APPEAL NO. 000633

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 8, 2000. With regard to the only issue before him, the hearing officer determined that the first impairment rating (IR) assigned by Dr. O on July 3, 1999, became final under Tex. W.C. Comm=n, 28 TEX. ADMIN. CODE ' 130.5(e) (Rule 130.5(e)). The appellant (claimant) appeals, contending that he verbally disputed Dr. O=s IR with both respondent=s (carrier) adjuster and the Texas Workers= Compensation Commission (Commission) within 90 days and requests that we reverse the hearing officer=s decision and render a decision in his favor. The carrier appeals on several evidentiary points, asserting errors in the hearing officer=s ruling, but otherwise urging affirmance on the merits.

DECISION

Affirmed.

Claimant was employed as a delivery driver by a soft drink/snack food company and was involved in a motor vehicle accident (MVA) on _____. The parties stipulated that claimant sustained a compensable injury on that date. Claimant received conservative treatment for a low back and left knee injury. Claimant=s treating doctor in the summer of 1999 was Dr. L. Claimant completed a work hardening program on August 18, 1999.

Claimant was sent to Dr. O, carrier=s required medical examination doctor and in a Report of Medical Evaluation (TWCC-69) and narrative both dated July 23, 1999, Dr. O certified maximum medical improvement (MMI) on that date with a nine percent IR (based on five percent impairment for the back, plus one percent impairment for range of motion and three percent impairment for the left knee). It is relatively undisputed that claimant received Dr. O=s report on or about August 1 or 2, 1999. Claimant testified that around that date he called carrier=s adjuster, Ms. VC, and disputed Dr. O=s nine percent IR. Claimant also testified that around that same time he called the Commission field office and spoke with someone called (apparently Ms. SK) and disputed Dr. O=s rating and that Ms. SK told him that a designated doctor would be appointed. In addition, claimant testified that he took Dr. O=s report to Dr. L=s office and (apparently Ms. RO) said she would take care of it.

In evidence is an affidavit from Ms. VC where she denies receiving a call from claimant disputing Dr. O=s certification of the nine percent IR. Also in evidence are audiotapes of Ms. VC where she states she does not remember claimant calling to dispute the IR. The Dispute Resolution Information System (DRIS) notes in evidence show that an automated "EES19 letter" was mailed on August 5, 1999. A DRIS noted dated August 18, 1999, indicates that claimant called but only inquired about additional nerve testing. A DRIS note dated November 9, 1999, indicates Ms. VC was "calling to see if clmt ever disputed MMI/IR of 9%. I explained that EES 19 ltr was sent on 080599 and that clmt didn=t call to dispute so 90 days are up now."

Also in evidence is a signed but undated note from claimant=s physical therapist (PT) saying claimant had asked him if he "knew what a 9% [IR] meant" and a letter dated February 7, 2000, from an attorney representing claimant in his third party MVA claim stating that claimant had spoken with the attorney in "August of 1999" and:

> that after seeing [Dr. O], that you spoke with your adjuster from the worker=s compensation insurance company about a nine (9) percent rating received from that Doctor. You related to me that you disagreed with that rating, and that you told the adjuster that you disagreed with the rating. At that time, I referred you to a lawyer . . . as I did not handle workers compensation cases.

Carrier objected to the admission of this correspondence on the grounds of "hearsay," "hearsay within hearsay" and "triple hearsay." Carrier=s objections were overruled by the hearing officer. In addition, some of claimant=s answers to carrier=s interrogatories are at variance with his testimony at the CCH.

The hearing officer, in the discussion portion of his decision, commented:

> The Claimant was not a persuasive witness at the hearing; additionally, and more importantly, his allegations are not substantively supported by the documentation in evidence. Indeed, the DRIS notes of "SK=s" conversations with the Claimant, as well as the recorded statements of [Ms. RO] and [Ms. SK], (as submitted by the Claimant) and some of the Claimant=s own interrogatory answers, run distinctly counter to the material elements of the Claimant=s hearing testimony. Overall, the Claimant failed to sustain his burden of showing a dispute within 90 days of August 2, 1999.

Claimant appeals the hearing officer=s findings asserting that he had disputed the IR with Ms. VC "on August 3, 1999 & asked her what the 9% IR meant & once she explained it to me, I told her I disputed it." Claimant also contends that he disputed the nine percent IR with Ms. SK. Clearly, there is a dispute as to who said what to whom and when. Section 410.165(a) provides that the hearing officer, as finder of fact, is the sole judge of the relevance and materiality of the evidence as well as the weight and credibility that is to be given the evidence. It was for the hearing officer, as trier of fact, to resolve the inconsistencies and conflicts 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 trier of fact may believe all, part, or none of the testimony of any witness. Aetna Insurance Company v. English, 204 S.W.2d 850 (Tex. Civ. App.-Fort Worth 1947, no writ). 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 decline to substitute our opinion of the credibility of the respective witnesses for that of the hearing officer.

Carrier asserts three points of error on appeal: 1) that claimant should be prevented from presenting testimony regarding matters he has not previously identified in his answers to interrogatories (claimant explained that he had forgotten to put certain information in the interrogatories); 2) carrier=s objects to other documentary evidence on the grounds of relevance; and 3) that one of claimant=s exhibits (the PT=s note and letter from claimant=s attorney) contained hearsay and hearsay within hearsay, etc.

Our review of a hearing officer=s rulings regarding relevancy objections is one of an abuse of discretion. Texas Workers= Compensation Commission Appeal No. 92411, decided September 28, 1992. Regarding the relevancy of documentary evidence, the hearing officer is the sole judge of the relevance and materiality of the evidence and of the weight and credibility to be given the evidence. Section 410.165(a). To obtain reversal of a judgment based upon the hearing officer=s abuse of discretion in the admission or exclusion of evidence, an appellant must show that the admission or exclusion was an abuse of discretion and that the error was reasonably calculated to cause and probably did cause the rendition of an improper decision. Texas Workers= Compensation Commission Appeal No. 992078, decided November 5, 1999; *see also* Hernandez v. Hernandez, 611 S.W.2d 732 (Tex. Civ. App.-San Antonio 1981, no writ). In determining whether there has been an abuse of discretion, the Appeals Panel looks to see whether the hearing officer acted without reference to any guiding rules or principles. Morrow v. H.E.B., Inc., 714 S.W.2d 297 (Tex. 1986). The carrier has not shown and we do not find any prejudicial error in the admission of the complained-of documentary evidence. Carrier was able to effectively point out the discrepancy between claimant=s answers in the interrogatories and his testimony. As far as the hearsay objections go, Section 410.165(b) provides that the hearing officer may accept a written statement signed by the witness with the only real ground for exclusion being a lack of timely exchange. *See* Rule 142.13. Section 410.165(a) specifically provides that conformity to legal rules of evidence is not necessary. We find carrier=s appeal without merit.

Upon review of the record submitted, we find no reversible error and we will not disturb the hearing officer=s determinations unless they are so against the great weight and preponderance of the evidence as to be clearly wrong or unjust. In re King=s Estate, 150 Tex. 662, 244 S.W.2d 660 (1951). We do not so find and, consequently, the decision and

order of the hearing officer are affirmed.

Thomas A. Knapp
Appeals Judge

CONCUR:

Judy L. Stephens
Appeals Judge

Dorian E. Ramirez
Appeals Judge