claimant the procedure for disputing MMI and for requesting a change in treating doctor. The claimant attempted to see Dr. GA on November 24, 1992, but this appointment was canceled when Dr. GA was unable to get advance confirmation that the carrier would be responsible for the charges incurred by the claimant. The claimant first saw Dr. GA on March 16, 1993. Up to this time, she received no medical care since her last appointment with Dr GE, but according to her testimony, had been in regular contact with a carrier's representative and Commission officials about the procedures for changing doctors and for getting carrier authorization for medical treatment.

Dr. GA on March 16, 1993, diagnosed "a shoulder injury of the proximal right shoulder girdle including the para and periscapula musculature on the right. . ." and entered her in a physical therapy program. A follow-up appointment on April 12, 1993, found a significant decrease in symptomatic pain and increase in freedom of movement. Physical therapy was continued. In a narrative statement of June 11, 1993, Dr. GA reported claimant reached MMI "as of the date of our disability rating" which apparently was June 15, 1993. The IR was two percent. We note that this information was not provided on a TWCC-69, as required by Tex. W.C. Comm'n 28 TEX.ADMIN. CODE 130.1 (Rule 130.1), but rather was contained in progress notes.

By letter of May 28, 1993, claimant was advised by a Commission disability determination officer to report for an examination by (Dr. D), a Commission designated doctor on June 8, 1993. An unsigned narrative by Dr. D, dated June 9, 1993, concluded:

> It appears that this lady has impingement and most of her discomfort is in her impingement arch area. . . . I will give her another four weeks of physical therapy and if she does not improve in three or four weeks, I will consider her to be at her maximum medical benefit.

The relevant determinations of the hearing officer are:

FINDINGS OF FACT

7. The letter from CLAIMANT dated September 25, 1992, raised a dispute of the Form TWCC-69 filed by [Dr. GE] certifying maximum medical improvement. . . .

9. CLAIMANT has been unable to obtain or retain employment due to her injury since (date of injury).

10. CLAIMANT had not abandoned medical treatment and actively sought medical treatment during all periods relevant to this claim.

CONCLUSIONS OF LAW

2.CLAIMANT filed a timely dispute of the certification of maximum medical improvement by [Dr. GE]. This was done on September 25, 1992.

3.CLAIMANT had disability from (date of injury), until June 15, 1993.

6.Because CLAIMANT actively sought medical treatment during all periods relative to this claim, Rule 130.4 does not apply.

Rule 130.5(e) provides:

The first impairment rating assigned to an employee is considered final if the rating is not disputed within 90 days after the rating is assigned.

Compliance with this rule has two elements: (1) the assertion of a dispute and (2) a 90 day deadline. Only the first element appears to be in issue in this case.[1]

Rule 130.5(e) prescribes no special format or content for a notice intended to dispute a finding of first impairment rating. Therefore, "whether a claimant had actually disputed an impairment rating under the rule would be a fact-specific determination in each case." Texas Workers' Compensation Commission Appeal No. 92452, decided November 30, 1992. The carrier asserts in its appeal that by its terms, the claimant's letter on September 25, 1992, only raises the issue of the choice of a second treating physician and that "reasonable minds could not differ on (this) interpretation. . . ." In support of its position, carrier cites Texas Workers' Compensation Commission Appeal No. 93385, decided July 2, 1993, where language in a letter, reading in pertinent part:

The enclosed letter is a request for the above-captioned client (claimant) to see Dr. M.D., as his second choice of doctors. The reason for this visit is to obtain another evaluation regarding (claimant's) current back condition and impairment rating.

was held by the Appeals Panel, contrary to the hearing officer's finding, not to constitute timely notice of a dispute of an IR determination.

[1]Previous Appeals Panel decisions addressing the issue have held that the 90 days begins to run from the date the party seeking to dispute the determination receives notice of the impairment rating. Texas Workers' Compensation Commission Appeal No. 92542, decided November 30, 1992; Texas Workers' Compensation Commission Appeal No. 92670, decided February 1, 1993. In this case, the carrier challenges the sufficiency of the claimant's notice of dispute, not the timeliness of that notice. Indeed, there is no evidence establishing when or if Dr. GE sent a copy of the TWCC-69 to the claimant. It is clear, however, that the carrier received a copy of the notice on July 31, 1992, but did not elect to stop temporary income benefits until September 21, 1992, when it sent TWCC-21 (Payment of Compensation or Notice of Refused/Dispute Claim) to the Commission and the Claimant. Since neither party raises this issue, we assume for purposes of this decision that the notice was timely under Rule 130.5(e).

