

APPEAL NO. 991801

This appeal arises pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act). A contested case hearing (CCH) was held on August 2, 1999. The single issue at the CCH was whether the first certification of maximum medical improvement (MMI) and impairment rating (IR) assigned on October 15, 1998, became final under Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 130.5(e) (Rule 130.5(e)). The hearing officer found that it did become final and the appellant (claimant) appeals. Claimant challenges findings of fact and urges that he did timely dispute the IR and that his treating doctor also timely disputed on his behalf. The respondent (carrier) urges that there is sufficient evidence to support the findings and conclusions of the hearing officer and asks that the decision be affirmed.

DECISION

Affirmed as modified.

The claimant sustained a compensable injury and was subsequently medically evaluated by Dr. H, who certified MMI on _____, with a three percent IR. According to the testimony of the adjuster on the case, Mr. M, a letter of notice of the rating was sent to the claimant and others on January 18, 1999. The claimant testified that he received a copy of Dr. H's report sometime (he stated a week or possibly three to four days) prior to January 26, 1999, when he talked to his treating doctor, Dr. M about the report. According to Mr. M, a person named Ms. C called on January 26, 1999 from Dr. M's office and stated Dr. M did not agree with the IR and wanted the claimant to see a Dr. He, which was authorized by Mr. M. Nothing was mentioned about the claimant or that Dr. M was acting on behalf of or for the claimant and no further communication was made. According to the testimony of Mr. M, the claimant first contacted the adjuster on April 27, 1999, acknowledged that he had gotten their notice and his doctor did not agree and he was unhappy and stated he would see what he can do about it. Mr. M. advised the claimant of the dispute procedures. Mr. M also said a form had already been sent out indicating converting over to impairment income benefits because of 90 days having passed. A memo from Dr. M's office dated June 23, 1999, states "I have disputed this impairment to the TWCC because I feel [claimant's] impairment is greater than 3%. I also am disputing this 3% impairment because it is based on [claimant's] dispute of the MMI rating."

Based on the evidence before her, the hearing officer found that the claimant received Dr. H's MMI/IR rating on January 23, 1999 (the latest date per claimant's testimony and the circumstances of receiving it some days before January 26, 1999), and that the claimant first disputed the MMI/IR of Dr. H on April 24, 1999 (this date should be April 27th according to the testimony and adjuster's logs, with no other evidence to the contrary) by calling the carrier. With the correction of the date April 24, 1999, to April 27, 1999, we conclude there was sufficient evidence before the hearing officer to support these findings, and clearly, that the findings and conclusion are not against the great weight and preponderance of the evidence. Employers Casualty Company v. Hutchinson, 814 S.W.2d

539 (Tex. App.-Austin 1991, no writ). The hearing officer also found that there was no agency relationship between the claimant and Dr. M for purposes of disputing the first certification of MMI/IR. Again, we conclude there is sufficient support for the inference reached by the hearing officer that an agency relationship for purposes of disputing the first certification of MMI/IR was not shown. While there was conflict in the evidence on this point, with the claimant stating he considered Dr. M his agent in disputing the rating, the hearing officer was not required to accept this assertion as establishing Dr. M as claimant's agent when his office contacted the carrier on January 26, 1999. Conflicts, where they exist in the evidence, are for the hearing officer to resolve. Garza v. Commercial Insurance Company of Newark, New Jersey, 508 S.W.2d 701 (Tex. Civ. App.-Amarillo 1974, no writ). She was not bound to accept the claimant's assertion that he considered Dr. M his agent on January 26, 1999. Bullard v. Universal Underwriters Insurance Company, 609 S.W.2d 621 (Tex. Civ. App.-Amarillo 1980, no writ). Given all the circumstances present, with the claimant subsequently disputing the MMI/IR directly with the carrier, albeit not within the 90-day time frame of Rule 130.5(e), we cannot conclude that there is overwhelming evidence against the hearing officer's finding. Cain v. Bain, 709 S.W.2d 175, 176 (Tex. 1986). With the modification of the date in Finding of Fact No. 4 to reflect the date April 27, 1999, rather than April 24, 1999, the decision and order are affirmed.

Stark O. Sanders, Jr.
Chief Appeals Judge

CONCUR:

Alan C. Ernst
Appeals Judge

Tommy W. Lueders
Appeals Judge