APPEAL NO. 94031
FILED FEBRUARY 15, 1994

This appeal arises under the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq*. (1989 Act). At a contested case hearing held in (City), Texas, on December 2, 1993, the hearing officer, (Hearing Officer), took evidence on the following disputed issue: Did the appellant (County) dispute the first impairment rating (IR) within ninety (90) days or has that rating become final. Finding, among other things, that the County was given notice that there had been a certification of maximum medical improvement (MMI) and an IR no later than December 3, 1992, that the County disputed the finding of MMI and the IR on April 16, 1993, and that the County did not dispute the first IR within 90 days, the hearing officer concluded that the first IR became final. In its request for review, the County specifically challenges the factual finding that the County was given notice that there had been a certification of MMI and an IR no later than December 3, 1992, as well as the aforesaid legal conclusion. The County contended at the hearing and maintains on appeal that while it did have notice of the assignment of an IR and failed to dispute such within 90 days, there was no evidence it also had notice that MMI had been certified; and that since the assignment of an IR is invalid without there also being a certification of MMI, it was not required to dispute the IR within 90 days, as provided for in Tex. W.C. Comm'n, TEX. ADMIN. CODE § 130.5(e) (Rule 130.5(e)), until it also had notice of the certification of MMI. The response of the respondent (claimant) urges the correctness of the challenged finding and conclusion and requests affirmance.

DECISION

Finding the evidence sufficient to support the challenged finding and conclusion, we affirm.

At the contested case hearing, no witnesses were called and no stipulations were entered into. The parties submitted their respective cases with documentary evidence. According to this evidence, claimant received a back injury on (date of injury), while driving a loaded dump truck over a county bridge which collapsed. The evidence also indicated that a number of diagnostic studies failed to reveal a herniated disc and that claimant was seen on referral by several doctors including one selected by the County. A Specific and Subsequent Medical Report signed by claimant's apparent treating doctor, (Dr. K), on March 15, 1992, stated claimant's diagnosis as lumbosacral neuritis/radiculitis, spondylolisthesis, and thoracic myofascitis. This exhibit also stated the anticipated date claimant would achieve MMI as "10-30-92" and bore a stamp showing it was received by (adjuster), apparently the County's adjusting firm, on April 26, 1993. Medical records of Dr. K showed that on 17 visits between and including "9/14/92" and "11/2/92," claimant manifested pain over the spinous processes of the fifth lumbar and sacroiliac joints for which he received chiropractic manipulations, electrotherapy, and cold packs.

The County introduced an undated Report of Medical Evaluation (TWCC-69), signed by Dr. K, stating that claimant reached MMI on "10-30-92" with an IR of 25%, and

referencing on its face attached reports of (Dr. S), to whom claimant had been referred by Dr. K for an IR evaluation. The TWCC-69 bore a stamp showing it was received by adjuster on April 13, 1993. Unlike the TWCC-69 discussed in Texas Workers' Compensation Commission Appeal No. 93259, decided May 17, 1993, the case upon which the carrier relies, the TWCC-69 in the case we here consider did not state a prospective MMI date and was thus not invalid on its face as a certification of MMI and an assignment of an IR.

The hearing officer inquired about the records of Dr. S referred to in the TWCC-69 as attached and the County then produced them and they were stapled to Dr. K's TWCC 69. The first page of these records of Dr. S was the first page of his detailed narrative report dated October 27, 1992. This report, which stated that claimant's IR was 25% but which did not state that claimant had achieved MMI, bore a stamp showing it was received by the adjuster on December 3, 1992. The County represented to the hearing officer that it could not say that Dr. K's TWCC-69 was with Dr. S's October 27, 1992, report when the latter report was received by the adjuster on December 3, 1992. It was the County's contention that there was no evidence that the County was notified earlier than April 13, 1993, when it received Dr. K's TWCC-69, that claimant had been certified to have reached MMI, and that although the adjuster did receive Dr. S's October 27, 1992, report on December 3, 1992, stating the 25% IR, the County was not required to dispute the 25% IR until such time as it was notified that claimant had reached MMI because the certification of MMI is a condition precedent to the valid assignment of an IR. Dr. S's report, which broke down the 25% IR into components for specific spinal disorders, range of motion, and neurological deficits, stated that "[t]he AMA guidelines to impairment rating are utilized."

In evidence was a letter from the County's representative to the adjuster, dated February 8, 1993, stating that a review of the file showed that no impairment income benefits had yet been paid, that Dr. S's 25% IR "was not on the required TWCC Form 69," that adjuster obviously disputes the 25% IR, that a Benefit Review Conference was to be set and that the adjuster may by then "have the correct forms on which you can respond and dispute the rating and request the Commission to select a designated doctor." Also in evidence was a letter from the adjuster to Dr. K, dated April 6, 1993, requesting a TWCC-69, and a letter from the adjuster to the Texas Workers' Compensation Commission (Commission), dated October 1, 1993, stating that the adjuster did not receive a TWCC-69 from Dr. K until April 12, 1993, and on April 16, 1993, disputed the IR of 25% and assessed an IR of five percent. The County's Notice of Refused/Disputed Claim (TWCC-21), dated April 16, 1993, stated that Dr. K's 25% IR was disputed per Rule 130.5.

Rule 130.5(e) provides as follows:

> 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 claimant maintained that the evidence showed that the 25% IR assigned to him was received by the County on December 3, 1992, was not disputed by the County until April 16, 1993, and that it thus became final under Rule 130.5(e). The County maintained that it was not required to dispute the 25% IR until such time as it was advised that claimant had been certified to have reached MMI, whether or not by means of a TWCC-69.

The hearing officer concluded that the first IR was final and based that conclusion on a number of factual findings including findings that Dr. K referred claimant to Dr. S for an IR evaluation which was accomplished on October 27, 1992, and which was received by the County on December 3, 1992, that Dr. K prepared a TWCC-69 stating that claimant reached MMI on October 30, 1992, with an IR of 25%, that the County was given notice there had been a certification of MMI and an IR no later than December 3, 1992, and that the County did not dispute the first IR within 90 days.

Section 410.165(a) provides that the hearing officer is the sole judge of the weight and credibility to be given the evidence. It is clear from the hearing officer's discussion that he inferred from the evidence that Dr. K's TWCC-69, which stated both the MMI date and the 25% IR and which referenced Dr. S's attached report, was sent to the County along with Dr. S's attached report. In Employers Mutual Liability Insurance Company v. Strother, 358 S.W.2d 753 (Tex. Civ. App.-Waco 1962, writ ref'd n.r.e.), a workers' compensation case where the trial court impliedly found that the amputation of the employee's leg was due to the injury and not to a noncompensable disease, the appellate court affirmed and stated:

> Any ultimate fact may be proven by circumstantial as well as by direct evidence. The trier of fact is the judge of the facts and circumstances proven, and may also draw reasonable inferences and deductions from the evidence adduced.

We cannot say that the aforesaid inference drawn by the hearing officer in this case could not be reasonably drawn from the evidence and we are satisfied the challenged finding and conclusion are not so against the great weight and preponderance of the evidence as to be manifestly unjust. In re King's Estate, 150 Tex. 662, 244 S.W.2d 660 (1951); Pool v. Ford Motor Co., 715 S.W.2d 629 (Tex. 1986).

The decision and order of the hearing officer are affirmed.

Philip F. O'Neill
Appeals Judge

CONCUR:

Stark O. Sanders, Jr.
Chief Appeals Judge

Robert W. Potts
Appeals Judge