APPEAL NO. 94132

This case returns for review pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq*. (1989 Act), following this panel's decision in Texas Workers' Compensation Commission Appeal No. 93810, decided October 26, 1993. In that decision, we found the hearing officer erred in his determination that the claimant disputed his first impairment rating in "November of 1992," stating that the evidence unequivocally showed that the claimant disputed the rating in question on June 8, 1992. We accordingly reversed the decision of the hearing officer that the claimant became aware of the impairment rating in question in "(month year)," and remanded for a more precise finding as to when the claimant became aware of the impairment rating. Finally, we reversed and remanded to allow the hearing officer to state for the record the basis on which he denied claimant's request to subpoena certain records of the Texas Workers' Compensation Commission (Commission) and adjuster's notes concerning conversations with the claimant.

Upon remand, the hearing officer, (hearing officer), stated that claimant's request for subpoena did not comply with Commission rules and therefore was denied for lack of good cause. He also stated that based upon the evidence he was unable to establish a precise date that the claimant became aware of the doctor's determination of maximum medical improvement (MMI) and impairment rating, and therefore reiterated his original determination that it occurred "in (month year)."

In his appeal the claimant says that there is no evidence to support the hearing officer's determination as to when he knew that his doctor had certified MMI and assigned an impairment rating, and he contends that the evidence shows that he received such notice on or after March 27, 1992. He also says it was improper for the hearing officer to have made these fact findings based upon the claimant's demeanor at the hearing, and says that the hearing officer's finding on remand fails to comply with the Appeals Panel's mandate to make a more precise determination. With regard to the discovery issue, the claimant argues that the hearing officer has failed to provide any information demonstrating that the subpoena failed to comply with Commission rules and states that, if that were the case, the hearing officer should not have ruled upon it.

In its response, the carrier contends that there is sufficient evidence to support a finding that the claimant's actions in (month year) demonstrated a knowledge of the MMI and impairment rating. The carrier also states that the claimant was not deprived of any relevant or material information because he was present at the hearing and able to testify as to his knowledge and date of dispute, and had the opportunity to cross-examine the carrier's adjuster.

DECISION

The decision and order of the hearing officer are affirmed.

This case involves Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 130.5(e) (Rule 130.5(e)), which 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. The facts of this case were set out in Appeal No. 93810, *supra*, and will not be repeated here except where pertinent to this decision.

The hearing officer's decision states, and the parties do not dispute, that on November 10, 1993, a telephone conference call was held between the hearing officer and the attorneys for claimant and carrier, and that the parties stated that they had no new evidence to submit on the remanded issues and asked the hearing officer to respond to the Appeals Panel based upon the record of the original hearing.

The hearing officer stated in his decision that upon reviewing the evidence and testimony, he was unable to establish a precise date on which the claimant became aware of the February 15, 1992, MMI date and impairment rating assigned by (Dr. S), the referral doctor who performed surgery on claimant's knee (Dr. S's Report of Medical Evaluation, Form TWCC-69, was undated). The hearing officer then summarized the evidence upon which he based his finding of fact and conclusion of law that "[t]he claimant was aware of the Maximum Medical Improvement date and the impairment rating in (month year)." Because of this finding and conclusion, and because it is necessary to calculate with certainty periods of time which affect a party's rights, we construe such finding to mean the latest date possible, which is February 29, 1992 (1992 being a leap year). The date the claimant was found to have disputed the impairment rating, June 8, 1992, is more than 90 days after February 29th. Therefore, we must determine whether the evidence supports a finding that claimant had such knowledge on or before February 29th.

When reviewing a "no evidence" point of error, we consider only the evidence and reasonable inferences therefrom which, viewed in their most favorable light, support the finder of fact, and reject all evidence and inferences to the contrary. *See* Nasser v. Security Insurance Company, 724 S.W.2d 17 (Tex. 1987).

In his discussion of the case, the hearing officer referenced the evidence upon which he relied in reaching his decision:

> The claimant said [Dr. S] told him that he was released to return to work on February 15, 1992. However, the claimant does not remember [Dr. S] using the magic words "maximum medical improvement" or "impairment." The claimant said his temporary income benefits stopped on February 15, 1992; then, in early March, he got a check and yellow paper from the Carrier.
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> The claimant filed for unemployment compensation in March, and received benefits. The claimant said he discussed maximum medical improvement and impairment with at least one of his attorneys in (month year). The claimant said he returned to [Dr. S's] office the last of February and was told he could

not be seen for physical therapy because the insurance company would no longer pay the bill.

For these reasons, and the general demeanor and appearance of the claimant, this hearing officer believes the claimant was aware of [Dr. S's] maximum medical improvement date and impairment rating in (month year).

We would also add that the claimant testified that he received a form (which was not in evidence, but which claimant said he believed was similar to a Payment of Compensation (TWCC-21) form) when his temporary income benefits (TIBS) stopped on February 15th.

