APPEAL NO. 000101

Following a contested case hearing held on December 28, 1999, pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act), the hearing officer, resolved the disputed issue by determining that the zero percent impairment rating (IR) assigned to the respondent (claimant) by Dr. F on September 1, 1998, as well as Dr. F's certification of September 1, 1998, as the date claimant reached maximum medical improvement (MMI), did not become final pursuant to Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 130.5(e) (Rule 130.5(e)). The appellant (self-insured employer) has requested our review, asserting that the evidence established that claimant did not dispute the IR within 90 days of receiving written notice of it and, in the alternative, that claimant withdrew her dispute with a telephone call to the Texas Workers' Compensation Commission (Commission). Claimant's response urges the sufficiency of the evidence to support the challenged determination.

DECISION

Affirmed as reformed.

The parties stipulated that the self-insured employer accepted liability for claimant's on-the-job injury sustained on _____. Claimant indicated she had been employed by the self-insured employer since August 1986.

Rule 130.5(e), prior to the effective date of its amendment, March 29, 2000, provided only 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.

It is not disputed that Dr. F, an independent medical examination (IME) doctor selected by the self-insured employer, examined claimant. However, in Finding of Fact No. 3, the hearing officer states that Dr. F's examination took place on September 1, 1998, and that he determined that claimant reached MMI on September 1, 1998, with a zero percent IR. Dr. F's Report of Medical Evaluation (TWCC-69) and the accompanying narrative report, both dated August 20, 1998, reflect that Dr. F examined claimant on August 20, 1998, and determined that claimant reached MMI on May 3, 1998, with an IR of zero percent. Accordingly, we reform Finding of Fact No. 3, as well as the "Decision" portion of the hearing officer's decision and order, to reflect the correct dates. It is not disputed that Dr. F's report stated the first IR assigned to claimant in this claim and the hearing officer so found.

Claimant testified that following Dr. F's examination on September 1, 1998, she attended a follow-up appointment on September 4, 1998, with her treating doctor, Dr. W; that when she arrived at Dr. W's office, she inquired whether Dr. F's TWCC-69 had arrived and was told it had not; that Dr. W's staff then called Dr. F's office and the TWCC-69 was "faxed" to Dr. W's office; that she took the TWCC-69 into the examining room where she read it, discussed it with Dr. W who explained it to her, and understood that it said she had

reached MMI with a zero percent IR; that she disagreed with the report; that Dr. W asked her if she wished to dispute the report and she responded that she did; and that Dr. W said he would dispute the IR for her. Claimant further stated that shortly thereafter, she received a letter from the Commission advising her about Dr. F's MMI date and IR which she did not understand because she thought Dr. W had already disputed Dr. F's report; that she called the Commission on September 9, 1998, and inquired about the letter; that she understood from this conversation that her doctor had not yet disputed the IR; that she then called Dr. W's office and was advised that he had "faxed" his dispute to the Commission; and that she thereafter did nothing more about it, not having been told by the Commission to do anything else. She said that as the time passed, she became aware that a designated doctor had not been appointed and that she brought this up with Dr. W who said he would write the Commission about appointing a designated doctor.

In evidence is a copy of Dr. F's TWCC-69. Dr. W completed the treating doctor's portion of the form at the bottom, noting his disagreement with Dr. F's MMI date and IR and signing the form on September 4, 1998. This exhibit also bears a date stamp showing receipt on September 8, 1998. The parties indicated that this date stamp was that of the Commission. The Commission's Dispute Resolution Information System (DRIS) notes in evidence reflect that on September 4, 1998, an EES-19 letter was printed and mailed concerning Dr. F's MMI date of May 3, 1998, and his IR of zero percent. A DRIS note of September 9, 1998, states that claimant called regarding the IME doctor's giving her a zero percent IR. This note states that claimant was to give the report to her treating doctor to see if he agrees and, if not, claimant will call back and dispute. Claimant said she did not call back because she was assured that Dr. W had indeed sent the TWCC-69 form with the stated disagreements to the Commission on September 4, 1998. A DRIS note of January 27, 1999, states that claimant called to dispute Dr. F's MMI date and IR; that the 90-day time period was explained to her; and that she indicated that her doctor had signed off on the disagreement on September 4, 1998, and requested a benefit review conference.

