APPEAL NO. 000515

This appeal arises pursuant to the Texas Workers= Compensation Act, TEX. LAB. CODE ANN. ' 401.001 *et seq.* (1989 Act). A contested case hearing was held on February 16, 2000. The hearing officer resolved the disputed issue by concluding that the first certification of maximum medical improvement (MMI) and impairment rating (IR) assigned by Dr. K on December 2, 1998, did not become final under Tex. W.C. Comm=n, 28 TEX. ADMIN. CODE ' 130.5(e) (Rule 130.5(e)). The appellant (carrier) requests our review, asserting the insufficiency of the evidence to support this conclusion and two underlying findings of fact. Claimant=s response urges the sufficiency of the evidence and requests our affirmance.

DECISION

Affirmed.

The parties stipulated that claimant sustained a compensable injury on _____, and that on December 2, 1998, Dr. K certified that claimant reached MMI on December 1, 1998, assigned claimant a seven percent IR, and was the first doctor to certify MMI and assign an IR.

Claimant testified that she was injured on _____, when two fingers became stuck in a grinder she was cleaning. She said she did not return to work at the place where she was injured but was later assigned to a light duty job as a temporary employee, and that she was eventually laid off. The records of Dr. K, the treating doctor, reflect that claimant sustained a crush injury to the left index finger and middle finger. Claimant mentioned that she now has reflex sympathetic dystrophy, that a finger will not bend, and that she had surgery on May 6, 1999.

Claimant further testified that in February 1999, Mr. B, apparently her supervisor, told her she had reached MMI and that she was laid off. She said that, knowing nothing about MMI, she thought it had to do with her employment and that it was the reason she was laid off. Claimant said she first received notice that Dr. K, her treating doctor, had determined that she had reached MMI with a seven percent IR when she received written notice in the mail in July 1999. Claimant said the envelope showed that it had been previously mailed to her address but had been returned to the carrier and she indicated she had been away from her residence and out of time for some two months for a family emergency. Curiously, the date that claimant disputed the seven percent IR was not established by the parties.

The carrier introduced certain records of Dr. K including a Report of Medical Evaluation (TWCC-69) stating that claimant reached MMI on December 1, 1998, with a seven percent IR; a Payment of Compensation or Notice of Refused or Disputed Claim (TWCC-21), dated January 6, 1999, which did not mention an IR but which stated, among other things, that a TWCC-69 and TWCC-21 were attached; and an undated Notification Regarding Maximum Medical Improvement and/or Impairment Rating (TWCC-28) which states that the carrier

received a report from Dr. C stating that claimant had reached MMI and was assigned a seven percent IR and further stating the amount and period she would be receiving impairment income benefits. The carrier introduced no records of Dr. C and the records of Dr. C introduced by claimant do not state an MMI date and make no mention of an IR. The carrier called no witnesses nor introduced no documents to prove when it mailed any written notification to claimant of the first assigned IR.

Rule 130.5(e) provides that the first IR assigned becomes final if not disputed within 90 days and the Appeals Panel has held that some form of written communication of the first IR assigned is required to start the 90-day period under Rule 130.5(e). Texas Workers= Compensation Commission Appeal No. 94354, decided May 10, 1994. In Texas Workers= Compensation Commission Appeal No. 950982, decided July 28, 1995, the Appeals Panel reversed and rendered a new decision that the first assigned IR had not become final under Rule 130.5(e) because the record contained no proof of the carrier=s having mailed the written notification of the first assigned IR to the claimant as the carrier had contended was done. Our opinion noted that there was no evidence by way of testimony, affidavit, or other manner that the written notification was mailed to or otherwise dispatched to the claimant and we further observed that the argument of the carrier=s counsel was not evidence. *And see* Texas Workers= Compensation Commission Appeal No. 972244, decided December 17, 1997.

The hearing officer found that claimant first received written notice of Dr. K=s certification of MMI and IR on or about July 2, 1999, which is the date the evidence established that she called her attorney about it, and that claimant first contested the certification of MMI and IR on or about September 1, 1999, which was within 90 days after receipt of written notice. While the record does not reflect the evidence relied on by the hearing officer to establish the date of claimant=s dispute, there is no appeal of the finding.

The carrier had the burden to prove by a preponderance of the evidence that claimant failed to timely dispute the first assigned IR under Rule 130.5(e). 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)). As an appellate reviewing tribunal, the Appeals Panel will not disturb a challenged factual finding of a hearing officer unless it is to against the great weight and preponderance of the evidence as to be clearly wrong or manifestly unjust and we do not find it 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:

Robert W. Potts
Appeals Judge

Thomas A. Knapp
Appeals Judge