APPEAL NO. 991638

This appeal arises pursuant to the Texas Workers' Compensation Act of 1989, TEX. LAB. CODE ANN. § 401.001 *et seq*. (1989 Act). On July 8, 1999, a hearing was held. He (hearing officer) determined that the initial certification of an impairment rating (IR) for appellant (claimant) relative to his injury of _____, provided by Dr. S became final under the provisions of Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 130.5(e) (Rule 130.5(e)). While claimant disagrees with certain parts of the Statement of Evidence and with certain findings of fact, he basically asserts that he was in the County jail as of August 13, 1991, and was not examined on August 19, 1991, when Dr. S said that maximum medical improvement (MMI) was reached with a zero percent IR. Claimant also points out that his letter of August 16, 1997, was his dispute of the IR and it was provided within 90 days of when he received written notice, so the initial IR did not become final. Claimant also attacks the findings of fact that said the entire injury was rated and that there was no misdiagnosis or inadequate treatment. Claimant stated that the hearing officer and respondent (carrier) were prejudiced by his conviction. Carrier replied that the decision should be affirmed.

DECISION

We affirm.

Claimant testified that he was injured on _____, while working at a construction site for (employer), when a board, three feet long, by two inches deep, by four inches wide, fell from above, striking him on the side of the head, on his neck, and on his shoulder. He stated that he began seeing Dr. S on the recommendation of his lawyer and treated with him for several months. On August 13, 1991, claimant said, he was arrested and placed in jail. He indicated that he was not released on bond and was then sentenced to prison on approximately April 6, 1992, for selling cocaine; he was thereafter released from prison in 1999.

Although Section 410.165 provides that conformity to the Texas Rules of Evidence is not necessary, those rules do provide that a witness' credibility may be impeached by evidence of a conviction of a felony when the conviction occurred within 10 years. *See* TEX. R. CIV. EVID. § 609. With claimant's credibility being subject to impeachment, and after having reviewed the record, we find no evidence of prejudice by the hearing officer as asserted by the claimant on appeal.

There is no appeal taken to the finding of fact that states claimant received his first written notice of the initial IR on June 19, 1997, when he received a response to his letter to the Texas Workers' Compensation Commission (Commission). Rule 130.5(e) requires a party who wishes to dispute the initial IR to do so within 90 days. Claimant's letter of August 16, 1997, was received by the Commission within the 90 days allowed by the rule as measured from the June 19, 1997, date found to be the date of notice.

The hearing officer, however, found that claimant's letter of August 16, 1997, did not dispute the initial IR. The hearing officer addressed the second paragraph of claimant's letter and concluded that claimant merely expressed an intent to dispute the initial IR upon release from prison. That second paragraph of the August 16, 1997, letter said:

> Upon my release, in March of 1998, [sic] I will seek out the proper avenue in order to obtain an evaluation of my physical condition due to the injury and to appeal [Dr. S's] ruling.

We cannot say that the hearing officer could not reasonably interpret the above quotation as indicating something other than a dispute of Dr. S's initial IR. In addition, there was other evidence in the record that was consistent with a determination that claimant, in 1997, intended to dispute the IR at some future time. Certainly at some later time, but prior to any further action having been taken, a person who made a statement such as the above could change his mind and never dispute and could effectively claim that the above statement did not constitute a dispute.

The Appeals Panel closely examined claimant's first paragraph in the August 16, 1997, letter, in which claimant stated that when Dr. S "gave me zero [IR] on the 19th of August 1991, I was incarcerated, therefore he could not have performed any further examination of my injury and could not have determined any [IR]." While carrier labeled the above as a history statement and indicative of no present dispute, that does not address the question set forth in Texas Workers' Compensation Commission Appeal No. 93046, decided March 5, 1993, in which the Appeals Panel reversed a decision that the initial IR had become final and rendered that it had not. In that case, the carrier did not dispute the IR within the time limit, but did state on a Payment of Compensation or Notice of Refused/Disputed Claim (TWCC-21) that a physical therapist completed the Report of Medical Evaluation (TWCC-69) (without adding any reference to a "present dispute" of the IR assigned). Considering that statement and the fact that carrier's statement was accurate as effectively asserting that no MMI (and therefore no IR) had been properly certified, the IR itself was considered to be disputed. In that case, the initial IR had not been assigned because a physician had not certified MMI.

The case under review may be distinguished from Appeal No. 93046, however. Just because a doctor, especially a treating doctor who has examined a claimant repeatedly, certifies MMI on a date subsequent to the last date claimant was examined does not make the certification of MMI invalid. Both Texas Workers' Compensation Commission Appeal No. 94846, decided August 16, 1994, and Texas Workers' Compensation Commission Appeal No. 950359, decided April 24, 1995, specifically said that a certifying doctor's MMI date was not invalid just because the respective date of MMI was either one and one-half months later, or five months later, than the last visit of the claimant to that doctor. (In both cases, there was no showing that the doctor certified MMI as a date prospective to the date he signed the TWCC-69 certifying MMI.) While it was observed that a doctor who so certified may have some explaining to do, that was a matter to be reconciled after a party had disputed the initial IR within the 90 days provided.

Therefore, unlike Appeal No. 93046, *supra*, in which the underlying problem raised within 90 days (no doctor's certification) indicated a basis, if true, for determining that the initial IR was invalid, claimant's assertion of an underlying problem (a date of MMI subsequent to the last visit), if true, does not invalidate the initial IR. Therefore, we conclude that the first paragraph of claimant's August 16, 1997, letter also does not dispute the IR because it does not state an underlying basis that the IR was invalid. There was no evidence of any other communication within 90 days of June 19, 1997, which could be considered as a dispute. Therefore, the determination that claimant disputed the initial IR only after the passage of 90 days is sufficiently supported by the evidence.

Claimant also attacks findings of fact that say the IR was given for the injury and that there was no misdiagnosis or inadequate treatment. Rule 130.5(e) only provides that the initial IR does not become final when disputed within 90 days. Rodriguez v. Service Lloyds Insurance Company, 42 Tex. Sup. Ct. J. 900 (July 1, 1999, motion for rehearing denied) held that there are no exceptions to the initial IR becoming final by passage of time. Therefore, the assertions on appeal as to misdiagnosis, treatment, and extent of injury are without merit.

Finding that the decision and order are sufficiently supported by the evidence, we affirm. *See* In re King's Estate, 150 Tex. 662, 244 S.W.2d 660 (1951).

_____
Joe Sebesta
Appeals Judge

CONCUR:

_____
Stark O. Sanders, Jr.
Chief Appeals Judge

_____
Alan C. Ernst
Appeals Judge