APPEAL NO. 94341

Pursuant to 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 17, 1994, (hearing officer) presiding as hearing officer. She determined that the appellant (claimant) did not timely dispute the first certification of maximum medical improvement (MMI) and impairment rating (IR) and that he reached MMI on July 14, 1992, with a 13% impairment in accordance with the first certification. The claimant appeals asserting that he did call the respondent's (carrier) adjuster and disputed the first certification of MMI and IR shortly after he received it. He asks that the MMI date be determined to be November 18, 1993. The carrier responds that there is sufficient evidence to support the hearing officer's determination.

DECISION

Finding the evidence sufficient to support the findings and conclusions of the hearing officer, the decision and order are affirmed.

The claimant sustained a compensable back injury on (date of injury), in a slip and fall incident. He subsequently underwent back surgery on August 15, 1991. On July 14, 1992, the claimant was examined by (Dr. D) at the carrier's request and he certified that the claimant reached MMI on July 14, 1992, with a 13% IR. A copy of Dr. D's certification was sent to and received by the claimant on or about July 21, 1992. The carrier stopped temporary income benefit (TIBS) payments and initiated the first of 39 weeks of impairment income benefits (IIBS). The claimant testified that within a day or two of receiving Dr. D's certification, he called the adjuster to dispute the MMI only. He also testified that the day following his original call, he called the adjuster to make sure he understood he was only disputing the MMI and not the 13% IR. He introduced a long distance phone bill which shows two phone calls to the carrier's office in (city), Texas, one on August 3, 1992, and the other on August 4, 1992. Both phone calls were of two minute duration. There does not appear to have been any further activity on the matter until February 25, 1993, when the claimant's treating doctor wrote a letter stating he agreed with the 13% IR rendered by Dr. D. The claimant's IIBS payments continued until April 1993, and when they stopped, according to the testimony of the adjuster, the claimant first indicated he disputed Dr. D's MMI.

The adjuster testified that the claimant never contacted him to dispute Dr. D's MMI or IR and he was unaware of any dispute on the matter until after the IIBS payments ended in April. He said it would not be possible to handle a matter relating to a dispute of this nature in a two minute phone call given the fact that the carrier had an answering system that takes time to get to a specific person or section and that it would take several minutes to retrieve a file from the file storage area. Official notice was taken of Texas Workers' Compensation Commission (Commission) computer log entries which do not reflect any dispute of Dr. D's certification until April 1993. Subsequently, a designated doctor was appointed who assessed an MMI date of July 14, 1992, but gave no IR. Erroneously, the Commission appointed a second designated doctor who assessed an MMI date of March

1993, with a five percent IR. *See* Texas Workers' Compensation Commission Appeal No. 93045, decided March 3, 1993.

Tex. W. C. Comm'n, 28 TEX. ADMIN. CODE § 130.5(e) (Rule 130.5) provides that the first IR assigned to an employee is considered final if the rating is not disputed within 90 days. We have held that the rule provides a method by which the parties may rely that an assessment of MMI and IR may safely be used to pay applicable benefits, by providing the time limit in which such assessment will be open to dispute. Texas Workers' Compensation Commission Appeal No. 92670, decided February 1, 1993. Although the evidence was in conflict on the factual issue of whether the claimant disputed Dr. D's certification within 90 days, there was a sufficient evidentiary basis for the hearing officer's determination that the claimant failed to dispute within 90 days. The hearing officer is the sole judge of the relevance and materiality of the evidence and of the weight and credibility to be given the evidence. Section 410.165(a). He is the one who resolves conflicts and inconsistencies in the evidence and makes findings of fact. *See* Garza v. Commercial Insurance Co. of Newark, New Jersey, 508 S.W.2d 701 (Tex. Civ. App.-Amarillo 1974, no writ); Burelsmith v. Liberty Mutual Insurance Co., 568 S.W.2d 695 (Tex. Civ. App.-Amarillo 1978, no writ). The hearing officer obviously found the evidence in opposition to the testimony of the claimant to be more persuasive. *See* Bullard v. Universal Underwriter's Insurance Co., 609 S.W.2d 621 (Tex. Civ. App.-Amarillo 1980, no writ); Cobb v. Dunlap, 656 S.W.2d 550 (Tex. App.-Corpus Christi 1983, writ ref'd n.r.e.). Here, the testimony of the adjuster, the absence of any indication in any of the records of a dispute prior to ending of IIBS payment, together with the circumstances and passage of time from the receipt of the report by the claimant to any action in obtaining a designated doctor, is a sufficient evidentiary basis for the hearing officer's determination that the claimant did not dispute Dr. D's certification until about April 1993, and that it was not a timely dispute. Therefore, the correct MMI date was determined to be July 14, 1992, with an IR of 13%.

For the reasons stated, the decision and order of the hearing officer are affirmed.

Stark O. Sanders, Jr.
Chief Appeals Judge

CONCUR:

Joe Sebesta
Appeals Judge

Alan C. Ernst
Appeals Judge