APPEAL NO. 93729

This appeal arises under the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq*. (1989 Act). On August 3, 1993, a contested case hearing (CCH) was held in (city), Texas, with (hearing officer). The sole issue presented, and agreed upon, at the CCH was: "whether claimant timely disputed her September 14, 1992, certification of maximum medical improvement and impairment rating, so as to prevent the certification from becoming final." The hearing officer determined that the claimant did not timely dispute maximum medical improvement (MMI) and impairment and that those certifications have become final.

Appellant, claimant herein, contends error in certain of the hearing officer's rulings and interpretation of the law, and requests that the hearing officer's decision "be reversed and the case remanded for a new determination of (MMI) and impairment." Respondent, carrier herein, did not file a response.

DECISION

The decision of the hearing officer is affirmed.

Claimant testified that she was a checker at (employer), employer herein, when on (date of injury), she injured her back lifting a heavy object. Claimant states she sought treatment from (Dr. R), M.D., upon the recommendation of an acquaintance. Claimant testified she got along with Dr. R but that he was in his 80s and described him as a "jerk." Claimant continued to see Dr. R on three or four occasions because she "was in pain and needed the help of a doctor." Claimant testified she is unable to work and has not worked since (date of injury). Dr. R completed a Report of Medical Evaluation (TWCC-69) certifying MMI (apparently on "9-14-1992" although the date is hard to read) with zero percent whole body impairment. Carrier asserts a copy of the TWCC-69 together with the Payment of Compensation or Notice of Refused/Disputed Claim (TWCC-21) was sent to claimant on "10-21-92." Claimant is very vague as to when she received this notice, but believed it was "only a few days" before she disputed the certification by sending a letter to carrier and to the Texas Workers' Compensation Commission (Commission) dated January 8, 1993. Carrier did not receive the letter disputing the impairment rating until April 6, 1993 and the Commission apparently did not receive its copy until April 1, 1993. Claimant, by Employee's Request to Change Treating Doctors (TWCC-53), dated January 22, 1993, requested a change in treating doctor because:

> [Dr. R's] reputation is poor. He has not provided me adequate treatment. Because I disagree with him about treatment and I feel that the physician-patient relationship has been seriously compromised.

Claimant does not indicate on this form any disagreement with Dr. R's certification of MMI or impairment.

Claimant contacted (Ms. A), a Commission employee, requesting assistance on April

1, 1993. Ms. A records that she asked claimant if claimant had ever disputed Dr. R's certification and that claimant responded "No, not yet, I wanted to see what my Dr. says. . . ." Claimant concedes she called the Commission and spoke with Ms. A on April 1st, but testified that Ms. A must have misunderstood her and denies saying she had not yet disputed Dr. R's impairment.

The hearing officer in the discussion portion of her decision notes "Claimant's testimony in support of her claim is not credible." The hearing officer notes inconsistencies and contradictions between claimant's statements at the benefit review conference (BRC) and the CCH, the unlikelihood that letters to the carrier and the Commission would both be misplaced, lost or mishandled by the recipients and/or postal service and both arrive the first week of April, almost three months after they were allegedly mailed, and that Ms. A would have misunderstood claimant's statement that claimant had not yet disputed Dr. R's impairment rating.

The hearing officer found that claimant was ". . .presumed to have received. . . (Dr. R's) impairment rating certification. . . by October 26, 1992," that claimant took no action to dispute Dr. R's certification prior to April 1, 1993 and consequently claimant "did not timely dispute MMI and impairment within ninety days and that Dr. R's impairment rating had become final."

Claimant requests review on the following points:

1)Insufficient evidence to support the finding that claimant received notice of Dr. R's rating in October 1992.

2)Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 130.5(e) (Rule 130.5(e)) applies only to certifications of impairment ratings and therefor does not apply to certifications of MMI.

3)That claimant's request to change doctors, TWCC-53, "should have been treated as a dispute. . . and should liberally be construed as a Rule 130.5(e) notice."

