APPEAL NO. 002457

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 October 10, 2000. The hearing officer determined that the first certification of maximum medical improvement (MMI) and impairment rating (IR) assigned by Dr. S on April 7, 1999, became final under Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 130.5(e) (Rule 130.5(e)). The appellant (claimant) appealed on the grounds of sufficiency of the evidence. The respondent (carrier) filed an appeal replying that the evidence was sufficient to support the determination of the hearing officer and should be affirmed.

DECISION

Affirmed.

The parties stipulated that the claimant sustained a compensable injury on _____, and that on April 7, 1999, Dr. S certified that the claimant reached MMI on April 2, 1999, with a 5% IR. Dr. S was the first doctor to certify MMI and assign an IR.

Rule 130.5(e), prior to its amendment on March 13, 2000, provided that "[t]he first [IR] assigned to an employee is considered final if the rating is not disputed within 90 days after the rating is assigned." The 90-day time period for disputing the first IR runs from the date the party received written notice of the rating. Texas Workers' Compensation Commission Appeal No. 94365, decided May 11, 1994; Texas Workers' Compensation Commission Appeal No. 960249, decided March 25, 1996.

A Texas Workers' Compensation Commission (Commission) entry contained in the Dispute Resolution Information System (DRIS) contact data notes dated March 15, 1999, reflects that a Commission employee spoke with the claimant's husband to verify the claimant's address and that the claimant herself called back on March 16, 1999, verifying her address as correct. On March 30, 1999, the claimant again contacted the Commission to advise that she would be out of the country for the next three months. The claimant, in return, was advised that Dr. S could assign her an MMI and IR while she was gone and that she should be aware of the rule requiring that she make a dispute within 90 days of receipt of written notice of the MMI date and IR.

Commission DRIS notes reflect that written notice of Dr. S's MMI date of April 2, 1999, and IR of 5% was sent to the claimant by a EES-19 letter dated April 13, 1999, to her address of record with the Commission. The next DRIS entry indicating contact with the claimant again, occurred on October 1, 1999, in which the claimant notified the Commission that she was receiving unemployment benefits and wanted to know how these benefits worked in relation to her workers' compensation benefits, specifically whether the carrier would resume paying income benefits. Dr. S's report was discussed and the claimant was told that her income benefits had been paid in full through July 16, 1999. The entry does not contain specific wording that the claimant was disputing Dr. S's report of

April 2, 1999. The hearing officer could have interpreted this computer entry as not containing a dispute of Dr. S's report of April 7, 1999. There are other DRIS entries through December 13, 1999, which document a change of treating doctor, but they do not evidence a response from the claimant disputing Dr. S's report. The hearing officer found that the claimant disputed Dr. S's MMI date and IR after December 13, 1999.

At the CCH, the claimant testified that because she was out of the country she did not open her mail from the Commission until she returned on July 6, 1999. She acknowledged that she received mail from her husband while she was out of the country which included a letter and a check from the carrier. The claimant asserted that she made a dispute with the Commission about a week after July 6, 1999. The DRIS notes from the Commission do not reflect any contact with the claimant at this time. The claimant stated that she did not contact the Commission again until October 1999 because she did not believe it to be important.

Rule 102.5(d) states that for purposes of determining the date of receipt for written communications sent by the Commission which require the recipient to perform an action by a specific date after receipt, unless the great weight of the evidence indicates otherwise, the Commission shall deem the received date to be five days after the date mailed. Five days after April 13, 1999, is April 18, 1999. Rule 102.3(e) provides that, "[u]nless otherwise specified by rule, any written or telephonic communications required to be filed by a specified time will be considered timely only if received prior to the end of normal business hours on the last permissible day of filing." In the present case, the hearing officer found that the claimant did not file a dispute with the Commission or the carrier within 90 days of April 18, 1999, or within 90 days of July 6, 1999.

The hearing officer is the trier of fact and is the sole judge of the relevance and materiality of the evidence and of the weight and credibility to be given to the evidence. Section 410.165(a). The trier of fact may believe all, part, or none of any witness's testimony. Taylor v. Lewis, 553 S.W.2d 153 (Tex. Civ. App.-Amarillo 1977, writ ref'd n.r.e.); Texas Workers' Compensation Commission Appeal No. 93426, decided July 5, 1993.

In a case such as the one before us where both parties presented evidence on the disputed issue, the hearing officer must look at all of the relevant evidence to make factual determinations and the Appeals Panel must consider all of the relevant evidence to determine whether the factual determinations of the hearing officer are so against the great weight and preponderance of the evidence as to be clearly wrong or unjust. Texas Workers' Compensation Commission Appeal No. 941291, decided November 8, 1994.

An appeals-level body is not a fact finder, and it does not normally pass upon the credibility of witnesses or substitute its own judgement for that of the trier of fact even if the evidence could 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). Only were we to conclude, which we do not in this case, that the hearing officer's determinations were so against the great weight and preponderance of the evidence as to

be manifestly unjust would there be a sound basis to disturb those determinations. In re King's Estate, 150 Tex. 662, 224 S.W.2d 660 (1951); Pool v. Ford Motor Company, 715 S.W.2d 629, 635 (Tex. 1986). Since we find the evidence sufficient to support the determinations of the hearing officer, we will not substitute our judgement for hers. Texas Workers' Compensation Commission Appeal No. 94044, decided February 17, 1994.

We affirm the hearing officer's decision and order.

Kathleen C. Decker
Appeals Judge

CONCUR:

Susan M. Kelley
Appeals Judge

Judy L. Stephens
Appeals Judge