APPEAL NO. 990790

This appeal arises under the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq*. (1989 Act). On March 22, 1999, a contested case hearing (CCH) was held. By joint request of the parties, with good cause found by the hearing officer, the issues of maximum medical improvement (MMI) and impairment rating (IR) were withdrawn from consideration at the CCH. The remaining issue of whether the first certification of MMI and IR became final pursuant to Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 130.5(e) (Rule 130.5(e)) was considered. The hearing officer determined that the first certification did not become final because it was timely disputed by the respondent's (claimant herein) treating doctor acting as the claimant's agent. The appellant (carrier herein) files a request for review. The carrier argues that there was insufficient evidence to support the decision of the hearing officer. The carrier argues that the claimant's treating doctor merely checked the Report of Medical Evaluation (TWCC-69) indicating his disagreement with the first certification of MMI and IR and returned this form to the Texas Workers' Compensation Commission (Commission). The carrier argues that this action alone was insufficient to dispute the first certification. The carrier argues that this was insufficient to let the Commission or the carrier know that the treating doctor was disputing the first certification on behalf of the claimant. The carrier argues that this is contrary to previous decisions of the Appeals Panel. The carrier further files a motion requesting the Appeals Panel to consider the present case *en banc*, contending that there are contradictions in the jurisprudence of the Appeals Panel concerning the legal questions raised by this appeal and that *en banc* consideration is necessary to maintain uniformity of Appeals Panel decisions in this area by resolving conflicting Appeals Panel decisions. The claimant responds, arguing that the 1989 Act does not allow for *en banc* consideration of appeals by the Appeals Panel. The claimant requests that the decision of the hearing officer be affirmed as the evidence showed that she timely disputed the first certification with her treating doctor, asking him to take care of the dispute, which he did.

DECISION

We deny the carrier's motion for *en banc* review. Finding sufficient evidence to support the decision of the hearing officer and no reversible error in the record, we affirm the decision and order of the hearing officer.

We will first address the carrier's motion for *en banc* review as this affects how the case should be handled procedurally. Essentially, the carrier argues that there is a conflict between our decision in Texas Workers' Compensation Commission Appeal No. 990046, decided February 25, 1999, and our decisions in Texas Workers' Compensation Commission Appeal No. 981088, decided July 8, 1998; Texas Workers' Compensation Commission Appeal No. 982646, decided December 23, 1998; and Texas Workers' Compensation Commission Appeal No. 982956, decided January 29, 1999. The carrier contends that the need for uniformity, as well as the importance of the issue involved, requires that we consider this case *en banc* to clarify the jurisprudence in this area. The claimant responds that we should deny the carrier's motion for *en banc* consideration

because it is without merit and that the 1989 Act does not permit *en banc* review because Section 410.201(a) specifically provides that appeals judges, in panels of three, shall conduct administrative appeals proceedings.

Without determining the issue of whether or not the 1989 Act in its terms prohibits *en banc* consideration by the Appeals Panel of a particular case, we deny the carrier's request for such consideration in the present case. First, we do note that Section 410.201(a) does state that appeals judges shall conduct administrative appeals proceedings in panels of three. We also note that no rule or policy has been promulgated by the Commissioners of the Commission, the Division of Hearings or by the Appeals Panel itself, providing for *en banc* consideration of appeals to the Appeals Panel under the 1989 Act. Finally, we do not agree that Appeals Panel decisions in this area are in irreconcilable conflict. We shall address the application of the prior Appeals Panel decisions to the present case in our discussion of the merits of the carrier's appeal. That discussion will make clear that our decision in Appeal No. 990046, *supra*, reflects the current state of the law in this area.

The essential facts of this case are not in any serious dispute and are set out in some detail in the hearing officer's decision. We will briefly set out the facts relevant to this appeal. This includes the fact that there is no dispute that the claimant suffered a compensable injury on _____. The claimant describes her injury as a low back injury that took place when she was lifting a patient. The claimant began treating with Dr. M, D.C., in May 1998. The carrier requested that the Commission require a medical examination by Dr. C. On July 29, 1998, Dr. M accompanied the claimant to her examination with Dr. C. Dr. M testified that on July 29, 1998, after the examination, he explained to the claimant that Dr. C would likely find her at MMI and advised her that once they received Dr. C's report they should discuss the report. Dr. C certified on a TWCC-69 dated April 3, 1998, that the claimant reached MMI on July 29, 1998, with a one percent IR. Dr. M testified that the claimant came to his office on August 10, 1998, and they discussed Dr. C's certification of MMI and IR. Dr. M and the claimant both testified that they agreed that they were in disagreement with Dr. C's certification and agreed that Dr. M would dispute it on the claimant's behalf. Dr. M testified that he indicated on the face of the TWCC-69 that was sent to him as the claimant's treating doctor that he disagreed with Dr. C's certification and sent a copy of the TWCC-69 showing his disagreement to both the Commission and to the carrier. Commission records show that the Commission received this document on August 11, 1998. The carrier presented testimony from the handling adjuster that the carrier did not receive a copy of the TWCC-69 showing Dr. M's disagreement with Dr. C until January 5, 1999, when they were provided a copy at a benefit review conference.

The hearing officer's Findings of Fact and Conclusions of Law include the following:

FINDINGS OF FACT

2. On August 3, 1998, [Dr. C] certified the Claimant at a 1% whole body [IR] and assessed a [MMI] date of July 29, 1998.
3. This was the first [IR] assigned to the Claimant for her injuries

sustained on _____.

4. On August 10, 1998, the Claimant and [Dr. M] discussed [Dr. C's] [IR].

5. Both [Dr. M] and the Claimant disagreed with [Dr. C's] findings of [IR] and [MMI] date.

6. [Dr. M] advised the Claimant that he would dispute the [IR] on her behalf.

