APPEAL NO. 002791

Following a contested case hearing held in Tyler, Texas, on November 14, 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 impairment rating (IR) assessed by Dr. S did 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's finding that the respondent (claimant herein) did not receive written notification of Dr. S's certification until April 1998 was contrary to the evidence. There is no reply 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 parties stipulated that the claimant sustained a compensable injury on _____. It was undisputed that Dr. S certified maximum medical improvement (MMI) and IR on a Report of Medical Evaluation (TWCC-69) dated June 23, 1997, and that this was the first certification of MMI and IR. The claimant testified that she did not receive written notice of Dr. S's certification until April 1998, and records of the Texas Workers' Compensation Commission (Commission) show that the claimant disputed Dr. S's certification on April 15, 1998. The claimant testified that she did receive a Notification Regarding Maximum Medical Improvement and/or Impairment Rating (TWCC-28) from the carrier at some point, but also testified that no TWCC-69 was attached to the TWCC-28.

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

FINDINGS OF FACT

2. On June 23, 1997, [Dr. S] prepared a TWCC-69 certifying MMI as of June 16, 1997 with an IR of 0%.
3. [Dr. S's] TWCC-69 was the first certification of MMI and IR.
4. Claimant first received written notification of [Dr. S's] assignment in April, 1998.
5. Claimant disputed [Dr. S's] assignment of MMI and IR on April 15, 1998, less than 90 days after she received notification of the assignment.

CONCLUSIONS OF LAW

3. The first certification of [MMI] and [IR] assigned by [Dr. S], M.D. on June 23, 1997 did not become final under Rule 130.5(e).

Rule 130.5(e) provides that 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. The claimant denies receiving this notice until April 1998. The carrier argues that other evidence showed the claimant received written notice of Dr. S's certification prior to this.

There was conflicting evidence concerning when the claimant first received written notice of Dr. S's certification. 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). 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 of review, we find sufficient evidence that the claimant did not receive written notice of Dr. S's certification until April 1998 and that she timely disputed Dr. S's certification of MMI and IR within 90 days of receiving written notice of it.

The decision and order of the hearing officer are affirmed.

Gary L. Kilgore
Appeals Judge

CONCUR:

Susan M. Kelley
Appeals Judge

Robert W. Potts
Appeals Judge