Dr. W wrote the Commission on April 21, 1999, stating that after seeing Dr. F, claimant came to his office and they discussed the IR; that he believes that she expected him or his office to handle the dispute, which he did; and that his response to the TWCC-69 on September 4, 1998, should be considered to be the "official request" from claimant and him to dispute the MMI date and IR.

The hearing officer found that claimant received a copy of Dr. F's report on September 4, 1998; that Dr. W, claimant's treating doctor, and claimant discussed Dr. F's report on that date and concluded that Dr. W would dispute the report; that Dr. W filed a dispute of Dr. F's certification on September 8, 1998, a date within 90 days of September 4, 1998; and that Dr. W's dispute was filed with the participation of claimant. The hearing officer concluded that because claimant has shown by a preponderance of the evidence that Dr. F's certification of MMI and assignment of the IR was disputed on her behalf within 90 days of being assigned, it is not considered final under Rule 130.5(e).

The self-insured employer challenges the aforestated factual findings and legal conclusion. The self-insured employer asserts that the hearing officer "ignored" the content of the September 9, 1998, DRIS notes which reflects that when claimant called the Commission on September 9, 1998, she "revealed she had not discussed the [IR] with her treating doctor" and was "unaware of whether the treating doctor agreed with the impairment"; that she acknowledged not having disputed the IR during the September 9th telephone conversation with the Commission; that she was told to call back if she wished to dispute the IR; and that she did not call back until January 27, 1999. The self-insured employer characterizes claimant's testimony as "sketchy," professes to be "utterly dumbfounded" with the hearing officer's failure to mention all the content of claimant's September 9, 1998, telephone conversation with the Commission, as such is reflected in the DRIS note; and asserts that the Commission's instruction to claimant to call back if she decided to challenge the IR is "clear and convincing evidence" that claimant had not even considered a dispute of the IR prior to that time. The self-insured employer further contends that even if the TWCC-69, as annotated and signed by Dr. W, was in actuality a dispute of the IR, claimant's telephone conversation with the Commission on September 9, 1998, "constituted an effective withdrawal of that dispute." The self-insured employer does not contend that a treating doctor cannot dispute the first assigned IR for a claimant so long as the claimant is involved in the dispute. *See, e.g.*, Texas Workers' Compensation Commission Appeal No. 961569, decided September 23, 1996.

It is apparent from the hearing officer's discussion of the evidence that he credited claimant's account of her involvement with Dr. W on September 8, 1998, in disputing Dr. F's IR and communicating that dispute to the Commission. As the sole judge of the weight and credibility of the evidence (Section 410.165(a)), claimant's credibility, which the self-insured employer emphasized was being questioned, was a matter for the hearing officer. It was the role of the hearing officer, as the trier of fact, to resolve the conflicts and inconsistencies in the evidence. Garza v. Commercial Insurance Company of Newark, New Jersey, 508 S.W.2d 701 (Tex. Civ. App.-Amarillo 1974, no writ). The Appeals Panel, an appellate reviewing tribunal, will not disturb the challenged factual findings of a hearing officer unless they are so against the great weight and preponderance of the evidence as to be clearly wrong or manifestly unjust and we do not find them so in this case. Cain v. Bain, 709 S.W.2d 175, 176 (Tex. 1986); In re King's Estate, 150 Tex. 662, 244 S.W.2d 660 (1951).

The decision and order of the hearing officer are affirmed.

Philip F. O'Neill
Appeals Judge

CONCUR:

Gary L. Kilgore
Appeals Judge

Dorian E. Ramirez
Appeals Judge