APPEAL NO. 950129

This appeal is brought pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act). A contested case hearing was held on October 20, 1994, in_____, Texas, with _____presiding as hearing officer. He determined that the respondent's (claimant herein) subsequent injury of _____, was not the sole cause of his current condition; that the claimant's first certification of maximum medical improvement (MMI) and impairment rating (IR) did not become final because it was timely disputed; that the issues of MMI and IR are not ripe for adjudication; and that the claimant had disability from _____, through the date of the hearing as a result of his compensable injury of _____. The appellant (carrier herein) appeals all of these determinations arguing that they are not supported by sufficient evidence. The claimant replies that the decision and order of the hearing officer are correct, supported by sufficient evidence, and should be affirmed.

DECISION

We affirm.

It was not disputed that the claimant sustained a compensable left wrist fracture on _____. A first bone graft was performed on April 4, 1992, by Dr. B (Dr. B). The carrier then referred the claimant to Dr. K (Dr. K) who, on September 2, 1992, did a second, and on February 12, 1993, a third, bone graft. On July 22 1993, Dr. K also transplanted nerves in the claimant's elbow.

On October 29, 1993, Dr. K completed a Report of Medical Evaluation (TWCC-69) in which he certified that claimant had reached MMI on October 28, 1993, with a 12% IR. In an accompanying report, Dr. K noted that the claimant had normal range of motion in all the digits and that his nerve function and finger grip strength was good, but there was diminished ulnar nerve distribution. This was the claimant's first certification of MMI and IR. A postal receipt form confirms the claimant's testimony that he received a copy of this certification on November 5, 1993. He further testified that he immediately called the adjuster, Mr. S (Mr. S), to express his disagreement with this IR and "to appeal" it. He said Mr. S told him that he would take care of the paperwork to accomplish this. The claimant also said he mailed a letter on November 19, 1993, to the Texas Workers' Compensation Commission (Commission) disputing this IR. No such record was produced from Commission files. The claimant's son testified that he was with the claimant when he picked up his mail on November 5, 1993, and overheard parts of a phone conversation that day between his father and a carrier representative about this IR. Mr. S no longer worked for the carrier at the time of the hearing. Ms. Turner (Ms. T), who replaced Mr. S as adjuster in January 1994, testified that she had no conversations with the claimant about disputing his IR and that there was no indication of any dispute in the file that she took over from Mr. S.

The claimant testified that on _____, he was using a pick and shovel in his back yard at home to remove some dirt. As he attempted to lift up on the pick handle, he said he felt a "twinge" in his hand and arm. He said he immediately stopped what he was doing and tried unsuccessfully to get in touch with both Mr. S and Dr. K. He finally saw Dr. K on January 10, 1994. After some discussions between the carrier, the claimant and Dr. K over liability for the consequences of the December 21st incident, the claimant next saw Dr. K on July 17, 1994. On July 18, 1994, Dr. K wrote that there was an indication of a fracture in the bone graft. This was confirmed by a CT scan. On September 13, 1994, Dr. K performed another (the fourth) bone graft. In a letter of _____, Dr. K stated:

> Apparently whatever happened in December [1993] caused symptoms to redevelop in his wrist. I believe without the pre-existing condition of his wrist the degree of accident he described occurring in December would not have resulted in symptoms.

The claimant testified that after the incident of _____, he was unable to return to work because the pain was too great. He said that after his surgery on _____, Dr. K never released him to return to work. No work excuses for this post-surgery period were introduced into evidence.

The carrier appeals the following Findings of Fact and Conclusions of Law of the Hearing Officer:

FINDINGS OF FACT

12. The medical evidence . . . does not support the Carrier's contention that the subsequent non-compensable injury is Claimant's sole cause of disability.

14. Claimant met his burden of proof in establishing that he timely contested [Dr. K's] certification of MMI and IR . . . .

15. The issues of MMI and IR are not ripe for adjudication because there is no designated doctor.

17. As a result of his _____ injury, Claimant has been unable to obtain or retain employment at a wage equivalent to his pre-injury wages from _____ through the date of this hearing.

CONCLUSIONS OF LAW

3.Claimant's subsequent injury is not the sole cause of the Claimant's current condition. It is a contributing cause of the Claimant's current condition.

4.The first certification of MMI and IR assigned by [Dr. K] on October 29, 1993 did not become final. Claimant timely disputed the certification of MMI and the IR.

5.The issues of MMI and IR are not ripe for adjudication because there is no designated doctor.

8.As a result of Claimant's _____ injury, Claimant has had disability from _____ through the date of this hearing.

