APPEAL NO. 950159

This appeal is brought pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq*. (1989 Act). A contested case hearing was held in (city), Texas, on December 14, 1994, with (hearing officer) presiding as hearing officer. The record was held open and was closed on January 10, 1995. The issues at the hearing were: (1) did the respondent, cross-appellant (carrier) timely contest compensability of the claimed carpal tunnel syndrome (CTS) injury; (2) is the claimant's CTS a result of the compensable injury sustained on (date of injury); (3) did the first certification of maximum medical improvement (MMI) and impairment rating (IR) assigned by (Dr. D) on June 11, 1993, become final under Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 130.5(e) (Rule 130.5(e)); (4) has the appellant, cross-respondent (claimant) reached MMI; and (5) if the claimant has reached MMI, what is the IR. The hearing officer determined that the carrier did not timely contest compensability of the CTS injury and that the carrier did not have good cause for not timely contesting the compensability of the CTS injury; (2) the claimant's CTS is a result of the compensable injury he sustained on (date of injury); (3) the first certification of MMI and IR by Dr. D did not become final because the carrier disputed it within 90 days; (4) the claimant reached MMI on November 24, 1993, with a 14% IR as certified by (Dr. B), the Texas Workers' Compensation Commission (Commission)-selected designated doctor. The claimant appealed arguing that the designated doctor did not include his CTS in the IR. The claimant requests that the Appeals Panel affirm the hearing officer's determinations that the carrier did not timely contest compensability of the CTS injury, that the CTS is a compensable injury, that the first certification of MMI and IR did not become final, and that he reached MMI on November 24, 1993, but reverse the determination that his IR is 14% and remand for the hearing officer to obtain an IR from the designated doctor that includes both his back and his CTS. The carrier also appeals arguing that the determinations of the hearing officer are contrary to the great weight of the evidence and requests that the Appeals Panel reverse the decision of the hearing officer and render a decision that the first certification of MMI and IR was not timely disputed by either the claimant or the carrier and became final under the provisions of Rule 130.5(e), that the carrier timely disputed the compensability of the CTS, and that the CTS was not caused by the lifting injury of (date of injury). Neither party filed a response.

DECISION

We reform the decision and order of the hearing officer, and affirm it as reformed.

The claimant testified that he began working for the employer, a manufacturer of heating and air conditioning equipment, on September 4, 1952, and worked for the employer until November 14, 1991, when he could no longer work because of his injuries sustained on (date of injury). He said that he picked up a skid weighing about 35 pounds

from the floor and it felt like a knife struck him in the back. He testified that he does not complain much, but that it hurt so bad that on November 14, 1991, he told his supervisor that he had to go to the doctor. He said that the employer wanted him to go to the company doctor, but that he went to (Dr. G) because a friend told him about Dr. G. The claimant said that he told Dr. G about his back and told him that his arms were numb and started going to sleep and that his legs would go to sleep. He said that Dr. G examined his back, arms, and legs; had x-rays taken, and prescribed medication. He said that an MRI was taken of his lower back. The claimant testified that (Dr. V) conducted an EMG on each arm on December 5, 1991, and told him that he had right CTS and possibly left CTS. He said that Dr. G prescribed anti-inflammatory medication for his back and hands and decided to wait to see if his hands got better rather than doing surgery at that time. He said that he did not have problems with his hands before (date of injury). He testified that his hands got worse and Dr. G performed surgery on his right hand. He said that after the surgery his hand got better, but then started getting worse and went to sleep more. He said that he had a second surgery on his right hand, it got 90% better, but that it still goes to sleep. He testified that his left hand goes to sleep, but not as much as his right hand does. He said that he was in Dr. G's office and heard a woman in Dr. G's office call the carrier and get approval for the second surgery on his right hand. He said that since he had back, leg, and hand problems at the same time he thought that they all generated from his back injury and that at the time of his injury he did not know what CTS was. He said that the secretary in Dr. G's office gave him a printout of the medical bills that the carrier paid and that he thought that the carrier agreed that the CTS was part of his compensable injury because it paid the medical bills.

