APPEAL NO. 991270

On May 21, 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 issue at the CCH was whether the first certification of maximum medical improvement (MMI) and impairment rating (IR) assigned by Dr. B on September 11, 1998, became final under Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 130.5(e) (Rule 130.5(e)). Appellant (claimant) requests that the hearing officer's decision that the first certification of MMI and IR assigned by Dr. B on September 11, 1998, became final pursuant to Rule 130.5(e) be reversed and that a decision be rendered in his favor. The respondent (carrier) requests affirmance.

DECISION

Affirmed.

Rule 130.5(e) provides 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 an employee must have written notice of the first assigned IR. Texas Workers' Compensation Commission Appeal No. 94354, decided May 10, 1994. The Appeals Panel has also held that if the IR becomes final under Rule 130.5(e), then so does the underlying finding of MMI. Texas Workers' Compensation Commission Appeal No. 92670, decided February 1, 1993. In Texas Workers' Compensation Commission Appeal No. 94747, decided July 25, 1994, the Appeals Panel stated that in certain cases a treating doctor may act as an agent of the claimant in raising a dispute pursuant to Rule 130.5(e), but that it must be apparent from the facts and circumstances of a given case that the treating doctor, in expressing disagreement with another doctor's certification of MMI and IR, has done so with some involvement of the claimant and that only then can it reasonably be concluded that the treating doctor is expressing the decision of the claimant to dispute the first rating. In Texas Workers' Compensation Commission Appeal No. 952151, decided February 5, 1996, the Appeals Panel held that where a treating doctor acts on his or her own in disputing the first assigned IR, and not as the agent of and with the involvement of the claimant, such does not constitute a timely dispute by the claimant.

The Appeals Panel has held that claimants may give notice of a dispute of the first IR to the Texas Workers' Compensation Commission (Commission) or to the carrier. Texas Workers' Compensation Commission Appeal No. 93200, decided April 14, 1993, and Texas Workers' Compensation Commission Appeal No. 962051, decided November 25, 1996. A dispute of MMI constitutes a dispute of the IR for purposes of Rule 130.5(e). Texas Workers' Compensation Commission Appeal No. 961724, decided October 18, 1996.

The parties stipulated that claimant sustained a compensable injury on _____. Claimant's testimony was translated by a Spanish-speaking interpreter. Claimant said he cannot read. Claimant testified that he was examined by Dr. B in August 1998. In a Report

of Medical Evaluation (TWCC-69) dated September 11, 1998, Dr. B certified that claimant reached MMI on August 25, 1998, with an eight percent IR. The parties stipulated that Dr. B's certification of MMI and assignment of an IR on September 11, 1998, was the first certification of MMI and assignment of an IR. The parties stipulated that claimant first received written notice of Dr. B's certification of MMI and assignment of an IR on September 21, 1998. The 90th day after September 21, 1998, was December 20, 1998. The parties also stipulated that on August 28, 1998, the Commission approved claimant's request to change treating doctors from Dr. B to Dr. L.

Dr. L noted in a medical report that he orginally examined claimant on September 3, 1998. The bottom portion of Dr. B's TWCC-69 contains a section for the treating doctor to note his or her agreement or disagreement with the certification of MMI and/or assigned IR, and in that section the boxes for noting disagreement with the certification of MMI and assigned IR are marked and a signature that may be that of Dr. L is on the line for the signature of the treating doctor and September 16, 1998, is provided for the date signed. Dr. B's TWCC-69 with the aforementioned disagreement notations is stamped as received by the Commission on January 28, 1999.

An MRI of claimant's right shoulder done on October 5, 1998, showed a partial tear of the rotator cuff. Claimant testified that on October 8, 1998, he discussed MMI and IR with Dr. L and that he understood from that conversation that Dr. L was going to dispute the IR for him. In a report dated October 8, 1998, with copies to the Commission and carrier, Dr. L wrote that claimant has an impingement of the right shoulder with a rotator cuff tear, that he wants claimant to have an MRI of the cervical spine, that there is an IR in claimant's file, that claimant was asked if he agreed with the rating (claimant's response to that question is not stated), that Dr. L discussed with claimant claimant's conditions, and that Dr. L could not agree with any MMI because he does not know the extent of claimant's injury or whether surgery is needed. The parties stipulated that carrier received Dr. L's report of October 8, 1998, on November 12, 1998.

