APPEAL NO. 960032
FILED FEBRUARY 20, 1996

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 held on December 14, 1995. In response to the issue at the CCH, the hearing officer determined that the first certification of maximum medical improvement (MMI) and the six percent impairment rating (IR) assigned by Dr. J (Dr. J) on May 23, 1995, did not become final pursuant to Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 130.5(e) (Rule 130.5(e)). On appeal, appellant (carrier herein) contends that the hearing officer erred in determining that the first certification of MMI and the six percent IR did not become final. Respondent (claimant) did not respond on appeal.

DECISION

We affirm.

Carrier first contends that there is insufficient evidence to support the hearing officer's determination that claimant disputed the first IR within 90 days by contacting the Texas Workers' Compensation Commission (Commission).

Claimant testified that he injured his neck and shoulder on _____, while working for (Employer). He said Dr. J's six percent IR was the first IR assessed. Claimant testified that Dr. J gave him an IR in his office in April or May and that he discussed it with Dr. J. He said he asked Dr. J why it did not include anything for "psychological" and that Dr. J told him it had "no bearing" on the IR. He testified that he believed that Dr. J told him about the IR the same day that Dr. J tested him for the IR. He testified that Dr. J said he did not know "about the psychological" and that Dr. J had referred him to Dr. S (Dr. S) in that regard. Claimant said that, either the same day or the day after Dr. J told him about his IR, he disputed it. He testified that he believed that he called the Commission, that he was given another number to call, and that he was told they would get back to him. He said he called the second telephone number and talked to a "hispanic lady" and she also said they would get back to him. He said that, after Dr. J assessed his IR, his condition began to deteriorate to where he could not talk on the telephone or deal with his personal affairs. He testified that he did not appear at the benefit review conference (BRC) in this case because he was in the hospital at the time for psychiatric treatment. Claimant's wife testified that, before the date that claimant received Dr. J's IR, he was able to talk on the phone and deal with his personal affairs. She said his psychological condition began to deteriorate thereafter.

A May 23, 1995, Report of Medical Evaluation (TWCC-69) signed by Dr. J states that claimant reached MMI on May 23, 1995, with a six percent IR. In a letter of October 3, 1995, Dr. J stated that the IR applied only to claimant's cervical sprain and that it did not

apply to any psychological illnesses. Claimant said "workers' compensation" was paying for his psychological treatment.

Rule 130.5(e) states 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." A claimant may dispute the first IR orally to either the Commission or to carriers' adjustor. Texas Workers' Compensation Commission Appeal No. 951493, decided October 18, 1995. The 1989 Act provides that the hearing officer is the sole judge of the weight and credibility of the evidence. Section 410.165(a). Where there are conflicts in the evidence, the hearing officer resolves the conflicts and determines what facts the evidence has established. As an appeals body, we will not substitute our judgment for that of the hearing officer when the determination is not so against the great weight and preponderance of the evidence as to be clearly wrong or manifestly unjust. Cain v. Bain, 709 S.W.2d 175, 176 (Tex. 1986); Texas Workers' Compensation Commission Appeal No. 950456, decided May 9, 1995.

In this case, the hearing officer believed the claimant's testimony that he disputed his IR either the day of or the day after he learned of it from Dr. J. Claimant testified that he called the Commission and that he immediately disputed the IR after Dr. J informed him about it and that this was in April or May 1995. The hearing officer determined that, on May 23 or May 24, 1995, claimant called the Commission and orally disputed Dr. J's May 23, 1995, six percent IR. After considering all the evidence, we conclude that the hearing officer's determination is not so against the great weight and preponderance of the evidence as to be clearly wrong or manifestly unjust. Cain, *supra.*

Carrier next contends that the hearing officer erred in determining that claimant was not competent to deal with his affairs from May 1995 through October 17, 1995, and this inability to handle his affairs "should toll" the application of the 90-day rule.[1] We note that this finding was unnecessary to the decision because the hearing officer found that claimant disputed the six percent IR within 90 days. Because the hearing officer found that claimant timely disputed the IR within 90 days, we strike the hearing officer's Findings of Fact Nos. 9 and 10 as surplusage unnecessary to the decision.

[1] We note that the time for disputing an IR runs from the time a claimant has written notice of the impairment rating. Texas Workers' Compensation Commission Appeal No. 94049, decided February 18, 1994. There is no good cause exception to Rule 130.5(e). Texas Workers' Compensation Commission Appeal No. 952166, decided February 1, 1996.

We affirm the hearing officer's decision and order.

Judy L. Stephens
Appeals Judge

CONCUR:

Susan M. Kelley
Appeals Judge

Gary L. Kilgore
Appeals Judge