Dr. G testified that he first saw the claimant on November 14, 1991. He said that the claimant said that he hurt himself lifting a skid on (date of injury), and that the claimant's chief complaints were low back pain, right leg tingling, and right arm falling asleep. He said that x-rays of cervical and lumbar spine were taken and MRI testing of cervical and lumbar spine was conducted. He said that he referred the claimant to Dr. V for EMG testing, and that Dr. V reported right CTS and suspected left CTS. He testified that he received a letter from an adjuster asking how the CTS was related to the claimant's back injury and that he responded. Dr. G's response is set forth later in this decision. Dr. G testified that CTS is the result of repetitive trauma. He said that the carrier paid the bills related to the treatment of CTS. Dr. G said that he elected conservative treatment before performing surgery on the back or the hand. He said that he performed a right CTS release on October 27, 1992, and a second right CTS release on November 15, 1993, in which he mostly removed scar tissue which is not unusual. He testified that the second surgery improved the claimant's condition, but did not completely alleviate the claimant's symptoms. He said that he assigned a four percent IR for the CTS and did not assign an IR for the claimant's back but that Dr. B did assign an IR for the claimant's back. Dr. G testified that he reviewed the report of Dr. D, that he does not agree with the report of Dr. D, and that the claimant had a second right CTS release after Dr. D rendered his report. He said that he agrees with Dr. B's assignment of a 14% IR for the claimant's back.

The claimant and the carrier introduced documents concerning the CTS. In Dr. G's record of the initial visit on November 14, 1991, Dr. G recorded that the claimant said that he hurt his back lifting a skid weighing approximately 35 pounds and that the chief complaints were low back pain and that the right arm and right leg were going to sleep. In an Initial Medical Report (TWCC-61) dated December 5, 1991, Dr. G reported that the claimant has lower back pain, tingling right leg, and right hand falls asleep, that the claimant said that he hurt his back lifting a 35 pound skid, that x-rays of the cervical and lumbar spine were taken, that an MRI revealed a broad based disc protrusion at L4-5 and degenerative disc changes with a small bulge at L5-S1, and that EMG of the left leg and both arms will be scheduled. In a report dated December 5, 1991, Dr. V reported that he had reviewed the report of the MRI of the cervical and lumbar spines and had performed nerve conduction studies and EMG testing of both upper extremities and the left lower extremity, and that there was no evidence of radiculopathy of the extremities tested and that the claimant has right CTS and suspected left CTS. On January 23, 1992, (Ms. N), a claims representative for the carrier, wrote to Dr. G requesting that he "[p]lease forward your medical opinion as to how [claimant's] problem of carpal tunnel is related to the back injury." On February 3, 1992, Dr. G responded:

> I am responding to your letter of 1/23/92 concerning the relationship of [claimant's] carpal tunnel to his back injury. The only relationship of those two injuries, is according to the patient, he injured both at the same time. On initial examination of [date of injury], [claimant] complained of low back pain, right arm and right leg pain and paresthesia. There is no other relationship to these conditions, other than patient complained of the problems on initial examination.

On August 22, 1994, Dr. G issued a Report of Medical Evaluation (TWCC-69) in which he reported that he performed a right CTS release on the claimant on October 10, 1992, and a repeat right CTS on the claimant on November 16, 1993, that the claimant has residual CTS symptoms, that he reached MMI on November 24, 1993, with a four percent IR for the CTS based on abnormal sensation. The carrier noted that in Hearing Officer Exhibit 1, the Benefit Review Conference (BRC) report, the benefit review officer (BRO) reported that the carrier's position is "[t]hat the carpal tunnel is not compensable. The claimant's injury claimed was to his back while lifting. There is not any medical relating the carpal tunnel to this injury." The carrier introduced an Employer's First Report of Injury or Illness (TWCC-1) in which the nature of injury is reported as "back strain", the part of body injured or exposed is reported as "back", and how the injury occurred is reported as "employee was lifting wooden skid and felt back pain." The carrier introduced a Payment of Compensation or Notice of Refused or Disputed Claim (TWCC-21) dated December 14, 1994, in which it wrote:

Carrier does not dispute compensability of back injury but disputes compensability of [CTS] or other medical conditions. Claimant did not sustain an injury in the course and scope of employment other than a back injury.

