APPEAL NO. 94293

This appeal arises under 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 February 15, 1994, to decide the issue of whether the respondent (claimant) timely disputed the first impairment rating and certification of maximum medical improvement (MMI). The hearing officer, (hearing officer), determined this issue in the claimant's favor, and the appellant (carrier) appeals contending that the overwhelming and only credible evidence shows that the claimant did not timely dispute. The carrier also questions the hearing officer's "neutrality." The claimant did not file a response.

DECISION

We affirm the hearing officer's decision and order.

The claimant, an employee of (employer), suffered a compensable knee injury on (date of injury). His treating doctor was (Dr. M), who performed surgery on April 2, 1992. In patient notes dated August 11, 1992, Dr. M wrote that claimant's knee "looks good," and that he was releasing claimant. He also wrote that he would give claimant a two percent whole body impairment rating, although he did not specifically state claimant had reached MMI. Sometime on or about December 22, 1992, Dr. M completed a Report of Medical Evaluation (Form TWCC-69) certifying MMI as of August 11, 1992, and again assigning a two percent IR. The TWCC-69 referenced patient notes of December 22nd, which indicated Dr. M had discussed with claimant his "disability rating," and stated that "I explained to him even though he considers his situation now quite difficult to have his knee replaced and then experience loosening and revisions to the point that it is either infected or cannot be further revised successfully would make his situation much more difficult."

Tex. W. C. Comm'n, 28 TEX. ADMIN. CODE § 130.5(e) (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. The parties stipulated at the hearing that Dr. M was the first doctor to certify MMI and assign claimant an IR.

The carrier's position at the hearing and on appeal was that the claimant stated at the benefit review conference (BRC) that he was not aware of the requirement to dispute within 90 days, but that he had disputed it on June 8, 1993, in a conversation with carrier's adjuster. (An affidavit from an adjuster, MN, stated that claimant did not call him or any other adjuster to dispute "within 90 days of the claimant having received the report.") The carrier also notes in its appeal that claimant, in responding to a question on cross-examination, stated that "[w]hatever I said then [at the BRC] I stand by now, I don't change my stories up." Thus, the carrier argues, any testimony by the claimant to the contrary is not credible.

The hearing officer, in determining that claimant had timely disputed Dr. M's IR, relied upon claimant's testimony that he spoke with a Commission representative in February 1993 about a number of matters, including the fact that he disagreed with Dr. M's opinion.

Among other things, he said he inquired about "what it took to go through the right channels to have the impairment rating changed," and that he was told he could contact the Commission ombudsman or an attorney. The claimant testified from personal notes which were not offered into evidence and which he said he made at the time of his conversations.

As the carrier observes, claimant's statements as reflected in the BRC report are in some conflict with his testimony at the hearing. This panel has held, however, that the question of whether an IR was disputed within 90 days is a question of fact. Texas Workers' Compensation Commission Appeal No. 93047, decided March 5, 1993. The 1989 Act provides that the hearing officer, as the trier of fact, is the sole judge of the weight and credibility of evidence. Section 410.165(a). As such, the hearing officer is entitled to 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.) and may resolve conflicts and inconsistencies in the evidence. Ashcraft v. United Supermarkets, Inc., 758 S.W.2d 375 (Tex. App.-Amarillo 1988, writ denied). Not only could the hearing officer credit claimant's testimony at the hearing, he may have believed that claimant's testimony concerning a timely conversation with a Commission employee was not necessarily inconsistent with his statements at the BRC that he was unaware of the 90-day rule and that his first contact with carrier's adjuster occurred much later. We also note that Dr. M's patient notes from December 22, 1992, indicate that claimant questioned the doctor about his assigned IR, which could have lent credence to claimant's contention at the hearing that he telephoned the Commission.

The carrier also raises a question as to the hearing officer's "neutrality" in deciding this case. We have reviewed the entire record in this case, including the recorded proceedings below, and find no impropriety or appearance of partiality on the part of the hearing officer. While the evidence in this case could have supported different inferences, that fact alone is not a sufficient basis upon which to reverse the fact finder. Texas Workers' Compensation Commission Appeal No. 92308, decided August 20, 1992.

Based upon our review, we find no basis for disturbing the decision of the hearing officer. Cain v. Bain, 709 S.W.2d 175, 176 (Tex. 1986). The hearing officer's decision and order are accordingly affirmed.

Lynda H. Nesenholtz
Appeals Judge

CONCUR:

Susan M. Kelley
Appeals Judge

Philip F. O'Neill
Appeals Judge