APPEAL NO. 000714

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 February 17, 2000. The hearing officer determined that the appellant=s (claimant) left knee condition was not caused or aggravated by the compensable injury of _____, and that the first certification of maximum medical improvement (MMI) and impairment rating (IR) assessed on April 1, 1997, became final under Tex. W.C. Comm=n, 28 TEX. ADMIN. CODE ' 130.5(e) (Rule 130.5(e)) because it was not disputed within 90 days of issuance. Accordingly, he found that the claimant reached MMI on March 12, 1997, with an eight percent IR. He also found that she had the inability to obtain and retain employment at her preinjury average weekly wage (AWW) for the period from March 9 through June 10, 1997. The claimant appeals and argues how and why her left knee is part of her original injury. She states that she turned all medical records over to the ombudsman and, therefore, appeals the finding that her surgery records are not in evidence; that she did not dispute the first doctor's IR because he was not her treating doctor; and that she timely disputed the first IR of her own treating doctor. The claimant also appeals various findings of fact by countering with what she believes are the actual facts. The respondent (self-insured) responds that the decision is supported by the evidence.

DECISION

We affirm the determination that the left knee is not part of the compensable injury. We reverse and remand on the issue of finality of the first IR.

The claimant was employed as a nurse's aide by (employer) when she injured her right foot and knee on _____. She had right knee surgery on December 18, 1996, performed by Dr. B, a doctor referred by her treating doctor, Dr. S. After the claimant returned to work doing light duty in January 1997, she developed left foot problems which the self-insured accepted as part of the original injury. Apparently, she also complained of left knee pain, as well, through her period of work in February and March 1997, although this was not accepted by the self-insured. She was working light- or sedentary-duty at this time, in a wheelchair much of the time. The claimant testified as to her belief that the left knee problem was caused by pushing herself along in a wheelchair with this leg.

The claimant last worked for the self-insured on March 8, 1997. On March 19, 1997, the adjuster wrote to Dr. B and asked if the claimant's left knee and left foot problems were related to her compensable injury. If there was an answer, it is not in the record. On April 1, 1997, Dr. B completed a Report of Medical Evaluation (TWCC-69) which certified that the claimant reached MMI on March 12, 1997, with an eight percent IR. He noted in his narrative that the claimant had developed left foot pain which he believed related from overcompensating due to the right extremity pain. Apparently, Dr. S also agreed with this IR, although, according to testimony, he initially said her IR was zero percent. The claimant said that she thought she first got notice of the zero percent IR "the third month of 1997." At the end of the CCH, the hearing officer noted that there had been a question about Dr. S's IR and

asked if it was in evidence. Dr. S's notes of August 23, 1996, and April 11, 1997, simply state that a TWCC-69 was sent or faxed to the self-insured. The ombudsman said that the IR was not in evidence because it had been determined to be an "invalid" IR since it contained a prospective date of MMI. It was then offered, and self-insured=s attorney objected because of no timely exchange, although he said he had seen it. Accordingly, the hearing officer did not admit it and found no good cause for failure to exchange.

The claimant agreed that she became aware of Dr. B's report in April 1997 through letters from both the adjuster and the Texas Workers' Compensation Commission (Commission). The claimant said she called the Commission field office and talked to "Joy" who told her to get with the adjuster. The claimant did and said she asked about Dr. S's IR report. The claimant considered the letter she wrote to the adjuster on April 22, 1997, about the percentage rate to be a dispute of the first IR. This letter states:

> I'm not to [sic] good about understanding all the matters concerning workers comp. Some of it I understand.
>
> What I don't understand is [Dr. S's] report. How did he come up with the % rating he gave me. I don't remember him testing me like [Dr. B] did. When I went to [Dr. S] he didn't really know what was causing the pain in my knee. That's why he decided to send me to [Dr. B].
>
> My other question is how the wage statement was figured out.
>
> I also want to know about the claims on my L knee and L foot. Has there been any advance on the investigation? Is there anything I can do to speed this up? What are the problems?

On May 13, 1997, the adjuster responded to this letter, and another letter of May 4, 1997, said that she was having records reviewed concerning the left foot and left knee injuries and would get back to the claimant soon and further that she would have to get with Dr. S on the reasons underlying his IR. She noted that he did agree with Dr. B's eight percent IR. She explained generally how an IR was determined and that impairment income benefits were paid at 70% of the AWW. She suggested that the claimant contact her employer about checking the correctness of the wage statement.

The claimant saw Dr. Q on April 3, 1999, but said she could not remember what he told her about the relationship of her left knee to her original injury. In fact, his notes of that date reflect his opinion that the left knee "might not be a direct aftermath" of her injury, but that she may have had underlying arthritis all along that was aggravated during her rehabilitation for the right knee injury and surgery.

