APPEAL NO. 010902
FILED JUNE 6, 2001

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 February 13, 2001. The hearing officer resolved the disputed issues by determining that the respondent (claimant) reached maximum medical improvement (MMI) by operation of law July 3, 2000, with an impairment rating (IR) of 20%. The hearing officer further resolved that the initial assessment of the claimant's MMI and IR issued September 22, 1999, did not become final under Tex. W.C. Comm'n 28 TEX. ADMIN. CODE § Rule 130.5 (Rule 130.5). The appellant (self-insured) appeals and seeks reversal on sufficiency grounds and because of irregularities with respect to the evidence after the adjournment of the CCH. The claimant responds and requests that the hearing officer's decision and order be affirmed.

DECISION

Affirmed in part, reversed and remanded in part.

The hearing officer did not err in deciding that the claimant's original certification of IR issued September 22, 1999, did not become final under Rule 130.5. Evidence introduced at the hearing, including the written dispute filed by the claimant's treating doctor and the testimony of both the claimant and the treating doctor, supports the hearing officer's determination that the September 22, 1999, certification was timely disputed by the treating doctor, acting on behalf of the claimant,[1] in accordance with Rule 130.5. The parties presented evidence that genuinely conflicts on the issue of whether the first certification and IR became final pursuant to Rule 130.5. Pursuant to Section 410.165(a), the hearing officer is the sole judge of the weight and credibility of the evidence. The hearing officer resolves the conflicts and inconsistencies in the evidence and determines what facts have been established from the conflicting evidence. Garza v. Commercial Insurance Company of Newark, New Jersey, 508 S.W.2d 701 (Tex. Civ. App.-Amarillo 1974, no writ); St. Paul Fire & Marine Insurance Company v. Escalera, 385 S.W.2d 477 (Tex. Civ. App.-San Antonio 1964, writ ref'd n.r.e.).

We agree that the hearing officer erred in not offering the parties an opportunity to respond to the additional evidence from the designated doctor before writing her decision. At the end of the CCH, the hearing officer noted that she would hold the record open to determine what further action needed to be taken with respect to the alleged deficiencies in the designated doctor's report. The hearing officer apparently contacted the designated doctor and asked that she clarify a few things that had been disputed by the self-insured at the CCH. The hearing officer did not include a copy of her letter to the designated doctor in the record.

[1]We have held that it is appropriate for the treating doctor to dispute the certification of the claimant's MMI and IR on behalf of the claimant. *See* Texas Workers' Compensation Commission Appeal No. 990790, decided May 19, 1999, and cases cited therein.

The designated doctor responded to the hearing officer, who then added the designated doctor's response with attachments to the CCH record as Hearing Officer's Exhibit No. 2. Then, the hearing officer wrote her decision, in favor of the claimant, on April 9, 2001. It was not until after writing her decision that she sent the parties a copy of the designated doctor's response in an envelope postmarked April 11, 2001, without having previously allowed the parties to comment on or object to the new evidence presented by the designated doctor.

The self-insured objected at this point and asked that the CCH be reopened, a request which was denied by the hearing officer. While we do not believe that the clarification letter was the only evidence in support of the decision on MMI and IR, the hearing officer's actions in this regard violated due process. We have previously held that it is reversible error to solicit a response from a designated doctor and write an opinion based thereon without having afforded the parties the opportunity to comment on the additional evidence. Texas Workers' Compensation Commission Appeal No. 93323, decided June 9, 1993.

Therefore, we reverse and remand to the hearing officer to reopen the evidence, include her letter to the designated doctor in the evidence, send both her letter and the designated doctor's response to the parties, and allow them a time certain to respond and comment on the evidence. The hearing officer may choose to reconvene the CCH with the parties present. We will not consider the points of error raised about the designated doctor's report at this time, pending the outcome of the remand and any subsequent appeal thereof.

The self-insured argues that statements allegedly made by the claimant to the self-insured after the hearing should be considered in assessing the credibility of the claimant. As with all evidence presented for the first time on appeal, this panel will not address those statements as they were not before the hearing officer, nor does it appear that consideration of these notations without reference to author or speaker would compel a different result.

For the reasons cited above, the hearing officer's decision and order is affirmed in part, and reversed and remanded in part.

Pending resolution of the remand, a final decision has not been made in this case. However, since reversal and remand necessitate the issuance of a new decision and order by the hearing officer, a party who wishes to appeal from such new decision must file a

request for review not later than 15 days after the date on which such new decision is received from the Texas Workers' Compensation Commission's Division of Hearings, pursuant to Section 410.202. *See* Texas Workers' Compensation Commission Appeal No. 92642, decided January 20, 1993.

Susan M. Kelley
Appeals Judge

CONCUR:

Judy L. S. Barnes
Appeals Judge

Philip F. O'Neill
Appeals Judge