Claimant further testified that on or about November 11 or 12, 1998, he took a letter (claimant was not asked to identify the letter he was talking about but it may be carrier's letter of September 18, 1998, notifying him of Dr. B's certification of MMI with an eight percent IR or a Commission letter notifying him of that certification or Dr. B's TWCC-69) to Dr. L, that Dr. L told him what was in the letter, that he discussed with Dr. L the IR assigned by Dr. B, that Dr. L told him that "neither of us" was in agreement, that claimant asked Dr. L to fill out the letter and state that claimant was not in agreement, that Dr. L told him that Dr. L was not in agreement and that Dr. L would dispute the IR with the Commission, that Dr. L did that, that Dr. L told claimant that Dr. L would take care of everything for claimant, and that he believed that Dr. L was going to act on his behalf to dispute the IR. Claimant said that he has never been in agreement with the IR assigned by Dr. B.

In a report dated November 17, 1998, Dr. L wrote that surgery on claimant's right shoulder was indicated. On December 10, 1998, claimant underwent surgery for the repair of the rotator cuff of the right shoulder.

Contact data notes from the Commission's Dispute Resolution Information System (DRIS) were in evidence and they reflect that on September 30, 1998, the Commission sent claimant a notice informing him that Dr. B had reported that he had reached MMI on August 25, 1998, with an eight percent IR. The DRIS notes also reflect that Dr. L's office called the Commission on January 19, 1999, in reference to claimant's dispute of the first IR and a Commission employee noted that it was not shown that claimant had disputed that rating. Dr. L wrote on January 21, 1999, that he had addressed claimant's MMI status in his report of October 8, 1998, that claimant is currently under post operative care, that claimant cannot be at MMI, and that "patient disputed this and I previously agreed to it, based on all medical and diagnostic findings."

Claimant said that about two weeks after discussing the IR with Dr. L in November 1998, he came to the Commission and told a Spanish-speaking Commission employee that he was not in agreement with the IR and that he wanted to dispute it. A DRIS note dated January 21, 1999, reflects that claimant came to a Commission office on that day and stated that "he disputed with carrier," that the Commission employee called the carrier's adjustor and was told by the adjustor that claimant "did not dispute with carrier," and that claimant stated that he told Dr. L to "assist him in disputing." A DRIS note dated January 26, 1999, reflects that claimant came to a Commission office that day with a letter from Dr. L (apparently the letter of January 21, 1999) and that when the Commission employee called Dr. L's office that day, she was told that Dr. L had filed a TWCC-69 with carrier showing that he disagreed with the MMI and IR. Dr. L wrote on May 21, 1999, that the IR was discussed with claimant and that claimant was advised to go to the Commission and dispute the rating.

The hearing officer stated in her Statement of the Evidence that she found that the preponderance of the credible evidence did not establish that Dr. L, acting as claimant's agent, nor the claimant disputed the first MMI date and IR within 90 days of claimant's first written notice; that Dr. L's letter of May 1999 reflected that he had advised claimant to go to the Commission and dispute the IR; that the first IR was not disputed until at least January 19, 1999; and that the 90-day time period for disputing was over on December 20, 1998. The hearing officer made a finding of fact that the 90-day time period for disputing the first IR ran out on December 20, 1998, and that neither claimant nor anyone acting on his behalf disputed it until at least January 19, 1999. The hearing officer concluded that the first certification of MMI and IR assigned by Dr. B on September 11, 1998, became final under Rule 130.5(e). Claimant states in his appeal that he discussed the IR assigned to him by Dr. B with Dr. L in November 1998, that they both disagreed with it, that he was instructed to go to the Commission, and that he went to the Commission within 90 days of receiving the first IR and timely disputed that IR.

Whether the first certification of MMI and IR was timely disputed by either claimant or by Dr. L acting at claimant's request presented fact questions for the hearing officer to determine from the evidence presented. 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 trier of fact, the hearing

officer resolves conflicts in the evidence and may believe all, part, or none of the testimony of any witness. Texas Workers' Compensation Commission Appeal No. 950084, decided February 28, 1995. 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 hearing officer, even if the evidence would support a different result. Appeal No. 950084. When reviewing a hearing officer's decision to determine the factual sufficiency of the evidence, we should set aside the decision only if it is so contrary to the overwhelming weight of the evidence as to be clearly wrong or unjust. Appeal No. 950084. We conclude that the hearing officer's decision is supported by sufficient evidence and that it 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).

The hearing officer's decision and order are affirmed.

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Robert W. Potts
Appeals Judge

CONCUR:

_____
Stark O. Sanders, Jr.
Chief Appeals Judge

_____
Philip F. O'Neill
Appeals Judge