APPEAL NO. 990866

This appeal arises under the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq*. (1989 Act). On April 5, 1999, a contested case hearing was held. With respect to the issue before him, the hearing officer determined the first certification of maximum medical improvement (MMI) and impairment rating (IR) assigned by Dr. R on June 1, 1998, became final under Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 130.5(e) (Rule 130.5(e)). The appellant (claimant herein) files a request for review arguing that she did timely dispute the rating. The claimant also argues that the hearing officer failed to grant her subpoena request. The respondent (self-insured) replies that the hearing officer resolved the factual dispute concerning when the claimant disputed the first certification of MMI and IR and that we should affirm his decision. The self-insured further asserts that any error in regard to the subpoena was harmless.

DECISION

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.

The parties stipulated that the self-insured accepted liability for a _____, injury to the claimant. It was undisputed that this was an injury to the claimant's right hip. The claimant was treated for this injury by Dr. R. On a Report of Medical Evaluation (TWCC-69) dated June 1, 1998, Dr. R certified that the claimant attained MMI on June 1, 1998, with a zero percent IR. It was undisputed that this was the first certification of MMI and IR in this case. The claimant testified that she received a letter from the self-insured on August 3, 1998, informing her of Dr. R's certification. The claimant further testified that she called the Texas Workers' Compensation Commission (Commission) on August 12, 1998, to disagree with the certification and that she was told to call the adjuster on her case. The claimant said she called the adjuster in October 1998 to discuss the certification. The records of the Commission do not reflect a call from the claimant on August 12, 1998. Ms. R, a claim supervisor for the self-insured, testified that she reviewed the handling adjuster's computer log and it showed no contact from the claimant between June 1, 1998, and November 5, 1998. The claimant objected to Ms. R using the self-insured's computer records to refresh her memory as these records had been subpoenaed by the claimant, but the claimant had not been provided these records apparently because the hearing officer had not granted the subpoena.

Rule 130.5(e) provides as follows:

> The first [IR] assigned to an employee is considered final if the rating is not disputed within 90 days after the rating is assigned.

We have held that this time does not begin to run until a party has received written notice of the assignment of an IR. Texas Workers' Compensation Commission Appeal No. 951229, decided September 5, 1995. In this case, the claimant testified that she received

written notice on August 3, 1998. The real question in this case was whether the claimant disputed the certification within 90 days of receiving this notice. There was conflicting evidence on this point. 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). We do not find that to be the case here.

As far as the claimant's contention that the hearing officer erred in not granting her subpoena is concerned, the record is less than clear in regard to this matter. There is no ruling on the record regarding the subpoena and the claimant appears in her appeal to complain that the subpoena was not acted on rather than it being denied. The only objection on the record concerns Ms. R's use of some of the material that was allegedly subpoenaed to refresh her testimony. This issue is not addressed in the claimant's appeal. Under these circumstances, we find that no error was preserved on the record regarding this matter.

The decision and order of the hearing officer are affirmed.

_____
Gary L. Kilgore
Appeals Judge

CONCUR:

_____
Joe Sebesta
Appeals Judge

_____
Robert W. Potts
Appeals Judge