

APPEAL NO. 020588
FILED APRIL 30, 2002

This appeal arises pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act). A contested case hearing was held on February 21, 2002. The hearing officer determined that the first certification of maximum medical improvement (MMI) and impairment rating (IR) assigned to the appellant/cross-respondent (claimant) did not become final, and that the compensable injury does not extend to the claimant's cervical spine. On appeal, the claimant expresses disagreement with the extent-of-injury determination. The respondent/cross-appellant (carrier) appeals the MMI/IR finality determination. The appeal file does not contain a response by either the claimant or the carrier to the opposing party's appeal.

DECISION

Affirmed.

The hearing officer did not err in determining that the claimant's compensable injury does not extend to her cervical spine. Extent of injury is a question of fact for the hearing officer to resolve. 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. 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 and we do not find it to be so in this case. Cain v. Bain, 709 S.W.2d 175, 176 (Tex. 1986).

The carrier argues that the hearing officer erred in determining that first certification of MMI/IR assigned to the claimant did not become final under Rule 130.5(e). Specifically, the carrier contends that Fulton v. Associated Indemnity Corporation, 46 S.W.3d 364 (Tex. App.-Austin 2001, pet. denied), wherein it was determined that Rule 130.5(e) was invalid, is not controlling in this case because that decision became final after the date on which MMI/IR would have otherwise become final in this case. We do not agree.

In Fulton, the court determined that the original version of Rule 130.5(e), the 90-day rule, which restricted the time period for disputing an IR, implicitly limited a claimant's time period for revisiting the assessment of MMI, because when the IR became final, so did the determination of MMI. Although the amended Rule 130.5(e) is applicable to the case under consideration, we have held that the reasons stated in the Fulton decision, also apply to the amended Rule 130.5(e). Texas Workers' Compensation Commission Appeal No. 020014-s, decided February 26, 2002. With respect to the original version of Rule 130.5(e), the court held that: (1) because Rule 130.5(e) severely restricts the statutory time period for assessing a final MMI, the Texas Workers' Compensation Commission (Commission) exceeded its authority in enacting the rule; (2) the rule is arbitrary and invalid because it impermissibly shortens the statutory time period allotted to an injured worker to

achieve MMI; (3) Section 401.011(30) establishes a 104- week deadline for a worker to achieve MMI, and the Commission may not, by rule, shorten this statutory period because to do so would impose restrictions in excess of those imposed by the 1989 Act; (4) Rule 130.5(e) is invalid to the extent that it prevents a reassessment of MMI because the IR or MMI was not disputed within 90 days; and (5) Rule 130.5(e) imposed on Fulton a restriction in excess of that found in the plain language of the 1989 Act and that Fulton's MMI certification, and, therefore, his IR, did not become final. Given the explicit invalidation of Rule 130.5(e) by the court and its admonishment that the Commission exceeded its authority by enacting it, we find no merit in the carrier's argument that because Fulton had not yet exhausted the appeals process at the time when the first certification in this case would have otherwise become final, the rule is valid and the MMI/IR certification became final. We perceive no error in the hearing officer's determination that Rule 130.5(e) is invalid and, therefore, the first certification of MMI and IR assigned to the claimant has not become final.

The decision and order of the hearing officer are affirmed.

The true corporate name of the carrier is **INSURANCE COMPANY OF THE STATE OF PENNSYLVANIA** and the name and address of its registered agent for service of process is

**TIM KELLY
AIG
675 BERING, 3RD FLOOR
HOUSTON, TEXAS 78057.**

Chris Cowan
Appeals Judge

CONCUR:

Elaine M. Chaney
Appeals Judge

Philip F. O'Neill
Appeals Judge