APPEAL NO. 000158

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 January 5, 2000. The issue at the CCH was whether the first certification of maximum medical improvement (MMI) and impairment rating (IR) assigned by Dr. L became final pursuant to Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 130.5(e) (Rule 130.5(e)). The hearing officer determined that the first certification of MMI and IR by Dr. L did become final under Rule 130.5(e). The appellant (claimant) has requested our review of this determination, asserting not only the insufficiency of the evidence but also the contentions that Rule 130.5(e) was not intended to apply to claimants and that she should prevail through application of the doctrine of "liberal construction." The respondent (carrier) urges in its response the sufficiency of the evidence to support the challenged findings.

DECISION

Affirmed.

The parties stipulated that Dr. L certified that claimant reached MMI on March 30, 1999, and was the first doctor to have done so.

Claimant testified that she injured her left shoulder at work on _____; that after seeing a doctor in an emergency room, she commenced treatment with Dr. L who had twice previously operated on that shoulder after a prior injury; that she later moved from (city 1) area to (city 2) area in late April 1999; that she responded to a TV ad and arranged to become the patient of Dr. F, a chiropractor, and that she knew nothing about a Report of Medical Evaluation (TWCC-69) signed by Dr. L on March 30, 1999, certifying that she had reached MMI on that date with a four percent IR until Dr. F "educated" her about it. She indicated that her last visit with Dr. L was on March 30, 1999, and that she first saw Dr. F on May 3, 1999. In her answers to carrier's interrogatories, claimant stated that she received Dr. L's TWCC-69 on March 30, 1999; that in Answer No. 4 Dr. F disputed Dr. L's certification of MMI and IR on her behalf on April 29, 1999; in Answer No. 13 that Dr. F disputed Dr. L's certification of MMI and IR on her behalf on May 10, 1999, as evidenced by the TWCC-69; and that the benefit review conference (BRC) report correctly states her position on the disputed issue. The BRC report in evidence states that Dr. F disputed Dr. L's March 30, 1999, MMI date and four percent IR and that he submitted a TWCC-69 to the Texas Workers' Compensation Commission (Commission) on April 29, 1999. Claimant testified that Dr. F told her on May 3, 1999, that "he was disputing it no matter what it was" and that he would do it for her. She stated that she called Dr. F's office and was given three dates, one of which was May 10, 1999, and that she is confused about the dates. Claimant does not challenge Finding of Fact No. 2 which states that she "received the certification of MMI and Impairment on May 1, 1999." Claimant introduced a copy of Dr. L's TWCC-69 signed by Dr. L on "3-30-99." This copy reflects that Dr. F checked his disagreement with the MMI date and IR and signed the form but did not date it. It bears

what appears to be a fax transmission date of April 20, 1999, and a date stamp of April 29, 1999, which may be that of the carrier.

Claimant further testified that a few weeks later she called an ombudsman at the Commission and told him she wanted to dispute the four percent IR. She indicated she had received a notice from the Commission advising her of the name of her ombudsman. Claimant conceded she had no documentation to support her statement that she made this call. She also said that she had surgery on her left shoulder in July 1999 by Dr. RL and that when she later called the Commission, she was told that Dr. L's IR had not been disputed.

In evidence is an undated letter from Dr. F stating that Dr. L gave claimant an MMI date and IR on April 30, 1999; that she underwent left shoulder surgery by Dr. RL on July 28, 1999; and that claimant "requested that this office dispute the [IR] and MMI and we did so on May 10, 1999." Dr. F's records contain a record reflecting a visit by claimant on April 29, 1999.

Also in evidence is a Commission EES-19 letter dated April 29, 1999, advising that Dr. L had determined an MMI date of March 30, 1999, and an IR of four percent, and that a dispute of these determinations must be made within 90 days after receiving notice thereof. The carrier introduced a copy of the "green card" reflecting that claimant signed for her receipt of mail on May 1, 1999. Claimant does not dispute the finding that she received the certification of MMI and the IR on May 1, 1999.

A Commission Dispute Resolution Information System (DRIS) note in evidence dated April 30, 1999, reflects that claimant called the Commission on that date for information and states as follows: "Clmt calling about MMI/IR and was given by Tr/Dr. No dispute." A DRIS note of June 4, 1999, reflects that the adjuster called to see if a designated doctor had been set and was informed that no designated doctor had been requested. A DRIS note of September 10, 1999, states that claimant called to see if a designated doctor had been set; that she was informed that the 90 days had elapsed; that claimant said she did not know she had to be the one to dispute it and that had she known, she would have done so; that her treating doctor told her "they were disputing it for her"; and that her treating doctor "brought over their dispute of the MMI/IR and dropped it off."

Rule 130.5(e) provides that the first IR assigned to an employee is considered final if not disputed within 90 days after it is assigned. The Appeals Panel has held that a treating doctor may dispute the first assigned IR for a claimant with the "involvement" of the claimant in the dispute. *See* Texas Workers' Compensation Commission Appeal No. 941195, decided October 20, 1994 (Judge Kilgore dissenting).

In addition to the dispositive conclusion, claimant challenges the sufficiency of the evidence to support findings that she disputed the certification of MMI and IR on September

10, 1999, and that she did not dispute such certification of MMI and IR within 90 days after receiving it.

Claimant had the burden to prove that she disputed Dr. L's IR within 90 days of having received written notice of it. The hearing officer is the sole judge of the weight and credibility of the evidence (Section 410.165(a)) and, as the trier of fact, resolves 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 body, 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 hearing officer resolved the conflicting evidence and determined that claimant's evidence of having timely disputed Dr. L's IR through Dr. F and through a telephone call to a Commission ombudsman was not persuasive. The testimony of a claimant, as an interested party, only raises questions of fact to be resolved and is not binding on the hearing officer. Texas Employers Insurance Association v. Campos, 666 S.W.2d 286 (Tex. App.-Houston [14th Dist.] 1984, no writ). Further, the hearing officer could consider, as he clearly did, the absence of evidence to prove when Dr. F communicated his dispute on claimant's behalf to the Commission or the carrier.

The decision and order of the hearing officer are affirmed.

Philip F. O'Neill
Appeals Judge

CONCUR:

Robert W. Potts
Appeals Judge

Gary L. Kilgore
Appeals Judge