The burden was on the carrier to prove that the claimant's non-compensable injury of _____, was the sole cause of his current condition, including disability. *See* Texas Workers' Compensation Commission Appeal No. 94844, decided August 15, 1994, and cases cited therein. As was noted in that case, there may be more than one producing cause, but only one sole cause. Whether the incident on _____, was a sole or only a producing cause of the claimant's current medical condition and disability was a question of fact for the hearing officer to decide. The only medical opinion on this issue was Dr. K's. The claimant relied on his statement, quoted above, that without the claimant's pre-existing wrist condition the accident of _____, as described by the claimant, would not have resulted in his current "symptoms." The carrier countered that Dr. K's certification of MMI and IR on October 29, 1993, together with his statement of October 20, 1993, that the claimant's "wounds are healed" and he can go back to work, establish that the _____, incident was the sole cause of the claimant's medical condition and current disability. The hearing officer, as fact finder, is the sole judge of the relevance and materiality of the evidence and of its weight and credibility. Section 410.165. It was his responsibility to resolve conflicts and inconsistencies in the interpretation of the medical evidence and judge the weight to be given to expert medical testimony. Texas Employers Insurance Association v. Campos, 666 S.W.2d 286(Tex. App.-Houston [14th Dist.] 1984, no writ). The hearing officer was not persuaded that the carrier met his burden of proof on the sole cause issue. 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 we will 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 Company, 715 S.W.2d 629 (Tex. 1986). We are satisfied that the medical opinion of Dr. K did not compel a finding in favor of the carrier on this issue. To the contrary, it is sufficient to support the opposite conclusion of the hearing officer and we will not reverse that decision on appeal.

We next turn to the issue of whether Dr. K's certification of MMI and IR became final. Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 130.5(e) (Rule 130.5(e)) provides that "[t]he first impairment rating assigned to an employee is considered final if the rating is not disputed within 90 days after the rating is assigned." If the IR becomes final by virtue of this rule, so does the underlying certification of MMI. Texas Workers' Compensation Commission Appeal No. 92670, decided February 1, 1993. We have also held that the 90 day time period for disputing a first certification begins when the challenging party receives written notice of the certification. Texas Workers' Compensation Commission Appeal No. 94354, decided May 10, 1994. It was not disputed that Dr. K's certification of October 29, 1993, was the claimants' first certification of MMI and IR. The claimant testified that he disputed this certification in a phone call to the adjuster. The adjuster no longer worked for the carrier at the time of the contested case hearing and no evidence was presented from him. The current adjuster stated there was no evidence in the file about a dispute, nor was there evidence in Commission files about a dispute. Whether and when a dispute by a party has been made is a question of fact for the hearing officer to decide. Texas Workers' Compensation Commission Appeal No. 931170, decided February 3, 1994, and Texas Workers' Compensation Commission Appeal No. 931110, decided January 20, 1994. In his discussion of the evidence, the hearing officer stated the claimant was "credible" in his testimony on this issue. Having reviewed the record, we conclude that the decision of the hearing officer on the issue of the finality of Dr. K's report is supported by sufficient evidence. Because the claimant timely disputed the certification, the issue of the claimant's correct MMI and IR must be resolved under the designated doctor procedures of Sections 408.122 and 408.125, or a determination made that statutory MMI has been reached pursuant to Section 401.011(30)(B).

Finally, the carrier asserts error in the hearing officer's finding of disability. We note that in its appeal of this issue, the carrier objects only to the pertinent finding of fact and conclusion of law and articulates no rationale for its disagreement with the hearing officer. Disability is defined by the 1989 Act as the "inability because of a compensable injury to obtain and retain employment at wages equivalent to the preinjury wage." Section 401.011(16). Whether disability exists is a question of fact for the hearing officer to decide, and a finding of disability may be based on the testimony of the claimant alone. Texas Workers' Compensation Commission Appeal No. 93560, decided August 19, 1993. The claimant testified that he was unable to work because of his hand condition after the incident of _____. The hearing officer, however, found disability to have begun after the claimant's surgery of _____, "because it is reasonable to assume that his recovery would necessitate that Claimant take time off from work." Neither party appealed

the refusal of the hearing officer to find disability before this date. The claimant was clear in his testimony that he could not work during the period of disability found by the hearing officer. There is no medical evidence on this point. While the record here could have been better developed and perhaps support contrary inferences, we cannot say that the determination of the hearing officer is subject to reversal or is without sufficient evidence in the record. *See* Texas Workers' Compensation Commission Appeal No. 93620, decided September 7, 1993.

Finding sufficient evidence to support the decision and order of the hearing officer, we affirm.

Alan C. Ernst
Appeals Judge

CONCUR:

Stark O. Sanders, Jr.
Chief Appeals Judge

CONCURRING OPINION:

I reluctantly concur, but only insofar as the evidence in this case did not appear to be sufficiently developed to support a determination that whatever medical treatment and disability that arose after the _____, incident (which, the hearing officer finds, resulted in a non-compensable injury) was attributable solely to that injury and was not a further medical complication flowing from a compensable injury.

Lynda H. Nesenholtz
Appeals Judge