Carrier stresses the similarity of this letter to the current claimant's letter of September 25, 1992. This case is, however, distinguishable from the one under consideration. In No. 93385, supra, the Appeals Panel looked to the cumulative evidence, including the attorney's own testimony about his role in the case and the claimant's intent in writing the letter, and concluded that the evidence "casts real doubt about the letter's actual intent." In the present case, we also look beyond the actual text of this letter to the other "cumulative evidence" to determine not only the claimant's intent, but also the context in which the letter was produced. The ombudsman testified to, and produced a computer generated record of, a telephone conversation with the claimant shortly after the carrier stopped TIBS. They discussed the claimant's dissatisfaction with care she received from Dr. GE and the options for disputing MMI. Shortly thereafter, the claimant sent the letter now in dispute. We conclude that under these particular circumstances, MMI was quite apparently the main concern of the claimant when she wrote her letter of September 25, 1992. Also, given this short time frame involved in responding to the carrier's notice of termination of TIBS because of Dr. GE's certification of MMI, we believe the carrier was sufficiently on notice that MMI was in dispute.

Section 410.163(b) provides that the hearing officer, as finder of fact, is the sole judge of the weight and credibility of the evidence. An appeals body is normally not a fact finder, and does not 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). In reviewing the sufficiency of the evidence to support a finding, only if we determine that the evidence is so weak or the finding so against the great weight and preponderance of the evidence as to be manifestly erroneous or unjust do we reverse. In Re King's Estate, 244, S.W.2d 660 (Tex. 1951); Texas Workers' Compensation Commission Appeal No. 93477, decided July 19, 1993. Applying this standard of review, we cannot say that there was insufficient evidence to support the finding of the hearing officer that the claimant intended to dispute Dr GE's MMI determination by her September 25, 1992, letter. While the evidence may lend itself to different inferences or conclusions than those drawn by the hearing officer, that is not a sufficient reason to reverse the decision. *See* Garza v. Com. Ins. Co. of Newark, N.J., 508 S.W.2d 701 (Tex. Civ. App.-Amarillo 1974).

The carrier also contends that sometime after claimant's last appointment with Dr. GE on July 29, 1992, she abandoned, without good cause, further medical treatment and pursuant to Rule 130.4(n)(3) the carrier may suspend TIBS. Claimant did not receive medical care from July 29, 1992, until her first appointment with Dr. GA on March 16, 1993. Abandonment of medical care is a question of fact. Texas Workers Compensation Commission Appeal No. 92222, decided July 15, 1992. The evidence in this case, establishes that the claimant first sought an appointment with Dr. GA for November 24, 1992, but this was canceled on Dr. GA's initiative because he could get no assurances from the carrier that he would be paid. During this time, up to March 1993, the claimant was in contact with both a Spanish speaking representative of the carrier and with Commission officials about a reinstatement of her benefits, including medical care. She returned to care once the carrier approved payment. Under these circumstances, we cannot say that there

was insufficient evidence to support the hearing officer's finding on this issue.

Finally, the carrier objects to the hearing officer's finding of fact that the claimant was unable to work from (date of injury), the date of her injury, until June 15, 1993, the date that, according to the hearing officer, the claimant reached MMI.[2] Carrier bases its objection on the failure of the claimant to meet her burden of proof that she has disability. Martinez v. Travelers' Insurance Co., 543 S.W.2d 911 (Tex. Civ. App.-Waco 1976, no writ). In addition to her own testimony about the injury and its effect on her, the record in this case contains medical evidence that the claimant was unable to work until at least Dr. GE's certification that the claimant reached MMI with zero percent disability on July 30, 1992. Dr. GA also found that she was unable to return to work until on or about June 15, 1993, based on his personal examination of the claimant and his review of the report of the physical therapist. He took special effort to emphasize that prior to his treatment, the claimant had suffered from medical mismanagement. While such a statement may be self-serving, it nonetheless constitutes evidence which in conjunction with the other evidence presented to the hearing officer forms a sufficient basis for his decision. As an appeals body we will not substitute our view of the evidence for that of the hearing officer.

For the above stated reasons, the decision of the hearing officer is affirmed.

Thomas A. Knapp
Appeals Judge

CONCUR:

Stark O. Sanders, Jr.
Chief Appeals Judge

Philip F. O'Neill
Appeals Judge

[2]The hearing officer also concluded that the parties did not dispute Dr. GA's determination that MMI was reached on June 15, 1993. No party has sought review of this finding. For this reason we do not address it on appeal.