APPEAL NO. 93863

This appeal arises under the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act) (formerly V.A.C.S. 8308-1.01 *et seq.*). On August 18, 1993, a contested case hearing (CCH) was held in (city), Texas, with (hearing officer) presiding as hearing officer. The sole issue to be decided at the CCH was: "Did Claimant dispute her treating doctor's date of maximum medical improvement and impairment rating within 90 days of notice?" The hearing officer determined that the claimant had timely disputed the treating doctor's maximum medical improvement (MMI) date and impairment rating. Appellant, carrier herein, contends that the hearing officer erred in finding that MMI and impairment had been timely disputed and requests that we reverse the hearing officer's decision and render a decision in its favor. Respondent, claimant herein, responds that the decision is supported by the evidence and requests that we affirm the decision.

DECISION

The decision of the hearing officer is affirmed.

By way of background, claimant apparently sustained a compensable injury to her left shoulder, arm and perhaps cervical spine on (date of injury). Her treating doctor was (Dr. H) who treated her until August 1991. Claimant was apparently initially satisfied with Dr. H, but she testified that after Dr. H moved his offices in the summer of 1991, he became aloof, did not conduct hands-on examinations and just asked "questions from across the room." Claimant agreed she saw Dr. H in August 1991. Dr. H in a Report of Medical Evaluation (TWCC-69) and accompanying narrative dated August 19, 1991, certified MMI on 8-19-91 with a six percent whole body impairment rating. The report indicated that Dr. H had "nothing further" to offer claimant and notes a copy was sent to claimant. Claimant does not dispute receiving ". . . something in the mail that said, you know, information about my, you know, going to appointments, my condition." Claimant testified she received "a big check" in September or early October 1991. Claimant vaguely testified she called carrier's adjuster about the check at the end of September 1991 but did not understand what the check was for. Claimant testified she then called (Ms. L) at the Texas Workers' Compensation Commission (Commission) local field office because Ms. L was someone claimant knew at the Commission and "she would know how this was supposed to be handled."[1] Claimant testified that Ms. L had been helpful in the past and had answered claimant's questions. Claimant stated that Ms. L ". . . was trying to explain like the way like the benefits work on workmans' comp and stuff like that . . . . But to me it was like, you know, a foreign language."

The crux of this dispute centers around the conversation that claimant had with Ms. L on October 2, 1991, and the circumstances surrounding claimant's filing a second choice of doctor form dated 10/10/91 stating the reason for changing doctors was "[f]or second opinion . . . ." Ms. L testified both telephonically at the CCH and by a sworn affidavit, sworn to on July 9, 1993. The affidavit states quite plainly that claimant called Ms. L on October 2nd,

[1]Ms. L was then a disability determination officer (DDO) at the local field office.

regarding the large check claimant had received from carrier, that Dr. H's TWCC-69 was not in the file, that Ms. L determined from carrier that they were paying impairment income benefits (IIBS) in accordance with Dr. H's impairment rating and "at that time [claimant] expressed to me that she was not happy with [Dr. H's] opinion that she had reached maximum medical improvement and she expressed to me that she did not agree with the 6% impairment rating given." Carrier challenges this statement in the affidavit stating Ms. L "repeatedly disavowed the quoted portion of the affidavit under cross-examination." Carrier also challenges Ms. L's testimony, and the affidavit, by pointing out that notes made by Ms. L and her assistant, in the Commission case file, appear to be both inconsistent and contradictory to the testimony.

The hearing officer determined that claimant had timely disputed Dr. H's date of MMI and impairment rating, quoting a portion of Ms. L's affidavit. As noted, carrier vigorously challenges the hearing officer's determination, in essence saying that it is against the great weight and preponderance of the evidence.