The hearing officer obviously based his determination on the 90-day issue upon inferences drawn from the evidence cumulatively. In a case with somewhat similar facts, Texas Workers' Compensation Commission Appeal No. 94031, decided February 15, 1994, the hearing officer, based on documentary evidence in the record, determined that the carrier had notice of an MMI date and impairment rating by December 3, 1992, and did not dispute same for more than 90 days. In affirming, this panel wrote that it was clear the hearing officer inferred that the TWCC-69 in question was sent to the insured along with the attached report of another doctor, which the insured had received. The panel cited Employers Mutual Liability Insurance Company v. Strother, 358 S.W.2d 753 (Tex. Civ. App.-Waco 1962, writ ref'd n.r.e.), wherein the court said that "[a]ny 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."

As in Appeal No. 94031, we cannot say that the aforesaid inference drawn by the hearing officer could not be reasonably drawn from the evidence. There is certainly other evidence, in the form of claimant's testimony, to support his contention on appeal that he was not aware of the impairment rating until March 27th, when he received the TWCC-21 with his impairment income benefits (IIBS) check. We note, however, his testimony that he received a similar form in February with his final TIBS check. In addition, the fact that different inferences may be drawn from evidence is not a sound basis, by itself, to reverse the fact finder's decision. Garza v. Commercial Insurance Co. of Newark, New Jersey, 508 S.W.2d 701 (Tex. Civ. App.-Amarillo 1974, no writ).

The hearing officer also said he based his determination on the "general demeanor and appearance" of the claimant. We assume the hearing officer had reference to the claimant's credibility notwithstanding such vague terminology. The hearing officer as sole finder of fact and judge of the credibility of the evidence, Section 410.165(a), is entitled to evaluate the credibility of witnesses and may believe all, part, or none of the testimony of any one witness. Taylor v. Lewis, 553 S.W.2d 153 (Tex. Civ. App.-Amarillo 1977, writ ref'd n.r.e.). The fact that claimant, as the hearing officer wrote, was "no stranger to the workers' compensation system" due to two prior injuries is certainly not probative evidence of his credibility on the issue at hand, particularly since the record shows his previous injuries were

in 1985 and 1986, well before the enactment of the 1989 Act and Rule 130.5(e). However, we do not find this statement alone to be harmful error.

With regard to the discovery issue, the hearing officer wrote in his decision on remand that:

> The issuance of a subpoena by a hearing officer is authorized by Commission Rule 142.2(1), and is controlled by Rule 142.12. The request submitted by Claimant's attorney does not comply with Rule 142.4. A request for a subpoena that does not comply with Commission rules can not be said to have validity and is therefore denied for lack of good cause. In retrospect, this hearing officer should have ignored the request altogether since it did not comply with Commission rules.

Rule 142.12, which governs the issuance of subpoenas, provides that a hearing officer may issue a subpoena at the request of a party if the hearing officer determines that the party has good cause. The rule further sets forth the manner by which a party represented by counsel must request a subpoena. In his decision on remand the hearing officer explained that he denied the claimant's request for subpoena because such request did not comply with the appropriate rule (although he did not explain the manner in which it did not comply, we presume it was the claimant's failure to deliver such request to the carrier, in compliance with Rules 142.12(c)(1)(E) and 142.4).[1] That being the case, and as the hearing officer apparently recognizes, it was error for him to deny the request on a finding of no good cause.

Under the particular facts of this case, however, we do not believe that the hearing officer committed reversible error. The carrier's adjuster was present and available for cross-examination and, if not called by the carrier, could have been called by the claimant as a rebuttal witness. As to the material sought from the Commission's files, the claimant could have secured that file prior to hearing and sought to introduce any documents contained therein. To the extent that evidence was sought as to when the claimant was first aware that an impairment rating was assigned, he himself could, and did, testify.

Where a hearing officer entertains a proper request for subpoena, however, the fact that the rule allows issuance upon a finding of good cause does not mean that a denial of a subpoena should be solely premised upon an unexplained finding of no good cause, especially where the record does not otherwise provide other evidence upon which a proper review could be made. Sufficient information in the record can expedite appellate review of a discovery issue in that any error alleged on appeal could be reviewed on appeal and not after remand. *See, e.g.*, Texas Workers' Compensation Commission Appeal No. 92613, decided December 28, 1992, where the Appeals Panel wrote that the hearing officer

[1]We question whether the same result could obtain where a claimant was not represented by counsel, as Rule 142.12 provides that an unrepresented claimant may request a subpoena merely "by contacting the commission in any manner."

may have acted arbitrarily if he denied a discovery motion as the result of imposing additional requirements not contained in the applicable rules, and thereafter examined the hearing officer's discussion of his denial of the motion to see whether he had abused his discretion.

Based upon the foregoing reasoning, the decision and order of the hearing officer are affirmed.

Lynda H. Nesenholtz
Appeals Judge

CONCUR:

Philip F. O'Neill
Appeals Judge

Thomas A. Knapp
Appeals Judge