

APPEAL NO. 000693

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. The issue at the CCH was whether the first certification of maximum medical improvement (MMI) and impairment rating (IR) assigned by Dr. E, on March 18, 1998, became final under 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 became final by operation of law. The appellant (claimant) appeals, requesting that we reverse the hearing officer=s decision and render a decision in her favor. The respondent (carrier) responds, urging affirmance.

DECISION

Affirmed although a finding is reversed and rendered.

The parties stipulated that the claimant suffered a compensable injury on \_\_\_\_\_. The claimant testified that she sustained this injury on \_\_\_\_\_, when she slipped and fell at work. The claimant was initially diagnosed with an injury to her left hand but also complained of left hip and low back pain. There is an incomplete Report of Medical Evaluation (TWCC-69) in the evidence. This TWCC-69 is dated March 2, 1998, and is unsigned although it shows it was prepared by Mr. B. This report does not show a date of MMI but shows an IR of seven percent. There is also in evidence a TWCC-69 dated March 18, 1998, and signed by Dr. E, the claimant's treating doctor, certifying the claimant attained MMI on February 19, 1998, with a seven percent IR. Records of the Texas Workers' Compensation Commission (Commission) show that the Commission mailed a letter informing the claimant of Dr. E's certification on April 1, 1998. The record indicates a number of contacts between the claimant and the carrier as well as the claimant and the Commission concerning the extent of the claimant's injury. The claimant testified that she orally disputed Dr. E's rating with the carrier in May 1998. The first notation in Commission records of the claimant disputing Dr. E's certification is a note of August 27, 1999. In a letter of December 19, 1998, from the claimant to the carrier, the claimant states that the fact the carrier has accepted that her injury extends beyond her left hand should entitle her to more than a seven percent IR.

The hearing officer's decision includes the following findings of fact and conclusions of law:

**FINDINGS OF FACT**

2. On March 18, 1998, [Dr. E], Claimant's treating doctor, issued a [TWCC-69] wherein he certified that Claimant had reached [MMI] on February 19, 1998 and assigned a 7% [IR].
3. [Dr. E's] 7% [IR] was the first [IR] issued for the compensable injury of \_\_\_\_\_.

4. The report of [Mr. B], issued on a TWCC-69 form, was a report of findings made by [Mr. B] for and under the direction of [Dr. E] and was not an [IR].
5. Claimant received written notice of [Dr. E's] 7% [IR] on April 6, 1998.
6. Claimant did not dispute [Dr. E's] 7% [IR] until on or about December 19, 1998.
7. Claimant disputed Carrier's denial of medical treatment for her low back and left hip in May, 1998, but did not communicate any dispute of the 7% [IR] to either Carrier or the Commission within 90 days of the date she received written notice of the [IR].

### **CONCLUSION OF LAW**

3. The first certification of [MMI] and [IR] assigned by [Dr. E] on March 18, 1998 became final under Rule 130.5(e).

Rule 130.5(e), in effect at the time, provides as follows:

The first [IR] assigned to an employee is considered final if the rating is not disputed within 90 days after the rating is assigned.

We have held that this time does not begin to run until a party has received written notice of the assignment of an IR. Texas Workers' Compensation Commission Appeal No. 951229, decided September 5, 1995. In this case, written notice of the IR was sent to the claimant by the Commission on April 1, 1998. Rule 102.5(h)<sup>1</sup> deems receipt of a notice from the Commission five days after it is mailed. The claimant was deemed to have received the April 1, 1998, notice from the Commission informing her of Dr. E's certification on April 6, 1999. The claimant testified that she disputed Dr. E's certification in May 1998, which would have been within 90 days. The hearing officer states in his decision that he does not find the claimant's testimony to this effect credible.

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 of 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

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<sup>1</sup>We note that effective August 29, 1999, this rule was changed. The new rule, Rule 102.5(d) provides that receipt is deemed five days after mailing by the Commission unless the great weight of evidence indicates otherwise.

Newark, New Jersey, 508 S.W.2d 701, 702 (Tex. Civ. App.-Amarillo 1974, no writ). The trier of fact may believe all, part, or none of the testimony of any witness. Taylor v. Lewis, 553 S.W.2d 153, 161 (Tex. Civ. App.-Amarillo 1977, writ ref'd n.r.e.); Aetna Insurance Co. v. English, 204 S.W.2d 850 (Tex. Civ. App.-Fort Worth 1947, no writ). An appeals level body is not a fact finder and does not normally pass upon the credibility of witnesses or substitute its own judgment for that of the trier of fact, even if the evidence would support a different result. National Union Fire Insurance Company of Pittsburgh, Pennsylvania v. Soto, 819 S.W.2d 619, 620 (Tex. App.-El Paso 1991, writ denied). When reviewing a hearing officer's decision for factual sufficiency of the evidence we should reverse such decision only if it is so contrary to the overwhelming weight 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 Co., 715 S.W.2d 629, 635 (Tex. 1986). This is so even though another fact finder might have drawn other inferences and reached other conclusions. Salazar v. Hill, 551 S.W.2d 518 (Tex. Civ. App.-Corpus Christi 1977, writ ref'd n.r.e.).

However, there is a note in the Commission's computer records which clearly shows that the claimant called the Commission on August 27, 1998, to dispute Dr. E's certification. In light of this, we cannot affirm the hearing officer's finding that the claimant first disputed Dr. E's certification on December 19, 1998. We have held that the claimant may dispute the first certification with either the carrier or the Commission. In light of the Commission's own records evidencing a dispute, we find the hearing officer erred in finding that the claimant first disputed Dr. E's certification on December 19, 1998, and find that the claimant disputed Dr. E's certification on August 27, 1998. However, we note that August 27, 1998, is still more than 90 days after April 6, 1998, so our reversal of the hearing officer's finding does not mandate a reversal of his decision. The decision of the hearing officer may be supported by any theory reasonably supported by the evidence. See Daylin, Inc. v. Juarez, 766 S.W.2d 347, 352 (Tex. App.-El Paso 1989, writ denied).

More troubling is the claimant's contention that Rule 130.5(e) does not apply to Dr. E's certification because it was not the first certification of IR. We have held that Rule 130.5(e) applies only to the first certification of IR and not to any subsequent certification even if the first certification was invalid. Texas Workers' Compensation Commission Appeal No. 941137, decided October 10, 1994. The hearing officer bases his decision on his finding that the TWCC-69 produced by Mr. B was not a certification at all, as it was a document produced for and under the direction of Dr. E. In this sense, the hearing officer is finding that the TWCC-69 produced by Mr. B is not a certification at all, but merely constituted the transmittal of information to Dr. E for his use in assessing IR. Under the particular facts of this case, we do not find this determination to be contrary to the great weight and preponderance of the evidence.

The decision and order of the hearing officer are affirmed.

Gary L. Kilgore  
Appeals Judge

CONCUR:

Philip F. O'Neill  
Appeals Judge

Dorian E. Ramirez  
Appeals Judge