The claimant was given a required medical examination by Dr. H, who agreed that her left foot injury was due to increased stress on her foot, but felt that the left knee pain

represented preexisting chondromalacia. Dr. H wrote that he did not believe her compensable injury was a "producing cause" of her left knee pain.

The claimant had not returned to work since March 8, 1997, because Dr. S gave her a note to keep her off work until he released her and he had not yet released her. She agreed that she was released with respect to her right knee in June 1997. She could not recall when she was released with respect to her left foot.

One matter which may have caused some confusion in this case is that there appear to have been several claims filed by the claimant. A letter from the Commission to the claimant dated _____, refers to not only the injury in issue, but two claims of injuries occurring _____, and _____. This same letter noted that there were no valid IRs for either of the 1997 injuries.

Concerning the relationship of the left knee injury to the _____, we affirm the hearing officer's decision that they were not related. The hearing officer is the sole judge of the relevance, materiality, weight, and credibility of the evidence presented at the hearing. Section 410.165(a). The decision should not be set aside because different inferences and conclusions may be drawn upon review, even when the record contains evidence that would lend itself to different inferences. Garza v. Commercial Insurance Company of Newark, New Jersey, 508 S.W.2d 701 (Tex. Civ. App.-Amarillo 1974, no writ). It was for the hearing officer, as trier of fact, to resolve the inconsistencies and conflicts in the evidence. Garza*, supra.* 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.).

The decision of the hearing officer will be set aside only if the evidence supporting the hearing officer's determination is so weak or against the overwhelming weight of the evidence as to be clearly wrong or manifestly unjust. Atlantic Mutual Insurance Company v. Middleman, 661 S.W.2d 182 (Tex. App.-San Antonio 1983, writ ref'd n.r.e.). We do not agree that this is true with regard to the extent-of-injury question and affirm that portion of his decision.

However, we remand the decision as to the finality of Dr. B's IR. We have held before that Rule 130.5(e) acts to finalize the first chronological report of IR and does not apply to subsequent reports. Texas Workers' Compensation Commission Appeal No. 93428, decided July 5, 1993. If the first report is invalid, the finality argument is not resurrected for the next report of IR. Texas Workers' Compensation Commission Appeal No. 941137, decided October 10, 1994; Texas Workers' Compensation Commission Appeal No. 981875, decided September 23, 1998. A report certifying a prospective date of MMI is invalid. Texas Workers' Compensation Commission Appeal No. 941098, decided September 29, 1994.

Where evidence comes forward indicating that the report whose finality is being asserted may not be the first chronological report, it is error to find that the report being adjudicated became final under Rule 130.5(e). Here, there was testimonial evidence that the claimant received a report of IR from Dr. S in March 1997 before Dr. B's report was issued. The hearing officer commendably sought to complete the record in accordance with Section

410.161 by asking that the IR report of Dr. S be offered. The self-insured's attorney conceded that self-insured was aware of this report (indeed, it is required to be sent to the self-insured under Rule 130.1(h)) but, nevertheless, objected for failure to exchange. As it turned out, neither party had exchanged this report, although it would clearly seem to fall under the requirement to exchange all medical records and reports as stated in Section 410.160(1) and (2), and it further appeared to be within the control or possession of each party. It would appear to us that the relaxation of the rules of evidence and the exchange requirements are to ensure that benefits decisions are made upon fully developed facts so that important facts directly bearing on the matters to be adjudicated are not omitted through trial tactics and strategy.

We hold that good cause for the admission of the report of Dr. S can be found in: (1) the mutual nondisclosure of the TWCC-69 which is critical to determination of the legal issue by both parties that each was required to exchange; and (2) the fact that the hearing officer, in order to correctly apply Rule 130.5(e), must ensure that the report of Dr. B is the "first" report of IR.

We, accordingly, reverse and remand so that the hearing officer may fully develop the facts and apply the law regarding whether the report of Dr. B is a report that may be finalized under Rule 130.5(e). Whether Dr. S's report was generated due to other claims for injury should also be clarified.

Pending resolution of the remand, a final decision has not been made in this case. However, since reversal and remand necessitate the issuance of a new decision and order by the hearing officer, a party who wishes to appeal from such new decision must file a request for review not later than 15 days after the date on which such new decision is received from the Commission=s Division of Hearings, pursuant to Section 410.202. *See* Texas Workers' Compensation Commission Appeal No. 92642, decided January 20, 1993.

Susan M. Kelley
Appeals Judge

CONCUR:

Gary L. Kilgore
Appeals Judge

CONCUR IN RESULT:

Alan C. Ernst
Appeals Judge