APPEAL NO. 012141
FILED OCTOBER 22, 2001

This appeal arises pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act). Following a contested case hearing held on August 15, 2001, the (hearing officer) resolved the sole disputed issue by concluding that the first certification of maximum medical improvement (MMI) and the impairment rating (IR) assigned by Dr. B on October 5, 2000, did not become final under Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 130.5(e) (Rule 130.5(e)). The appellant (carrier) has appealed this determination on sufficiency of the evidence grounds and also asserts error in the hearing officer's admission into evidence of two affidavits. The file does not contain a response from the respondent (claimant).

DECISION

Affirmed.

Rule 130.5(e) provides in part that the first certification of MMI and IR assigned to an employee is final if the certification of MMI and/or the IR is not disputed within 90 days after written notification of the MMI and IR is sent by the Texas Workers' Compensation Commission (Commission) to the parties, as evidenced by the date of the letter, unless based on compelling medical evidence the certification is invalid for certain stated reasons. The parties stipulated that on October 5, 2000, Dr. B assigned the first certification of MMI and IR that the claimant had a zero percent IR and reached MMI on October 5, 2000, and that the Commission mailed written notification of Dr. B's October 5, 2000, report to the claimant on November 2, 2000, which was deemed to have been received on November 7, 2000, pursuant to Rule 102.5(d). The carrier disputes findings that on December 12, 2000, the claimant disputed Dr. B's MMI date and IR and that such dispute was timely.

The claimant testified that in October 2000, his treating doctor, Dr. H, annotated Dr. B's Report of Medical Evaluation (TWCC-69) to reflect his disagreement with the MMI date and IR; that Dr. H discussed Dr. B's MMI date and IR with him and referred him to Dr. M for a second opinion; that after Dr. M reported his disagreement to Dr. H, Dr. H, during an office visit on December 12, 2000, again discussed the MMI date and IR with the claimant; and that while still at Dr. H's office on that date, he called the Commission and advised the employee he spoke with of his dispute of Dr. B's MMI date and IR. The claimant was able to recall the name of the Commission employee he spoke with, notwithstanding that there was an absence of Dispute Resolution Information System notes on his claim during an approximately four-month period, including December 2000.

The carrier objected to the admission into evidence of the affidavits of Dr. H and his office administrator, Ms. L, concerning Dr. H's having discussed Dr. B's MMI date and IR with the claimant on December 12, 2000, and the claimant's having called the Commission from Dr. H's office on that date. The carrier urged that the affidavits had not been timely exchanged because the benefit review conference (BRC) was held on May 1, 2000, and

the affidavits were dated June 13, 2000, a date well beyond the 15-day period for discovery exchange provided for in Rule 142.13(c). After listening to the claimant's explanation for his failure to have obtained and exchanged the affidavits within 15 days of the BRC, and the carrier's argument, the hearing officer stated merely that she found "good cause" without specifying just what such good cause consisted of, and admitted the affidavits. Obviously, it does not well serve the appellate review process for a hearing officer to state that good cause is found without articulating what constitutes such good cause. Since the hearing officer failed to articulate the nature or substance of the good cause she found, we are unable to review her ruling for abuse of discretion. However, we are satisfied that the admission of these affidavits did not probably result in the rendition of an erroneous decision. The affidavits only corroborated, in part, the claimant's testimony about his dispute of Dr. B's MMI date and IR to the Commission by telephone on December 12, 2000, from Dr. B's office and to that extent were cumulative of the testimony and not controlling. While the hearing officer's discussion of the evidence does mention the claimant's call to the Commission, the hearing officer did not even comment on the content of the affidavits. We thus conclude that the hearing officer's ruling, if erroneous, was not reasonably calculated to cause and probably did not cause the rendition of an improper decision and thus does not constitute reversible error. Gee v. Liberty Mutual Fire Insurance Company, 765 S.W.2d 394 (Tex. 1989).

The hearing officer is the sole judge of the weight and credibility of the evidence (Section 410.165(e)) and she clearly found the claimant's testimony credible. We are satisfied that the challenged determination is not so against the great weight and preponderance of the evidence as to be clearly wrong or manifestly unjust. In re King's Estate, 150 Tex. 662, 244 S.W.2d 660 (1951).

The decision and order of the hearing officer are affirmed.

The true corporate name of the insurance carrier is **AMERICAN HOME ASSURANCE COMPANY** and the name and address of its registered agent for service of process is

CORPORATION SERVICE COMPANY
800 BRAZOS, COMMODORE 1, STE. 750
AUSTIN, TEXAS 78701.

Philip F. O'Neill
Appeals Judge

CONCUR:

Thomas A. Knapp
Appeals Judge

Robert W. Potts
Appeals Judge