7. On August 10, 1998, [Dr. M] signed block 22 of the TWCC-69 indicating that he disagreed with the [IR] and [MMI] date assigned by [Dr. C].

8. The TWCC-69 with [Dr. M's] disagreement was filed with the Commission on August 11, 1998.

9. [Dr. M] acted as the Claimant's agent and his submission of the TWCC-69 sufficiently disputed the [IR] and [MMI] date assigned by [Dr. C].

CONCLUSION OF LAW

3. The first certification of [MMI] and the assignment of the [IR] by [Dr. C] on August 3, 1998 did not become final pursuant to Rule 130.5(e).

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). Applying this standard of review we find sufficient evidence to support the hearing officer's factual findings.

The thrust of the carrier's appeal appears to be that, as a matter of law, the Appeals

Panel has required that to be effective as a dispute a treating doctor must inform the carrier or the Commission of his or her authority to dispute for the claimant within the 90-day period prescribed by Rule 130.5(e). The carrier argues that such evidence was required by our decisions in Appeal No. 981088, *supra,* Appeal No. 982646, *supra*, and Appeal No. 982956, *supra*. The carrier argues that even though we explicitly did not require such evidence for an effective dispute in Appeal No. 990046, *supra*, this decision was incorrect and inconsistent with the other three decisions. We note, as did the carrier, that we explicitly cited the aforementioned previous decisions in our opinion in Appeal No. 990046. We believe that our decision in Appeal No. 990046 reconciles these decisions and clearly states the law in this area. We find that the hearing officer did not err by relying on our decision in Appeal No. 990046, which we find to be controlling in the present case. We do not believe that the Commissioners, in promulgating Rules 130.3 and 130.4(f), requiring treating doctors to comment upon a certification of MMI and IR by another doctor, intended to create a meaningless or futile exercise.

The decision and order of the hearing officer are affirmed.

_____
Gary L. Kilgore
Appeals Judge

CONCURRING OPINION:

I would further add that if Texas Workers' Compensation Commission Appeal No. 990046, decided February 25, 1999, had not reconciled the decisions in question with the plain language of the statute, then the doctrine of liberal construction of Sections 408.123(a) and 408.125(a) would justify, if not outrightly mandate, the decision of the hearing officer in this case. I also believe that it is a form of "second guessing" the trier of fact to reverse a decision because of evidence we think he or she *should have had* before making an inference, unless there is a firm statutory basis for such an evidentiary requirement. To the extent that Texas Workers Compensation Commission Appeal No. 981088, decided July 8, 1998, imposed the extra requirement of contemporaneous evidence of agency between a claimant and a treating doctor (which as a practical matter would almost never exist), it represented a strict and narrow construction of the purpose and language of the provisions relating to disputes over impairment ratings (IR), and cannot be further carried out and expanded upon. An actual agency relationship is not required to be shown. Texas Workers' Compensation Commission Appeal No. 990323, decided April 5, 1999 (Unpublished). We have since been assured by the Texas Supreme Court that liberal construction is still the law. Albertson's Inc. v. Sinclair, 984 S.W.2d 958 (Tex. 1999). The fact finder should always retain the ability to assess, without the requirement of a contemporaneous writing, that the doctor acted with the authorization of, or was ratified by, the injured worker. Our system of hearings and appellate review does not exist for the primary purpose of preserving the "constructs" that may have been set up along the way, to the exclusion of the statutory purpose, which is to compensate injured workers for the

effects of their work-related injuries. The outcome of allowing a dispute in this case is one that should be welcomed by all the parties as the claimant will be examined by a designated doctor. If, in fact, the IR and maximum medical improvement of the carrier's doctor was correct, there should be no fear about having the system work as contemplated by the legislature.

_____
Susan M. Kelley
Appeals Judge

DISSENTING OPINION:

I dissent because I believe the precedent in Texas Workers' Compensation Commission Appeal No. 981088, decided July 8, 1998, should be followed as it was in Texas Workers' Compensation Commission Appeal No. 982646, decided December 23, 1998, Texas Workers' Compensation Commission Appeal No. 982956, decided January 29, 1999, and in Texas Workers' Compensation Commission Appeal No. 990535, decided April 22, 1999 (Unpublished). Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 130.3 and 130.4(f) (Rules 130.3 and 130.4(f)) require a treating doctor to indicate agreement or disagreement with the certification and evaluation of another doctor who certifies that a claimant has reached maximum medical improvement and the Report of Medical Evaluation (TWCC-69) form contains a block for the treating doctor to comply with these rules. However, with regard to a dispute of the first assigned impairment rating (IR) under Rule 130.5(e), the Appeals Panel has long held that a dispute by the treating doctor under Rule 130.5(e) must be done with the involvement of the claimant, that is, as the claimant's agent. Were it otherwise, a treating doctor could dispute an IR with which a claimant did not disagree for whatever reason. In Appeal No. 981088, *supra*, the Appeals Panel required that some evidence of the claimant's involvement in the treating doctor's dispute of a first assigned IR be communicated to the carrier or the Texas Workers' Compensation Commission within the 90-day period of Rule 130.5(e) to be an effective dispute by the claimant. Otherwise, a treating doctor's mere indication of disagreement on the bottom of a TWCC-69, without more, would indicate no more than the treating doctor's own compliance with Rules 130.3 and 130.4(f). A basic tenet of agency law is that the agency relationship be communicated to third parties to be affected by that relationship. The decision in Appeal No. 990535, *supra*, clearly demonstrates this problem.

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Philip F. O'Neill
Appeals Judge