

APPEAL NO. 990750

Following a contested case hearing held on March 11, 1999, pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act), the hearing officer, resolved the disputed issues by concluding that the respondent's (claimant) compensable injury of _____, extends to and includes chronic right shoulder impingement; that the compensable injury does not extend to or include a neck injury or carpal tunnel syndrome; that claimant had disability for six days immediately following the compensable injury; that he has again had disability since June 11, 1998, through the date of the hearing; and that the first certification of maximum medical improvement (MMI) and the assignment of an impairment rating (IR) by Dr. T as of September 25, 1995, has not become final pursuant to Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 130.5(e) (Rule 130.5(e)). The appellant (self-insured) appeals the extent of injury and Rule 130.5(e) determinations, contending that after September 25, 1995, claimant did not again seek treatment for his right shoulder injury until after he was suspended from employment in April 1998 after failing a drug test, and that despite his denial of having ever received written notice of Dr. T's IR, the evidence established that the self-insured mailed such notice to him in its usual and customary manner and that claimant simply failed to timely respond to the notice. The file does not contain a response from claimant.

DECISION

Affirmed.

Claimant testified that on _____, while employed with the self-insured's water department, he slipped exiting a water line repair trench and injured his right shoulder when he broke his fall with his extended right arm; that he was seen at an emergency room and was referred to Dr. T; that Dr. T released him to return to work on September 25, 1995; that he returned to work, performing his regular duties; and that he worked in pain from his right shoulder because he was a long-time employee, was concerned about his job, and did not want to appear too injured. He further stated that he saw his family doctor, Dr. E, in May 1996 and did mention his shoulder pain at that time. Claimant said that in March 1998, he tested positive for marijuana during a drug screen and on March 23, 1998, was suspended from his job without pay for one month; that his right shoulder pain had become worse because he was carrying and installing 50-pound water meters by himself; that he told supervisory personnel, Mr. M, Mr. G, and Mr. C, about his right shoulder pain at that time because he was hurting so much he could not perform his duties; and that he saw Dr. B in June 1998 and was taken off work. Claimant further testified that he never received written notice of Dr. T's having determined that he reached MMI on September 25, 1995, with an IR of zero percent until being shown a copy of Dr. T's Report of Medical Evaluation (TWCC-69) by Texas Workers' Compensation Commission (Commission) personnel in June 1998. Claimant said he discussed the TWCC-69 with his wife, who reads better than him and who reads all their mail, and that they agreed they had not previously seen such a document.

Mr. M testified that claimant called him in April 1998, stating he was still having trouble with his shoulder from the old injury and wanted to see a doctor. He also stated that claimant was on vacation from March 12 to March 20, 1998, and received a 30-day job suspension on March 23, 1998.

Dr. B's June 8, 1998, report states that claimant, then 53 years of age, was seen on June 4th upon referral from Dr. E; that claimant has a long history of shoulder problems dating back to 1995 when he fell at work and sustained trauma to this joint; that over the years, claimant has been experiencing intermittent pain and discomfort in his shoulder which radiates into his right upper extremity; and that over the past three to four months, claimant says his symptoms have become progressively worse and that he has had little to no improvement with analgesic and anti-inflammatory medications. Dr. B concluded that claimant presented with evidence of chronic right shoulder impingement syndrome and that a rotator cuff tear cannot be ruled out without an MRI. Dr. B wrote on July 27, 1998, that an MRI report indicated that the right shoulder was grossly within normal limits except for two small cysts and that his provisional diagnosis is chronic impingement syndrome, right shoulder.

Concerning the shoulder injury, Dr. J reported to the self-insured on September 24, 1998, that he had reviewed claimant's records and that he thought it probably unlikely that claimant's present shoulder problem is related to the _____, injury due to the lapse of time from that injury to claimant's present complaints. He further stated that shoulder impingement is a developmental problem which is an ordinary disease of life.

Rule 130.5(e) provides that the first IR assigned to an employee is considered final if the rating is not disputed within 90 days after the rating is assigned. The Appeals Panel has held that the communication of the first assigned IR to the parties requires a writing. Texas Workers' Compensation Commission Appeal No. 94354, decided May 10, 1994; Texas Workers' Compensation Commission Appeal No. 94547, decided June 13, 1994.

In evidence is a TWCC-69 signed by Dr. T on January 31, 1996, stating that claimant reached MMI on "09-25-95" with an IR of "0%." Dr. E's record of May 15, 1996, reflects that in addition to other symptoms, claimant had right shoulder pain. Also in evidence is a Commission Dispute Resolution Information System (DRIS) note dated June 29, 1998, stating that claimant called to say he had received a letter from the insurance company advising that he "would not be receiving anything" and that a Commission employee called the adjuster who advised that claimant's doctor had certified him to be at MMI with a zero percent IR, that the certification was not disputed, and that claimant was notified. The DRIS note further stated that claimant said he did not remember receiving anything telling him he had been certified at MMI with a zero percent IR; that claimant was advised to request a benefit review conference to determine whether the IR had become final; and that the DRIS records reflected that the TWCC-69 was not received by the Commission until June 29, 1998, and that an "EES 19" was not previously sent to claimant since the Commission had not received a TWCC-69 which would generate an EES 19 letter.

In addition to the previously mentioned legal conclusions, the self-insured appeals factual findings that claimant's on-the-job injury of _____, includes chronic right shoulder impingement and that claimant did not receive notice of Dr. T's certification of MMI on September 25, 1995, with a zero percent IR until June 29, 1998. The self-insured has not appealed the finding that claimant disputed the MMI date and IR certification within 90 days of June 29, 1998.

Whether claimant's compensable injury included chronic right shoulder impingement and whether claimant received (written) notice of Dr. T's MMI date and IR were questions of fact for the hearing officer to resolve. The hearing officer is the sole judge of the weight and credibility of the evidence (Section 410.165(a)) and as the trier of fact resolves the conflicts and inconsistencies in the evidence including the medical evidence (Texas Employers Insurance Association v. Campos, 666 S.W.2d 286 (Tex. App.-Houston [14th Dist.] 1984, no writ)). As an appellate reviewing tribunal, the Appeals Panel will not disturb challenged factual findings of a hearing officer unless they are so against the great weight and preponderance of the evidence as to be clearly wrong or manifestly unjust and we do not find them so in this case. Cain v. Bain, 709 S.W.2d 175, 176 (Tex. 1986); In re King's Estate, 150 Tex. 662, 244 S.W.2d 660 (1951). Dr. B's records support the appealed extent-of-injury issue and claimant's testimony that he never received notice of Dr. T's IR before being advised by Commission personnel on June 29, 1998, was unrefuted.

The decision and order of the hearing officer are affirmed.

Philip F. O'Neill
Appeals Judge

CONCUR:

Robert W. Potts
Appeals Judge

Elaine M. Chaney
Appeals Judge