4)That claimant's communication with the Commission as reflected in the "DRIS Notes" contain "details of conversations between claimant and [Ms. P], the Ombudsman. . . ." Claimant is apparently asserting that claimant's communications with the Commission and the ombudsman is entitled to some type of attorney-client privilege.

Rule 130.5(e) states:

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.

In reference to claimant's first contention of error, although Rule 130.5(e), quoted above, states the rating is final if not disputed within 90 days after the rating is "assigned", prior Appeals Panel decisions have addressed that issue and have held that the 90 days begin to run from the date the party seeking to dispute the determination receives notice of the impairment rating. *See* Texas Workers' Compensation Commission Appeal No. 93666, decided September 15, 1993; Texas Workers' Compensation Commission Appeal No. 92542, decided November 30, 1992; Texas Workers' Compensation Commission Appeal No. 92670, decided February 1, 1993. Whether claimant received notice of Dr. R's rating in October 1992, as found by the hearing officer, is a factual determination for the trier of fact and the hearing officer as the trier of fact is the sole judge of the weight and credibility to be given to the evidence. (Section 410.165(a); formerly Article 8308-6.34(e)). The hearing officer very clearly did not find claimant's testimony credible and cited inconsistencies and contradictions between claimant's testimony at the CCH and her statements at the BRC. The hearing officer may accept some parts of a witness' testimony and reject other parts of that testimony where the testimony is inconsistent, contradictory or where the manner or demeanor of the witness created doubt concerning its truthfulness. Aetna Insurance Company v. English, 204 S.W.2d 850 (Tex. App.-Fort Worth, 1947, no writ); Cobb v. Dunlap, 656 S.W.2d 550 (Tex. App.-Corpus Christi 1983, writ ref'd n.r.e.). Claimant appears to allege that the carrier had some obligation to call witnesses to rebut claimant's testimony. That is not the case. Here the hearing officer found claimant's testimony not credible, rejected it as she had a right to do, and relied on documentary evidence that claimant was mailed a TWCC-21 with the certification of impairment on October 21, 1992, allowed five days for delivery, and found a presumption claimant had received the notice October 26th. The hearing officer's determination is supported by sufficient evidence and claimant's allegation of error is without merit.

Claimant's second contention of error is that Rule 130.5(e) applies to impairment ratings only and nothing in the rule "talks about certification of (MMI)." We have addressed this concept in Texas Workers' Compensation Commission Appeal No. 93377, decided July 1, 1993, where we held:

> Rule 130.5(e) provides that 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. While the rule does not expressly refer to MMI, this panel had held that it would be inconsistent to interpret the rule to bind a claimant or carrier to the percentage of impairment yet allow an "end run" around this finality through the open-ended possibility of an attack on MMI. *See* Texas Workers' Compensation Commission Appeal No. 92670, decided February 1, 1993. Thus a carrier or claimant who disagrees either with the first impairment rating, or the finding of MMI on which it was based, must make known such dispute within the 90 days required by the rule; a failure to timely dispute one element renders both final, as impairment and MMI have been held to be intertwined for these purposes.

Consequently, claimant's failure to timely dispute impairment is also considered to have

failed to timely dispute MMI.

Claimant's third contention is that claimant's request to change treating doctors was a dispute of Dr. R's impairment rating. We agree that under some circumstances, looking to the "cumulative evidence," a request to change treating doctors could amount to disputing a first impairment rating. In Texas Workers' Compensation Commission Appeal No. 93684, decided September 21, 1993, we held language that "I am making this change out of concern for my health" insufficient to constitute timely notice of a dispute of an impairment rating. On the other hand, in Texas Workers' Compensation Commission Appeal No. 93666, *supra*, where claimant called an ombudsman (evidence was submitted in the form of a computer generated record of a telephone conversation) expressed dissatisfaction with care of her doctor, discussed the options of disputing MMI, and three days later submitted a letter stating she wanted another doctor to examine her, we concluded that under those particular circumstances, where the MMI certification was clearly a "main concern" of the claimant when she wrote her letter, the hearing officer's finding that the carrier was sufficiently on notice that MMI was in dispute, was supported by the evidence. In the instant case, claimant alleges that she had sent a letter dated January 8, 1993, disputing impairment and MMI, then subsequently on January 22, 1993, she requested a change in treating doctor because "[Dr. R's] reputation is poor. He has not provided me adequate treatment." There is nothing in that letter, or the cumulative evidence surrounding the circumstances, to give notice that the letter was intended to be an impairment dispute.

