

APPEAL NO. 000988

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 April 3, 2000. The hearing officer determined that the first certification of maximum medical improvement (MMI) and impairment rating (IR) assigned by Dr. L on August 28, 1999, did not become final under Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 130.5(e) (Rule 130.5(e)). The appellant (claimant) appealed, pointing out contradictions between the adjuster's testimony and the Dispute Resolution Information System (DRIS) notes. Claimant contends that respondent (carrier) verbally withdrew its dispute of a 31% IR. Claimant requests that we reverse the hearing officer's decision and render a decision in her favor. Carrier responded, urging affirmance.

DECISION

Affirmed.

The issue in this case is whether carrier verbally withdrew its dispute of a 31% IR. The issue is confused by the fact that claimant had an injury on _____ (the 1998 injury which is not at issue here), to her left hand, wrist, and shoulder. Claimant testified that she lost no time from that injury although she may have been paid some income benefits. Claimant sustained another compensable injury on _____ (the 1999 injury at issue here), to her low back and hip. A Workers Compensation First Report of Injury or Illness (Form 1A-1) in evidence references a "_____" date of injury for a contusion of the lower arm. Claimant began treating with Dr. L and testified that Dr. L was treating both the 1998 and 1999 injuries. In evidence is a Report of Medical Evaluation (TWCC-69) dated August 28, 1999, and a narrative dated August 26, 1999. The TWCC-69 references a "_____" date of injury while the narrative lists "Date of Injury/Onset: _____." The IR deals with hip and lumbar impairment. Dr. L certified MMI on August 26, 1999, with a 31% IR. Although not in evidence, there was testimony that MMI for the 1998 injury was certified on July 30, 1999, with a nine percent IR.

In evidence is a Notice of Maximum Medical Improvement/Impairment Rating Dispute (TWCC-32) dated September 1, 1999, referencing the 1999 injury and stating that the TWCC-69 was received on September 1, 1999. In block 10, entitled "Type of Dispute," the box stating "Date of [MMI] and [IR]" is checked. However, below that entry, beside another unchecked box entitled "other" is the notation "This is a duplicate injury of _____" (the form states 1999 but probably means 1998). The "MMI/IR that is being disputed" is the treating doctor's MMI of August 26, 1999, and 31% IR, but block 12 "Selection of Designated Doctor Needed" is marked "no." The form is signed by (Ms. C), carrier's senior case manager. Ms. C testified at the CCH that her extension is 2510. In evidence is a DRIS note dated October 1, 1999 which states:

MRF// X2510 Adjustor, [Ms. C], called to say that TWCC-32 submitted did not have box checked requesting DD be set. Carrier says this injury date was deemed a duplicate file and all medical and benefits were being paid off the other claim. DOI for other claim is _____. Adjustor requesting their dispute of MMI/IR be withdrawn if it means it will go to a DD. They do not want to go to DD because they have not accepted this as a new injury but part of the _____ injury. Forwarding to PW for cancellation of DD appointment.

Ms. C testified that she did not call the Texas Workers' Compensation Commission (Commission) on or about October 1, 1999; did not withdraw carrier's dispute of Dr. L's 31% IR; and did not request that the designated doctor's appointment be canceled. Also in evidence is another DRIS note dated October 4, 1999, which states:

Recd req from FOM to call & cancel DD appt w/B on 101199 called & spoke to C . . . told her to cancel DD appt for 101199 . . . told her I would send out cancellation notices . . . sent to all parties.

In evidence is a letter dated October 4, 1999, from the Commission to the parties notifying the parties that claimant's appointment with the designated doctor was canceled. Ms. C testified that she did not receive that letter and was unaware that the designated doctor's appointment was canceled until the benefit review conference on March 1, 2000. Ms. C also filed an affidavit stating that Dr. L's TWCC-69 assigning a 31% IR "was never withdrawn, either verbally or in writing, by me or anyone else on behalf of [carrier]."

The hearing officer, in her Statement of the Evidence, commented that the October 1, 1999, DRIS note is unclear as to "what' would go to the designated doctor – the 31% or the 9% [IR]." The hearing officer concluded by saying:

The DRIS note of October 1, 1999 is confusing and is not absolutely clear that Carrier did without a doubt withdraw a dispute of the 31% [IR] for an injury of _____. There is too much left to speculation due to the wording of the note. It does not make sense that a Carrier would withdraw the dispute of 31%. Claimant failed to sustain her burden to prove by a preponderance of the evidence that Carrier withdrew its dispute on October 1, 1999. Therefore a designated doctor should evaluate the injury sustained on _____.

Claimant, in her appeal, points out the discrepancies between Ms. C's testimony and the October 1, 1999, DRIS note, and that the nine percent IR (for the 1998 injury) was not at issue; and questions Ms. C's testimony that Ms. C never received the cancellation notice of the designated doctor's appointment. Claimant, in referring to the various inconsistencies and contradictions, states several times that the Appeals Panel "cannot rule this information is correct." We do not rule whether information, testimony, or evidence is correct or not. Our standard of review is whether the hearing officer's decision

is so against the great weight and preponderance of the evidence as to be clearly wrong and manifestly unjust. 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). In this case, the hearing officer obviously believed Ms. C's testimony and found the DRIS note (and the TWCC-32) unclear. It was within the hearing officer's province to assign weight and credibility to the evidence.

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.

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:

Philip F. O'Neill
Appeals Judge

Dorian E. Ramirez
Appeals Judge