APPEAL NO. 001158

This appeal arises pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act). A contested case hearing was held on April 28, 2000. The hearing officer determined that the first certification of maximum medical improvement (MMI) and impairment rating (IR) assigned by Dr. S became final under Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 130.5(e) (Rule 130.5(e)). The appellant (claimant) appealed, contending that the evidence established that he disputed the IR certification of Dr. S within 90 days of receiving it as required by Rule 130.5(e) and that the certification would not be final had the hearing officer properly applied Rule 130.5(f). The respondent (carrier) responded, arguing that there was sufficient evidence to support the hearing officer's determination that the claimant did not timely dispute Dr. S's certification and that Rule 130.5(f) does not apply in the present case.

DECISION

Finding sufficient evidence to support the decision of the hearing officer and no reversible error in the record, we affirm the decision and order of the hearing officer.

It was undisputed that the claimant suffered a compensable injury on _____. The parties stipulated that on July 30, 1999, Dr. S certified that the claimant reached MMI on June 25, 1999, with a zero percent IR and that Dr. S was the first doctor to certify MMI and IR. The carrier presented evidence that it sent notice of Dr. S's certification to the claimant by both certified and regular mail and that the post office notified the claimant on August 19, 1999, of the certified letter. The certified letter was returned to the carrier unclaimed after three postal notices but the regular mail copy was never returned. The carrier sent the notices to the same address at which the claimant received benefit checks. The claimant testified that he never received notice of Dr. S's certification until December 28, 1999. The claimant contends that he then timely disputed Dr. S's certification.

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

FINDINGS OF FACT

2. The claimant received [Dr. S's] certification of [MMI] and [IR] on August 19, 1999.

3. The claimant disputed [Dr. S's] certification of [MMI] and [IR] on January 25, 2000.

4. The claimant did not dispute the initial certification of [MMI] and [IR] within 90 days of its receipt.

CONCLUSION OF LAW

3. The first certification of [MMI] and [IR] assigned by [Dr. S] became final under Rule 130.5(e).

The version of Rule 130.5(e) which was in effect prior to March 13, 2000, 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, there is conflicting evidence as to when the claimant first received written notice. When notice was received is a factual matter. Section 410.165(a) provides that the contested case 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 Newark, New Jersey, 508 S.W.2d 701, 702 (Tex. Civ. App.-Amarillo 1974, no writ). This is equally true regarding medical evidence. Texas Employers Insurance Association v. Campos, 666 S.W.2d 286, 290 (Tex. App.-Houston [14th Dist.] 1984, 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).

Applying this standard, we find sufficient evidence to support the hearing officer's finding that the claimant received written notice on August 19, 1999. The hearing officer reasoned that the claimant would have received the letter sent by regular mail on the same day that the post office sent the first notice of the certified letter. We believe this is an inference that the hearing officer could draw from the evidence and we do not find error in this finding as a matter of law. While there was also conflicting evidence as to when the claimant first disputed Dr. S's certification, the claimant argues that the earliest date of dispute was December 28, 1999, the date he asserts he first became aware of the certification. Clearly, December 28, 1999, is more than 90 days after August 19, 1999.

The claimant argues that the new version of Rule 130.5(e), which became effective on March 13, 2000, applies in the present case. The new Rule 130.5(e) provides certain

exceptions to the finality of the first certification. However, the hearing officer refused to apply the new Rule 130.5(e) based upon his finding that Dr. S's certification had become final prior to the effective date of new Rule 130.5(e). This is exactly what Rule 130.5(f) provides when it states as follows:

> This rule applies to certifications of MMI and [IRs] that have not become final prior to the effective date of this rule.

The decision and order of the hearing officer are affirmed.

Gary L. Kilgore
Appeals Judge

CONCUR:

Dorian E. Ramirez
Appeals Judge

Judy L. Stephens
Appeals Judge