Claimant, on more than one occasion, both at the CCH and on appeal, states that "the Act is to be liberally construed in favor of claimants. . . ." We note there is no such provision in the 1989 Act and we have held that the weight of case law authority under the pre-1989 Act does not extend a liberal construction to questions of fact, as opposed to law. *See* Texas Workers' Compensation Commission Appeal No. 93057, decided February 25, 1993.

Claimant's last contention of error is the admission of the "DRIS Notes" as being a breach of "confidential and privileged communications between claimant and her benefits review conference representative." Claimant cites no authority, and we know of none, that extends either a common law attorney/client privilege or a statutory privilege to Commission personnel in the Texas workers' compensation system. Nothing in the 1989 Act supports claimant's contention that it is the duty of Commission staff to withhold pertinent information from one party or the other. It was claimant's conversation with Ms. A on April 1, 1993, which noted that claimant said she had not yet disputed Dr. R's ratings, which apparently became a key factor. Apparently Commission personnel routinely make computer generated notes of telephone conversations. Those computer

generated notes then apparently go into the Commission claim file for that claimant. We have, on occasion, expressed disapproval of hearing officers taking official notice of the entire Commission claim file. *See* Texas Workers' Compensation Commission Appeal No. 93425, decided July 14, 1993; Texas Workers' Compensation Commission Appeal No. 93629, decided September 10, 1993.

Regarding taking official notice of portions of the claims file, our recommendation has been ". . . that the hearing officer make hearing officer exhibits of relevant documents which are in the claims file and which the hearing officer wishes to consider in resolving the case, instead of taking official notice of such documents." Appeal No. 93629, *supra*. In the instant case, the hearing officer could have, and perhaps should have, made the "DRIS Notes" a hearing officer's exhibit. However, we note that the hearing officer is authorized to take official notice of certain items, including facts that are judicially cognizable and generally recognized facts within the Commission's specialized knowledge. *See* Rule 142.2. To the extent the hearing officer may have taken notice of any facts not within the Commission's specialized knowledge, any such error would be harmless in that critical parts of that record were also properly admitted as a carrier's exhibit. Regarding claimant's objection that carrier's copy of the DRIS Notes, which are limited to the telephone log of Ms. A, was not properly exchanged, we note the same objection was made at the CCH. Carrier stated that it had only received the notes from the Commission on either July 30th or August 2nd before the August 3rd CCH. The hearing officer found good cause for not exchanging the document and admitted the exhibit into evidence. The hearing officer did not abuse her discretion in finding good cause and admitting the exhibit under those circumstances. Claimant further maintains that the author of those notes, Ms. A, was unavailable for cross-examination and this violated claimant's due process. We note that carrier's copy of Ms. A's notes are certified as being a full and correct computer printout of the April 1, 1993, entry by Ms. A concerning her conversation with claimant as documented under the Dispute Resolution Information System. The documents were certified by the Executive Director of the Commission as the custodian of the records. The hearing officer did not abuse her discretion in admitting these certified documents into evidence.

In sum, we find no reversible error, and we find the hearing officer's decision was not so against the great weight and preponderance of the evidence as to be manifestly erroneous or unjust. In re King's Estate 244 S.W.2d 660 (Tex. 1951); Pool v. Ford Motor Co., 715 S.W.2d 629, 635 (Tex. 1986).

The decision of the hearing officer is affirmed.

Thomas A. Knapp
Appeals Judge

CONCUR:

Lynda H. Nesenholtz
Appeals Judge

Gary L. Kilgore
Appeals Judge