APPEAL NO. 000592

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 March 1, 2000. The hearing officer determined that the first certification of maximum medical improvement (MMI) and impairment rating (IR) assigned by Dr. O on February 4, 1999, became final under Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE ' 130.5(e) (Rule 130.5(e)). The appellant (claimant) appeals this determination, contending that it was contrary to the great weight and preponderance of the evidence. The respondent (carrier) replies that the decision is correct, supported by sufficient evidence, and should be affirmed.

DECISION

Affirmed.

Rule 130.5(e) in effect at all times pertinent to this appeal provided 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."[1] If the IR becomes final by virtue of this rule, so does the underlying certification of MMI. Texas Workers' Compensation Commission Appeal No. 92670, decided February 1, 1993. We have also held that the 90-day dispute period is triggered by the receipt of written notice of the assignment of the IR. Texas Workers' Compensation Commission Appeal No. 94354, decided May 10, 1994.

[1]This rule was amended effective March 13, 2000, for certifications of MMI and IR that have not become final prior to that date.

The parties stipulated that Dr. O's certification on February 4, 1999, of a five percent IR and a date of MMI of February 4, 1999, was the first certification for purposes of Rule 130.5(e). The claimant has not appealed the determination that she received a copy of this certification on February 14, 1999. The claimant did not assert that she timely disputed this certification with the Texas Workers' Compensation Commission (Commission), but rather that she disputed this certification in a series of phone calls she made to Ms. Z, who worked for the third party administrator and was the adjuster then assigned to her claim. She said that she called Ms. Z on the day of the examination (February 4, 1999) to tell her how upset she was with Dr. O over the way he performed the examination and again when she received a copy of the certification. In this latter conversation, the claimant said she pointed out what she considered were errors in the report;[2] that "there were a lot of things that were on there that were not true and it was upsetting"; and that she was not in agreement with the report. She said Ms. Z told her she did not yet have a copy of the certification and could not then respond to her comments. According to the claimant, they agreed to discuss the report when Ms. Z obtained a copy. The claimant said she again called Ms. Z in February 1999 and asked what she needed to do about the report. Ms. Z then reportedly told the claimant not to worry about it and that she, the claimant, was doing exactly what she was supposed to do. Ms. Z left the employment of the carrier sometime in the summer of 1999. The claimant said she then talked to Ms. Z some two and one-half weeks before Ms. Z left to ask her what was going on with her case. She said Ms. Z told her she was overworked and underpaid and did not get a chance to "update her file." She further suggested the claimant hire an attorney. The claimant said she considered Ms. Z to be a friend.

Ms. Z did not testify. The carrier also changed third party administrators. The computer notes of Ms. Z were in evidence. No note reflects contact with the claimant on February 4 or 14, 1999. A note of February 15, 1999, reflects that Ms. Z received the certification on this date. A note of February 22, 1999, the last one for this month and quoted by the hearing officer in her decision and order, reflected that the claimant called and was "very frustrated at no relief and feels knowone (sic) has or will help her get well so she can rtw [return to work]." The note also reflects that the claimant intended to change treating doctors.[3] A note of May 4, 1999, entered by another adjuster stated: "waiting to see if ee [employee] disputes." Another adjuster noted on May 10, 1999, that there should be follow-up with the Commission on May 20, 1999, to determine if the claimant disputed Dr. O's certification. On May 28, 1999, temporary income benefits (TIBs) were stopped based on Dr. O's certification. On July 1, 1999, Ms. Z entered a note that the claimant did not dispute Dr. O's certification.

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[2]The report itself was not in evidence.

[3]Dr. O was not the claimant's treating doctor, but was selected by the carrier.

Whether and, if so, when a dispute of a first certification of IR is made is a question of fact for the hearing officer to decide. Texas Workers' Compensation Commission Appeal No. 971443, decided September 5, 1997. The hearing officer extensively discussed the evidence of the claimant and the adjusters' notes in her decision and order and properly observed that the resolution of the disputed issue depended on an evaluation of the credibility of the evidence. She concluded that the notes were more reliable than the claimant's testimony primarily because it did not make sense to her that with all the information in the adjusters' notes there would be no reference to a dispute of Dr. O's certification. She determined that the claimant failed to establish by a preponderance of the evidence that she timely disputed Dr. O's certification and that this certification became final by operation of Rule 130.5(e).

The error asserted by the claimant on appeal is that the hearing officer "found for the Carrier despite no evidence contradicting the Claimant's live testimony." Since there was evidence, that is, the adjusters' notes, that could be considered to contradict the claimant's testimony, we assume that the claimant is asserting that her testimony could only be disbelieved if Ms. Z testified and was found more credible than the claimant. We disagree. The adjusters' notes were relevant and properly admitted into evidence. Section 410.165(a) provides that the hearing officer is the sole judge of the weight and credibility of the evidence. In this case, she based her evaluation of credibility on all the evidence. We perceive no error in the hearing officer's affording more weight to the notes than to the claimant's recollection of events presented through her live testimony.

We will reverse a factual determination of a hearing officer only if that determination is so against the great weight and preponderance of the evidence as to be clearly wrong and unjust. Cain v. Bain, 709 S.W.2d 175, 176 (Tex. 1986); Pool v. Ford Motor Company, 715 S.W.2d 629, 635 (Tex. 1986). Applying this standard of review to the record of this case, we find the evidence deemed credible and persuasive by the hearing officer sufficient to support her determination that the claimant failed to timely dispute Dr. O's certification.

For the foregoing reasons, we affirm the decision and order of the hearing officer.

Alan C. Ernst
Appeals Judge

CONCUR:

Robert W. Potts

Appeals Judge

Susan M. Kelley
Appeals Judge