APPEAL NO. 001558

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 June 15, 2000. The record was closed on June 25, 2000. The hearing officer determined that the impairment rating (IR) of 12% issued by Dr. S dated April 1, 1999, became final under Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 130.5(e) (Rule 130.5(e)). The appellant (claimant) appealed the findings of fact that she did not dispute Dr. S's certification before March 30, 2000, and that Dr. S's certification was the claimant's first certification of IR and maximum medical improvement (MMI) on the grounds of insufficiency of the evidence. The claimant contended that the hearing officer erred in not applying Rule 130.5(e) as it existed in its amended form as of March 13, 2000. The respondent (carrier) urged, in response, that the evidence was sufficient to support the challenged findings of fact and conclusion of law and that the hearing officer correctly applied the proper version of Rule 130.5(e).

The findings that Dr. S certified the claimant at MMI on March 30, 1999, with a 12% IR and that the claimant received notice of Dr. S's certification no later than April 8, 1999, were not appealed and have become final by operation of law. Section 410.169.

DECISION

Affirmed.

The claimant testified she received a letter on April 8, 1999, from the Texas Workers' Compensation Commission (Commission) dated April 6, 1999, which informed her that Dr. S, her treating doctor, had certified her at MMI as of March 30, 1999, with an IR of 12%. She contended that on April 8, 1999, she called the _____ field office of the Commission and spoke with Ms. C and specifically disputed Dr. S's certification of MMI and IR. The claimant testified that, in addition to Ms. C, she spoke with the carrier's adjuster, Ms. T, on the telephone on the same day to dispute the certification of MMI and IR and asked for another doctor to treat her left knee.

Additionally, the claimant contended that since she had been certified at MMI by Dr. S her knee had deteriorated which necessitated a total knee replacement. She urged that Rule 130.5(e), as amended on March 13, 2000, should be controlling because she had received inadequate medical treatment which prevented the certification from becoming final. However, she admitted that as of the certification date, Dr. S had discussed the possibility of surgery in the future which ultimately was performed on January 3, 2000.

Records admitted at the CCH reflect that Dr. S's certification of MMI and IR was the first certification of IR and MMI by a doctor. A Dispute Resolution Information System (DRIS) contact note dated April 8, 1999, indicates that the claimant spoke to Ms. C on this date and the following entry was made to memorialize the conversation:

> I/w called and ask if the job had to give her lite duty now that she has reached MMI, no. She ask if they could fire her, yes. Exp that Tx at will state. She states that her dr has said that at some point in time that she will need total knee replacement and she would not get paid while off. Exp MMI.

Other DRIS notes which were entered prior to July 9, 1999, do not reflect that the claimant had any other conversations with Commission employees or the carrier's adjuster regarding MMI and IR. The first entry specifically disputing the MMI and IR by Dr. S is contained in a DRIS note dated March 30, 2000. The carrier introduced the claimant's answers to interrogatories, specifically Answer No. 13, which asked when and to whom she disputed Dr. S's certification. The claimant answered that she spoke to Ms. C on April 8, 1999, and mailed a dispute to Ms. T on July 6, 1999, and sometime prior to June 23, 1999.

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 did not believe the claimant's testimony and found the DRIS note and the claimant's answer to the interrogatory to be persuasive as to the conversation between the claimant and Ms. C on April 8, 1999, and communication with the carrier. 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 just. 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 witness for that of the hearing officer and will not disturb his finding that the claimant failed to dispute Dr. S's certification of MMI and IR prior to March 30, 2000.

The claimant argues that her date of MMI and IR did not become final prior to the "new" Rule 130.5(e) becoming effective in its current amended form. The new Rule 130.5(e) became effective on March 13, 2000, for certification that became final on or after this date. We have declined to reverse the determination of finality ordered by the hearing officer. Therefore, the provisions of the "new" Rule 130.5(e), which specifically provide an exception to finality due to improper or inadequate medical treatment, are not controlling, and the version of the "old" Rule 130.5(e) as it existed on July 9, 1999 (the expiration of 90 days after April 8, 1999), must be applied. We previously recognized an exception to the finality provision of the "old" Rule 130.5(e) in circumstances where there was a clear misdiagnosis or improper medical treatment; however, in Rodriguez v. Service Lloyds Insurance Company, 997 S.W.2d 248 (Tex. 1999), the Texas Supreme Court held that the

"old" Rule 130.5(e) did not include exceptions and further determined that the exceptions created by the Commission were invalid. Accordingly, no basis exists for avoiding the finality provision of the "old" Rule 130.5(e) when the certification of Dr. S became final, even if the claimant had received improper or inadequate medical treatment since that time. *See* Texas Workers' Compensation Commission Appeal No. 992214, decided November 18, 1999 (Unpublished).

The hearing officer's decision and order are affirmed.

Kathleen C. Decker
Appeals Judge

CONCUR:

Alan C. Ernst
Appeals Judge

Robert E. Lang
Appeals Panel
Manager/Judge