Carrier cites portions of the testimony and evidence in the transcript in support of its contention that the impairment rating and MMI had not been timely disputed as required by Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 130.5(e) (Rule 130.5 (e)). Rule 130.5(e) states 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. The Appeals Panel has interpreted this provision to mean that the 90 days begin to run from the date the party seeking to dispute the determination actually receives notice of the impairment rating. 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. 93729, decided October 5, 1993. In the instant case, although the date claimant actually received notice is unclear, it is undisputed that the conversations and events around October 2nd and October 10th were both well within 90 days of the date the rating was assigned by Dr. H.

Claimant clearly was confused about what she should do when she received carrier's "big check." She sought out Ms. L and asked what she should do but "she [Ms. L] was saying some things, but I didn't quite understand it. And I told her like my side of it." Claimant stated she told Ms. L "[w]ell, why are they sending me this check if I was disputing--they knew I was disputing the six percent? Why are they sending me the check?" Certainly there is evidence and testimony that would appear to contradict claimant and notes in the record that are inconsistent with claimant's testimony.

It is clear claimant was dissatisfied with Dr. H's lack of attention and treatment. Ms. L testified that she interpreted and understood claimant's complaints about Dr. H to constitute a dispute of the impairment rating and MMI. Ms. L further testified that in October 1991 the rules and procedure for disputing impairment under the new law were still unclear and if a claimant expressed dissatisfaction with the treating doctor or disputed the doctor's treatment, the proper procedure was to tell the claimant to change doctors. Ms. L testified she understood claimant to be disputing Dr. H's impairment rating. Carrier challenges Ms.

L's interpretation and argues that claimant never actually said she was disputing Dr. H's report but only that she was unhappy with the treatment, that her arm still hurt and those statements do not constitute a dispute of the impairment rating. Carrier argues that Ms. L's interpretation of what claimant meant is irrelevant and in any case was inconsistent and contradicted, as reflected in various contemporary notes made in 1991 and early 1992. In summary, it is amply clear that the testimony and evidence could easily be interpreted to have completely different meanings.

The hearing officer is the sole judge of the relevance and materiality of the evidence offered and of the weight and credibility to be given to the evidence. Section 410.165(a). The hearing officer obviously accepted the evidence in Ms. L's affidavit that claimant expressed to Ms. L that claimant did not agree with the six percent impairment. We agree there is contradictory or inconsistent testimony from both Ms. L and claimant, however, where evidence is conflicting it is the hearing officer's duty to resolve the conflicts and inconsistencies in the evidence and determine what credence should be given to the whole, or any part, of the testimony of each witness. Gonzales v. Texas Employers Insurance Association, 419 S.W.2d 203 (Tex. Civ. App.-Austin 1967, no writ); Garza v. Commercial Insurance Co. of Newark, N.J., 508 S.W.2d 701 (Tex. Civ. App.-Amarillo 1974, no writ). Bearing in mind that the hearing officer resolves conflicts and inconsistencies in the evidence, our review of the record reveals sufficient evidence upon which, if believed, the hearing officer could base her decision. Although we, or a different fact finder, might well have drawn different inferences from the evidence than those drawn by the hearing officer, this is not, in and of itself, a sound basis to reverse if there is some probative evidence to support the determinations of the hearing officer. Garza, *supra*; Texas Workers' Compensation Commission Appeal No. 92113, decided May 7, 1992; Texas Workers' Compensation Commission Appeal No. 92062, decided April 2, 1992. We find there is sufficient evidence to support the hearing officer's decision in Ms. L's affidavit and claimant's testimony.

We do not find the hearing officer's determination to be so against the great weight and preponderance of the evidence as to be manifestly wrong or unjust. In re King's Estate, 150 Tex. 662, 244 S.W.2d 660 (1951); Pool v. Ford Motor Co., 751 S.W.2d 629

(Tex. 1986). Consequently there is no sound basis on which to disturb the hearing officer's decision.

The decision is affirmed.

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Thomas A. Knapp
Appeals Judge

CONCUR:

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Robert W. Potts
Appeals Judge

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Philip F. O'Neill
Appeals Judge