APPEAL NO. 990766

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 March 11, 1999. The issues at the CCH were: (1) whether the appellant's (claimant) compensable injury of _____, extends to and includes her back; (2) whether the respondent (carrier) has waived its right to dispute the alleged compensability of the claimant's back injury; (3) whether the claimant has sustained disability; (4) whether the first certification of maximum medical improvement (MMI) and impairment rating (IR), which was assigned by Dr. F on July 31, 1995, has become final pursuant to Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 130.5(e) (Rule 130.5(e)); and, if not, (5) when did the claimant reach MMI and what is the claimant's IR. The hearing officer determined that the claimant's compensable injury does not extend to or include her back, the claimant's compensable injury is limited to her right foot and ankle, the carrier waived its right to dispute the compensability of the claimant's back injury, the claimant's compensable injury has resulted in only two days of disability, and the first certification of MMI and IR assigned by Dr. F on July 31, 1995, became final pursuant to Rule 130.5(e). The claimant appeals, urging that the first certification issued by Dr. F did not become final; the issues of MMI and IR are not ripe for adjudication; and she sustained disability from _____, through the date of the CCH, or in the alternative, _____, through July 26, 1995, and August 14, 1996, through the date of the CCH. The carrier replies that the hearing officer's decision is correct and should be affirmed. The determinations of extent of injury and waiver of the right to dispute the back injury have not been appealed and have become final. Section 410.169.

DECISION

Affirmed in part, reversed and rendered in part.

The claimant sustained a compensable injury to her right foot, ankle, and back on _____, when she tripped and fell while performing her job duties as a sales clerk at a clothing store. The claimant testified that her job required her to stand for the entire eight-hour shift. The claimant testified that immediately following the injury, her employer sent her to Dr. F. According to the claimant, Dr. F put her foot in a brace, gave her crutches, and took her off work for two days. The claimant testified she returned to Dr. F and he released her to light duty. The claimant stated that she worked light duty for the employer, sitting and tagging merchandise for two days. According to the claimant, her supervisor told her he felt it was time for her to go back to her regular duties and she returned to regular duties for one day. The claimant testified that she was unable to work regular duty because of the pain, so she resigned employment. The claimant testified that she never returned to Dr. F. The claimant subsequently received medical treatment from Dr. FL in July 1996, who diagnosed accessary tarsal navicular and chronic foot sprain. Dr. FL referred the claimant to Dr. D in August 1996. Dr. D prescribed medication and orthotics. In September 1997, the claimant changed treating doctors to Dr. H, a chiropractor, who began to treat her back. The claimant testified that she is still under the care of Dr. H.

The claimant testified that no doctor has ever released her to return to work at full duty. In a letter dated December 14, 1998, Dr. D states:

> Even though [claimant] stated that she was improved, she did not feel that she could return to work during the period of time in question, from 14 August, 1996, through 23 September, 1997. From these facts and my treatment, I can thusly determine that her injury did cause the pain and disability, and the need for the patient's absence for work related to the injury, even though there was a congenital component to the injury [site] (the accessary bone). [Claimant] would have been incapable of returning to her full-duty occupation during this period of time.

The claimant testified that she has not sought any employment because she is unable to work because of pain. The claimant stated that she has received no income benefits since her injury of _____.

The claimant testified that she did not recall receiving a copy of Dr. F's Report of Medical Evaluation (TWCC-69) in the mail. The claimant testified that the first time she learned Dr. F had certified MMI and assigned an IR was after she telephoned the Texas Workers' Compensation Commission (Commission). The claimant stated that if she had received Dr. F's TWCC-69, she would have disputed it immediately. According to the claimant, she first saw the TWCC-69 at the benefit review conference. The claimant testified that after the Commission told her about Dr. F's certification, she disputed it, and the Commission appointed Dr. L as the designated doctor. The claimant testified that she did receive a letter from the handling adjuster dated July 2, 1996, no later than July 15, 1996. That letter, in pertinent part, states:

> It is my understanding that you have had additional medical care with a physician other than the physicians you were seen by in (City 1), that actually released you from care and provided the rating of 0% whole person impairment.

The pertinent determinations of the hearing officer are:

FINDINGS OF FACT

11. [Dr. F], M.D. certified Claimant as having reached [MMI] on July 31, 1995, with a zero percent whole body [IR].

12. The [MMI] and [IR] Certification referenced in the previous Finding of Fact was the first such certification issued with respect to Claimant's compensable injury of _____.

13. Claimant received written notice of the zero percent [IR] certified by [Dr. F] on or before July 15, 1996.

14. Within ninety days of July 15, 1996, on or before October 13, 1996, Claimant took no action to dispute the [IR] previously certified by [Dr. F].

* * * *

17. Claimant did dispute the [MMI] and [IR] Certification referenced in Finding of Fact No. 11 within ninety days of her receipt of a copy of the TWCC 69 issued by [Dr. F].

Rule 130.5(e) states that "[t]he 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 90-day period for disputing an IR does not run from the date the doctor issues (or "assigns") the report, but from the date the parties become aware, or have actual knowledge, of the rating. Texas Workers' Compensation Commission Appeal No. 92693, decided February 8, 1993, noted that it would be hard to envision that one could dispute something of which one is not aware. Texas Workers' Compensation Commission Appeal No. 94354, decided May 10, 1994, explained that the Appeals Panel decisions involving Rule 130.5(e) have all used some form of written notice as the point at which the 90-day period began. It was further noted that notice of the first IR is best conveyed through a written report such as the TWCC-69. The Appeals Panel has previously determined that a writing which amounts to the functional equivalent of the TWCC-69 form will suffice. *See, e.g.*, Texas Workers' Compensation Commission Appeal No. 94222, decided April 7, 1994; Texas Workers' Compensation Commission Appeal No. 94229, decided April 11, 1994.

