

APPEAL NO. 991036

On April 12, 1999, a contested case hearing (CCH) was held. The CCH was held under the provisions of the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act). The issues at the CCH were: (1) whether the compensable injury sustained by appellant (claimant) on _____, extends to and includes subluxation of the left patella and chondromalacia of the left patellofemoral joint (left knee); (2) whether respondent (carrier) contested compensability on or before the 60th day after being fairly informed that the subsequent left knee injury was work related; (3) should the finding of maximum medical improvement (MMI) and impairment rating (IR) assigned by Dr. F on August 30, 1995, be considered final under Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 130.5(e) (Rule 130.5(e)); (4) whether claimant has reached MMI; and (5) what is the IR. Claimant requests reversal of the hearing officer's decision that: (1) carrier did contest compensability on or before the 60th day after being fairly informed that the subsequent left knee injury was work related; (2) the finding of MMI and IR assigned by Dr. F on August 30, 1995, should be considered final under Rule 130.5(e); (3) claimant reached MMI on August 30, 1995; and (4) claimant's IR is 12%. There is no appeal of the hearing officer's decision that the compensable injury sustained by claimant on _____, does extend to and include the subluxation of the left patella and chondromalacia of the left patellofemoral joint (left knee) and the decision on the compensability of the left knee has become final. Section 410.169(a). No response was received from carrier.

DECISION

Affirmed.

Claimant testified that on _____, she was walking down wet stairs at work when she slipped and felt her right knee pop. The parties stipulated that claimant sustained a compensable injury to her right knee on _____. Claimant began seeing Dr. F on December 14, 1993. Dr. F performed surgery on claimant's right knee on May 4, 1994, and after that claimant had physical therapy. Dr. F performed a second surgery on claimant's right knee on September 29, 1994. Claimant said that after her second right knee surgery she was in a cast for eight weeks, that she complained to Dr. F about her left knee hurting, that Dr. F told her it hurt because of the way she was walking, and that she has had problems with her left knee since that time. Claimant had physical therapy after her cast was removed. Dr. F referred claimant to Dr. B for pain management. In a Report of Medical Evaluation (TWCC-69) dated September 19, 1995, with an attached narrative report showing a date of evaluation of August 30, 1995, Dr. F reported that claimant had injured her right knee, that she reached MMI on August 30, 1995, and that she has a 12% IR for that injury. He also wrote that he was releasing claimant from his care. Dr. F was the first doctor to certify MMI and assign claimant an IR. KV, RN, carrier's rehabilitation consultant, wrote on September 7, 1995, that claimant told her that Dr. F advised her that she had reached MMI and that an IR was assigned. Claimant said she did not recall having that conversation.

JL, the claims adjuster who has been handling claimant's claim for carrier, testified that on September 20, 1995, he sent a Notification Regarding MMI and/or IR (TWCC-28) to claimant with a copy of Dr. F's TWCC-69 by certified mail and his claims diary note of that date indicates that that was done. However, in a claims diary note dated September 27, 1995, JL indicated that the TWCC-28 would be sent to claimant in the next day or two, but does not indicate it would be sent by certified mail. The TWCC-28 dated September 20, 1995, states that Dr. F reported that claimant reached MMI with a 12% IR and that a copy of that report is attached and that if claimant does not agree with the MMI date or IR she may dispute the rating by contacting the Texas Workers' Compensation Commission (Commission) within 90 days from receiving notice of the IR. JL said that while he does not have a green card signed by claimant showing her receipt of the TWCC-28, he did not receive anything back showing it was not delivered.

Claimant testified that she does not recall receiving the TWCC-28 or Dr. F's TWCC-69, but that she did receive forms that informed her of the amount she was getting paid and weeks of payment. In a Payment of Compensation or Notice of Refused/Disputed Claim (TWCC-21) dated May 1, 1996, which indicates that a copy was mailed to claimant on that date, carrier noted that impairment income benefits (IIBS) were being terminated on May 8, 1996, because, per claimant's treating doctor, claimant was at MMI on August 30, 1995, and it had paid 12% IIBS per the treating doctor. The TWCC-21 noted the number of weeks IIBS had been paid (36) and the amount of payments. In a claims diary note dated May 1, 1996, JL wrote that there had been no dispute as of that date concerning the treating doctor's findings.

The record reflects that claimant had some difficulty finding another treating doctor. She began seeing Dr. H on May 24, 1996. She said that when she changed treating doctors, she got her medical records from Dr. F's office. Dr. H's patient notes for claimant from March 24, 1996, through January 7, 1997, are in evidence and they reflect in several places that Dr. H felt that the claimant's symptoms in her left knee are related to her right knee activity as well as the immobilization from the previous right knee surgery; however, there is no indication as to when carrier received those patient notes. Dr. H performed another right knee surgery on claimant in June 1996. Dr. N wrote in June 1996 that claimant has a congenital anomaly of the left knee and carrier did not authorize left knee surgery. Claimant had left knee surgery in November 1996 which was paid for by the Texas Rehabilitation Commission (TRC). Dr. M consulted with claimant for chronic pain in June 1998 and he noted that claimant had had right knee surgeries in April, August, and November 1997. Claimant said she has had a total of 10 surgeries on her right knee and seven surgeries on her left knee and that Dr. H has told her she will eventually need total knee replacements. Claimant said her left knee surgeries have been paid for by TRC and Medicaid. Claimant said that prior to August 1995, Dr. F had spoken to her about eventually needing a total right knee replacement.

