APPEAL NO. 001990

Following a contested case hearing (CCH) held on August 3, 2000, pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act), the hearing officer, resolved the disputed issue by determining that the first certification of maximum medical improvement (MMI) and impairment rating (IR) had not become final pursuant to Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 130.5(e) (Rule 130.5(e)). The appellant (carrier herein) files a request for review arguing that the hearing officer erred in finding that the respondent (claimant herein) did not receive written notice of the first certification until March 20, 2000. There is no response to the carrier's request for review from the claimant in the appeal file.

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.

The hearing officer summarized the evidence in her decision and we adopt her rendition of the evidence. We will only briefly summarize the evidence germane to the appeal. The parties stipulated that the claimant sustained a compensable injury and that on September 13, 1999, Dr. L certified that the claimant reached MMI on September 8, 1999, with a zero percent IR. The parties also stipulated that Dr. L was the first doctor to certify MMI/IR. The claimant testified that he never received Dr. L's certification and first became aware of it when he telephoned the Texas Workers' Compensation Commission (Commission) in March 2000. A Commission computer record in evidence shows this conversation took place on March 13, 2000. There is an additional Commission computer record showing the claimant came by the offices of the Commission on March 20, 2000, to discuss Dr. L's certification.

The carrier presented evidence that it mailed a copy of Dr. L's certification to the claimant and that this letter was signed for by Ms. S on October 15, 1999. The claimant testified that Ms. S is his former wife and that they were divorced in 1994. The claimant testified that he does not live with Ms. S. An affidavit in evidence from Ms. S states that she did not give the claimant a copy of the letter from the carrier. Further there was evidence that the Commission was using the same address for the claimant as the one to which the carrier mailed Dr. L's certification and the Commission used this address even after Commission records indicated that this was not the claimant's address. It was undisputed that the claimant first disputed Dr. L's certification on May 16, 2000.

Rule 130.5(e) provides that the first impairment rating 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 the hearing officer found that the claimant first received written notice of Dr. L's first certification on March 20, 2000. 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).

There is sufficient evidence in the testimony of the claimant and the computer records of the Commission in evidence to support the hearing officer's factual finding. The carrier relies upon the fact that it sent the claimant a copy of Dr. L's rating to an address for the claimant which it was provided by the employer and that Ms. S signed for this letter. The carrier argues that the present case is similar to Texas Workers' Compensation Commission Appeal No. 980677, decided May 12, 1998. In that case we affirmed a decision of a hearing officer that a first certification of IR had become final pursuant to Rule 130.5(e) when there was evidence that the carrier mailed a copy of the certification to the claimant, that the claimant's fiancée signed for the letter, and that the claimant did not dispute the certification within 90 days. We find the carrier's reliance upon Appeal No. 980677 misplaced. First, both these cases turn on whether there is sufficient evidence to support factual findings by hearing officers. Merely because the hearing officer in Appeal No. 980677 found that the claimant received notice of certification of IR when his fiancée received the letter from the carrier does not mean that the hearing officer in the present case had to factually find that the claimant received notice when his former wife signed for a similar letter. Also, there are factual distinctions between the cases. For instance in Appeal No. 980677 the claimant had been living at the address to which the carrier mailed the letter, but was temporarily out of state. In the present case, there was evidence from the claimant that he was not living with his former spouse from whom he had been divorced since 1994. In the present case, we find sufficient evidence to support the hearing officer's factual finding that the claimant did not receive written notice of Dr. L's certification until March 20, 2000.

The decision and order of the hearing officer are affirmed.

Gary L. Kilgore
Appeals Judge

CONCUR:

Kenneth A. Huchton
Appeals Judge

Susan M. Kelley
Appeals Judge