The issue before us is whether carrier's letter to claimant on July 2, 1996, amounts to sufficient written notice to begin the 90-day period of Rule 130.5(e). We do not think that the language in the letter sent to the claimant informs the claimant that she was certified as having reached MMI and assigned an IR so as to trigger the 90-day requirement of Rule 130.5(e). The language of the letter does not indicate that a certification of MMI was made and there is no indication of the doctor who issued the IR. Dr. F is located in (City 1), Texas, yet the carrier's letter indicates a physician other than a physician in (City 1) provided the IR. Under the circumstances of this case, we hold that the carrier's letter was insufficient to provide notice to the claimant of the first certification of MMI and IR. Regarding the hearing officer's determinations quoted above, we find Finding of Fact No. 13 is supported by the evidence, but the written notice was insufficient to begin the 90-day dispute period. We reverse the hearing officer's decision on the basis that there was no written communication to the claimant, other than the carrier's letter, which purportedly informed the claimant that Dr. F had certified MMI and assessed a zero percent IR. We render a new decision that the first certification of MMI and IR assigned by Dr. F on July 31, 1995, did not become final because it was timely disputed.

The claimant asserts that the issues of MMI and IR are not ripe for adjudication and should be remanded because the claimant has not had the opportunity to have medical tests performed to appropriately determine the extent of the injury to her back. Dr. L, the

designated doctor, certified the claimant reached MMI on March 5, 1998, with a six percent IR. MMI is the point at which further material recovery or lasting improvement can no longer be anticipated, according to reasonable medical probability. Section 401.011(30)(A). A person can be at MMI yet still continue to suffer symptoms and pain from the injury if, based on medical judgment, there will likely be no further material recovery from the injury. Section 408.122(c) provides that the report of the designated doctor has presumptive weight which can be overcome only if the great weight of the other medical evidence is to the contrary. The hearing officer considered all of the medical evidence presented and made a finding that the MMI and IR certification of Dr. L was not overcome by the great weight of contrary medical evidence. Dr. L examined the claimant for the compensable injury, including the lumbar spine. The designated doctor was not precluded from ordering additional testing to assist him in his evaluation; however, there is no indication that he felt additional testing was necessary to issue an opinion. We find the issues of MMI and IR ripe for adjudication. The hearing officer's determination that the claimant reached MMI on July 31, 1995 with a zero percent IR is reversed and a new decision is rendered that the claimant reached MMI on March 5, 1998, with a six percent IR.

The hearing officer determined that the claimant's compensable injury of _____, resulted in only two days of disability. Disability is defined as "the inability because of a compensable injury to obtain and retain employment at wages equivalent to the preinjury wage." Section 401.011(16). To prove disability, a claimant need not prove that he either looked for work or that he is totally unable to do any kind of work at all. As we have previously noted "a restricted release to work, as opposed to an unrestricted release, is evidence that the effects of the injury remain, and disability continues." Texas Workers' Compensation Commission Appeal No. 92432, decided October 2, 1992. We have also stated that "an employee under a conditional work release does not have the burden of proving inability to work." Texas Workers' Compensation Commission Appeal No. 941566, decided January 4, 1995 (quoting Texas Workers' Compensation Commission Appeal No. 93953, decided December 7, 1993). Additionally, we have noted that where the claimant is released to return to work light duty, there is no requirement that the claimant look for work. Texas Workers' Compensation Commission Appeal No. 941092, decided September 28, 1994. A claimant is not entitled to temporary income benefits pursuant to Section 408.082(a) unless the injury results in disability for at least one week.

The hearing officer is the sole judge of the weight and credibility of the evidence. Section 410.165(a). The hearing officer states the claimant did not prove to be a particularly reliable witness in her own behalf. While the hearing officer does make reference to the claimant's "low preinjury wage," we do not find that the hearing officer inappropriately applied an incorrect standard in making her determinations on disability. The only evidence presented indicating the claimant was released to light duty was the claimant's own testimony. The hearing officer considered the claimant's testimony and the medical records and resolved the issue against the claimant. The hearing officer, as fact finder, may believe all, part, or none of the testimony of any witness. The testimony of a claimant as an interested party raises only an issue of fact for the hearing officer to resolve. 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, 635 (Tex. 1986). We find there was sufficient evidence to support the determination of the hearing officer that as of the date of the CCH, the claimant's compensable injury of _____, resulted in only two days of disability.

We reverse the hearing officer's decision that the first MMI and IR certification assigned by Dr. F as of July 31, 1995, became final pursuant to Rule 130.5(e) and render a new decision that the first certification of MMI and IR assigned by Dr. F on July 31, 1995, did not become final; we also render a new decision that the claimant reached MMI on March 5, 1998, with a six percent IR. We affirm the hearing officer's decision that as of the date of the CCH, the claimant's compensable injury of _____, resulted in only two days of disability.

_____
Dorian E. Ramirez
Appeals Judge

CONCUR:

_____
Thomas A. Knapp
Appeals Judge

_____
Alan C. Ernst
Appeals Judge