APPEAL NO. 950026
FILED FEBRUARY 17, 1995

This appeal arises pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act). A contested case hearing (CCH) was opened on October 4, 1994 with the record closing on November 28, 1994. The issues at the CCH were: 1. whether the first certification of maximum medical improvement (MMI) and impairment rating (IR) by (Dr. F) became final under Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 130.5(e) (Rule 130.5(e)); 2. whether the respondent (claimant herein) had reached MMI, and if so, on what date; 3. what is the claimant's correct IR; and 4. whether the claimant had disability as a result of the _____, injury. The hearing officer found that the certification of MMI and the IR by Dr. F had not become final under Rule 130.5(e), that the claimant had not reached MMI, that assessment of IR would be premature and that the claimant had disability due to the injury from June 16, 1992, to November 8, 1992, and from May 1, 1993, continuing through the date of the CCH with the exception of July 15, 1993. The appellant (carrier herein) files a request for review challenging a number of the findings of fact and conclusions of law of the hearing officer. The carrier argues that the certifications by Dr. F became final, that if it did not the claimant is at least at statutory MMI and that the evidence does not support the finding of the hearing officer on disability. The claimant files a response requesting we affirm the decision of the hearing officer.

DECISION

Finding sufficient evidence to support the decision of the hearing officer's findings as to Rule 130.5(e), impairment and disability, we affirm the decision and order of the hearing officer regarding these issues. We reverse the decision of the hearing officer regarding MMI and render a decision that unless the claimant did not reach MMI sooner, he is at statutory MMI.

The claimant testified that he suffered an injury to his right knee on or about _____. Claimant testified that as result of the injury he was unable to work from June 16, 1992, to November 8, 1992, and from May 1, 1993, continuing to the date of the CCH, with the exception of July 15, 1993, when he worked in an attempt to see if he could return to employment.

The claimant testified that he was initially treated in an emergency room and was referred from there to Dr. F. Dr. F's reports indicate that on August 12, 1992, he performed an anterior cruciate ligament reconstruction on claimant's right knee. The claimant testified that he continued to treat with Dr. F after this surgery. The claimant testified that he returned to work on November 9, 1992.

On a Report of Medical Evaluation (TWCC-69) dated March 3, 1993, Dr. F stated as follows in block 13 concerning the claimant's narrative history:

Initially seen 6-23-92--torn ACL r knee. Off work. Physical therapy-rehab. exercise program. 8-12-92-surgery-A/E + ACL reconstruction r knee. Post-op physical therapy + rehab. exercise program. Returned to light duty work 11-9-92. Fitted with custom knee brace 2-15-93. Return for follow-up in one month.

In block 14 there is no check mark as to whether or not the claimant is at MMI and no date of MMI given. There is a notation concerning impairment which states "seven % whole person." Next to where the TWCC-69 requests "Document objective laboratory or clinic finding of impairment," there is the following notation:

Please refer to the attached letter from [Dr. S], regarding physical.

The report from Dr. S describes the medical history of claimant's right knee, the results of Dr. S's range of motion measurements and how he computed a seven percent IR using the "AMA Guides." There is no mention of MMI in his letter.

The claimant testified that Dr. F sent him to Dr. S for a one-time examination on February 17, 1993. He testified that the exam was brief. The claimant testified that he was aware of Dr. F's seven percent rating in March of 1993, but he did not appreciate the significance of it. The claimant testified that he stopped working at the end of April 1993 as he was scheduled for another surgery. A Specific and Subsequent Medical Report (TWCC-64) dated April 28, 1993, from Dr. F stated that the claimant was "scheduled for arthroscopic surgery due to increased symptoms."

Dr. F apparently issued a second TWCC-69 dated May 12, 1993, certifying that the claimant attained MMI on February 17, 1993, with a seven percent IR. The claimant testified that he was unaware of this second TWCC-69 until March 1994, which appears to be around the time this TWCC-69 was received by the Texas Workers' Compensation Commission. On May 20, 1993, Dr. F performed a medial meniscectomy of the claimant's right knee. Dr. F stated on a TWCC-64 dated May 26, 1993, that the date the claimant would achieve MMI was "undetermined." This same notation appears on TWCC-64's dated June 17, 1993, and June 30, 1993. On a September 1, 1993, TWCC-64, Dr. F states that the claimant's achieved MMI on August 16, 1993.

The claimant testified that he looked for work under his restrictions after his second surgery, but other than working on July 15, 1993, he has not worked. The claimant testified that he sought assistance for retraining through the Texas Rehabilitation Commission (TRC). During that process the claimant testified that he asked the TRC for a referral to another doctor. The claimant testified he was referred to (Dr. L). The claimant testified that he first saw Dr. L on March 1, 1994. Dr. L indicated in his initial medical report that without total knee replacement the work which the claimant could do was very limited. On August 15, 1994, Dr. L performed a total right knee replacement on the

claimant. The claimant testified that he was still recovering from this third knee surgery at the time of the CCH. For some period of time between the claimant's second and third surgery he drew unemployment benefits.

Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 130.5(e) (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 hearing officer found that both the certifications of IR by Dr. F were invalid. We have previously held that an IR cannot be assigned, and made final, absent a certification of MMI. *See* Texas Workers' Compensation Commission Appeal No. 92670, decided February 1, 1993. We have also held that a TWCC-69 that is defective on its face will not become final under Rule 130.5(e). *See* Texas Workers' Compensation Commission Appeal No. 941098, decided September 29, 1994. Further we have held that a prospective date of MMI will preclude an IR from becoming final. Appeal No. 941098. No certification of MMI is obviously a greater defect than prospective certification. The carrier argues persuasively that the second TWCC-69 issued by Dr. F is valid because it does not prospectively determine MMI. The hearing officer apparently believed that this TWCC-69 was invalid because the MMI date of February 17th was after the claimant's February 15th appointment. Dr. F may have inferred this date from his review of the report of Dr. S's examination or from his own examinations of the claimant after February 17th. The validity of this TWCC-69 is not relevant to Rule 130.5(e) because, as a subsequent certification, it cannot trigger the deadline. We have held that only the first attempt to certify MMI and IR, and not subsequent ones, can become final under Rule 130.5(e). Texas Workers' Compensation Commission Appeal No. 941137, decided October 10, 1994; Texas Workers' Compensation Commission Appeal No. 950008, decided February 15, 1995.

In regard to the second TWCC-69, the hearing officer found that the claimant was not aware of it until March of 1994 and disputed it at that time. We have noted before that the 90-day deadline for disputing an IR does not run from the date a doctor issues a report, but from the date the parties become aware of the rating. We stated that this is because it is hard to envision that one could dispute something of which one is not aware. *See* Texas Workers' Compensation Commission Appeal No. 92693, decided February 8, 1993. Thus we believe that the hearing officer's decision as to Rule 130.5(e) and IR were factually and legally supportable.

We are somewhat troubled by the hearing officer's disposition of the MMI issue. The hearing officer concludes that the claimant has not reached MMI in her decision. Clearly at the time of her decision the claimant was at statutory MMI. *See* Section 401.011(30)(b); Texas Workers' Compensation Commission Appeal No. 93678, decided

September 15, 1993. The hearing officer's failure to make a finding on statutory MMI may be based upon requests by the carrier, renewed in its appeal, that we not preclude a designated doctor from finding a date of MMI prior to statutory MMI by finding that the claimant is at statutory MMI. To clarify this issue, we reverse the decision of the hearing officer that the claimant is not at MMI and render a new decision that the claimant is at statutory MMI, unless an earlier date is found by a designated doctor. The parties should seek to resolve their dispute regarding MMI and IR through the designated doctor process.

This leaves only the issue of disability. The carrier argues that there was insufficient evidence to support the decision of the hearing officer. We have held that disability is a question of fact and may be based on the testimony of the claimant alone. Texas Workers' Compensation Commission Appeal No. 93560, decided August 19, 1993. Section 410.165(a) provides that the contested case hearing officer, as finder of fact, is the sole judge of the relevance and materiality of the evidence as well as of the weight and credibility that is to be given the evidence. It was for the hearing officer, as trier of fact, to resolve the inconsistencies and conflicts in the evidence. Garza v. Commercial Insurance Company of Newark, New Jersey, 508 S.W.2d 701, 702 (Tex. Civ. App.-Amarillo 1974, no writ). This is equally true regarding medical evidence. Texas Employers Insurance Association v. Campos, 666 S.W.2d 286, 290 (Tex. App.-Houston [14th Dist.] 1984, no writ). The trier of fact may believe all, part, or none of the testimony of any witness. Taylor v. Lewis, 553 S.W.2d 153, 161 (Tex. Civ. App.-Amarillo 1977, writ ref'd n.r.e.); Aetna Insurance Co. v. English, 204 S.W.2d 850 (Tex. Civ. App.-Fort Worth 1947, no writ). An appeals level body is not a fact finder, and does not normally pass upon the credibility of witnesses or substitute its own judgment for that of the trier of fact, even if the evidence would support a different result. National Union Fire Insurance Company of Pittsburgh, Pennsylvania v. Soto, 819 S.W.2d 619, 620 (Tex. App.-El Paso 1991, writ denied). When reviewing a hearing officer's decision for factual sufficiency of the evidence we should reverse such decision only if it is so contrary to the overwhelming weight of the evidence as to be clearly wrong and unjust. Cain v. Bain, 709 S.W.2d 175, 176 (Tex. 1986); Pool v. Ford Motor Co., 715 S.W.2d 629, 635 (Tex. 1986).

In the present case the finding of the hearing officer is clearly based on the testimony of the claimant. The carrier emphasizes the fact that the claimant drew unemployment benefits during part of the period the hearing officer found disability. We have repeatedly held that the drawing of such benefits will not bar a finding of disability. Texas Workers' Compensation Commission Appeal No. 94983, decided September 6, 1994.

We affirm the decision of the hearing officer on the issues of Rule 130.5(e), IR and disability. On the issue of MMI we reverse the decision of the hearing officer and render a new decision that unless he reached MMI earlier than at the expiration of 104 weeks after income benefits began to accrue the claimant has achieved statutory MMI.

Gary L. Kilgore
Appeals Judge

CONCUR:

Robert W. Potts
Appeals Judge

Philip F. O'Neill
Appeals Judge