In a letter to carrier dated December 16, 1998, Dr. H wrote that claimant had had complaints with her left knee caused by the weakness and instability of the right knee since he began seeing her in March 1996 and that it is his impression that the claimant's left knee

symptoms are related to the activity of her right knee and the immobilization of the right knee from previous surgery. In a TWCC-21 dated January 26, 1999, which JL said was filed with the Commission on or about that date, carrier disputed that claimant's left knee is part of her compensable injury. Claimant said that Dr. H has assigned her a 23% IR for impairment of both knees.

Section 409.021(c) provides that, if a carrier does not contest the compensability of an injury on or before the 60th day after the date on which the carrier is notified of the injury, the carrier waives its right to contest compensability. Section 409.021(a) provides for written notice of injury to carrier. Rule 124.1 provides that written notice of injury, as used in Section 409.021, consists of the carrier's earliest receipt of the Employer's First Report of Injury or Illness (TWCC-1), notification from the Commission, or any other notification regardless of source, which fairly informs the carrier of the name of the injured employee, the identity of the employer, the approximate date of the injury, and facts showing compensability. The TWCC-1 references a right knee injury. While there are numerous references in the medical records about left knee complaints, the hearing officer determined that Dr. H's letter of December 1998 to carrier provided notice to carrier of the relation of the left knee injury to the compensable injury and that carrier contested compensability of the left knee injury on _____, which she concluded was on or before the 60th day after carrier was fairly informed that the left knee injury was work related.

The 1989 Act makes the hearing officer the sole judge of the relevance and materiality of the evidence offered and of the weight and credibility to be given to the evidence. Section 410.165(a). As the finder of fact, the hearing officer resolves conflicts in the evidence. An appellate level body is not a fact finder and does not normally pass upon the credibility of witnesses or substitute its judgment for that of the trier of fact even if the evidence would support a different result. *Texas Workers' Compensation Commission Appeal No. 950084*, decided February 28, 1995. We conclude that the hearing officer's decision on the waiver issue is supported by sufficient evidence and is not so contrary to the overwhelming weight of the evidence as to be clearly wrong and unjust. *Cain v. Bain*, 709 S.W.2d 175 (Tex. 1986). Although the hearing officer found in carrier's favor on the waiver issue, her decision in favor of claimant on the extent-of-injury issue has not been appealed and is final under Section 410.169.

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 an employee must have written notice of the first assigned IR. *Texas Workers' Compensation Commission Appeal No. 94354*, decided May 10, 1995. Claimant's testimony was that she was unaware that Dr. F had assigned an IR. When she was asked whether she was saying that the reason she did not dispute that IR was because she did not receive notice of it, she said that she did not understand it and she did not have a treating doctor and was just concerned about seeing a doctor so that she could get back to work. When she was asked whether she had ever disputed the date of MMI and IR, she said she had not. There is evidence from which it can reasonably be inferred that claimant received written notice that Dr. F had reported that she reached MMI on

August 30, 1995, with a 12% IR at least by May 1996 and that she did not dispute the date of MMI or the IR within 90 days.

In Texas Workers' Compensation Commission Appeal No. 93489, decided July 29, 1993, the Appeals Panel noted that if a certification of MMI or IR were determined to be invalid based on compelling evidence of significant error or a clear misdiagnosis, then a situation could result where the passage of 90 days would not be dispositive. The hearing officer determined that there was no compelling medical evidence of a misdiagnosis or of inadequate treatment. There is evidence that at the time Dr. F certified MMI and an IR, claimant was aware that she had had left knee problems since her second right knee surgery in 1994 because of the way she walked after that surgery and that Dr. F had told her that she might need a total right knee replacement. Thus, reasons for disputing the MMI date and IR were present. See Texas Workers' Compensation Commission Appeal No. 941748, decided February 13, 1995. We conclude that the hearing officer's decision that the finding of MMI and IR assigned by Dr. F should be considered final under Rule 130.5(e) and that claimant reached MMI on August 30, 1995, with a 12% IR is supported by sufficient evidence and is not so contrary to the overwhelming weight of the evidence as to be clearly wrong and unjust. Cain, *supra*.

The hearing officer's decision and order are affirmed.

Robert W. Potts
Appeals Judge

CONCUR:

Philip F. O'Neill
Appeals Judge

Elaine M. Chaney
Appeals Judge