The claimant testified that at the request of the carrier he was examined by Dr. D on July 24, 1992. He said that he told Dr. D about his back and that Dr. D told him that he had CTS. He said that he was seen by Dr. D a second time in June 1993. He said that he took records to Dr. D and that Dr. G sent records to Dr. D. He testified that Dr. D said that he did not have CTS and that he reached MMI on June 11, 1993, with a five percent IR. He said that he talked with Dr. G about Dr. D's report and called the Commission and talked about the report. He said that someone at the Commission told him that if he did not do anything in ten days the Commission would send him to a designated doctor. He said that he went to Dr. B, the designated doctor, who reported that he reached MMI on November 24, 1993, with a 14% IR that did not include his hands because Dr. B was asked to rate only his back. He said that Dr. G said that he has a four percent IR for his hands and wants the 14% IR and the four percent IR added for a whole body IR.

We first address the issue of whether the carrier timely contested the compensability of the CTS injury. The claimant's position is that the carrier did not timely contest the compensability of the CTS injury. The carrier asserts that it first learned that the claimant was claiming that his CTS was work related at the BRC on October 20, 1994, that the carrier paid the medical bills related to the claimant's CTS by mistake, and that it timely disputed the compensability of the claimant's CTS injury at the BRC and again by filing a TWCC-21 on December 14, 1994. In closing argument the carrier stated that Dr. G believes that the injuries are separate or a least caused by separate problems. The hearing officer found in Finding of Fact No. 9 that the carrier received first written notice of the claimant's CTS not later than January 23, 1992, when it wrote to Dr. G about being in receipt of Dr. V's test results and found in Finding of Fact No. 10 that the carrier did not contest compensability of the CTS until December 13, 1994, and she concluded in Conclusion of Law No. 2 that the carrier did not timely contest compensability of the CTS injury and that there was not newly discovered evidence that could not have reasonably been discovered earlier. 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 because the finder of fact judges the credibility of each and every witness, the weight to assign to each witness's testimony, and resolves conflicts and inconsistencies in the 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. This is equally true regarding medical evidence. Texas Employers Insurance Association v. Campos, 666 S.W.2d 286 (Tex. App.-Houston [14th Dist.] 1984, no writ). An appeals level body is not a fact finder, and it 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). Only were we to conclude that the hearing officer's determinations were so against the great weight and preponderance of the evidence as to be clearly wrong or unjust, would there be a sound basis to disturb those determinations. In re King's Estate, 150 Tex. 662, 244 S.W.2d 660 (1951); Pool v. Ford Motor Co., 715 S.W.2d 629, 635 (Tex. 1986). We find the evidence to be sufficient to support the hearing officer's factual determination that the carrier received written notice of the claimant's CTS no later than January 23, 1992. It would have been better for the hearing officer to have included specific findings of fact pertaining to the carrier being put on notice that the CTS was job related. The BRC report indicates that the carrier contested the compensability of the CTS at the BRC, and in Texas Workers' Compensation Commission Appeal No. 94292, decided April 26, 1994, we held that the carrier's contesting the compensability of a claim at a BRC and the BRO's reporting the contest of compensability in the BRC report are sufficient to establish that the carrier contested the compensability of an injury. However, the BRC on October 10, 1994, and the BRC report dated November 8, 1994, are certainly more than 60 days after January 23, 1992. Even though the hearing officer could have been more specific and accurate in her findings of fact, the evidence is sufficient to support her conclusion that the carrier did not timely contest the compensability of the CTS injury and that there was not newly discovered evidence that could not have reasonably been discovered earlier.

Since Section 410.204 provides that an Appeals Panel shall issue a decision that determines each issue on which review is requested, we address the issue of the compensability of the CTS regardless of a decision on the issue of timely disputing the compensability of the CTS injury. The hearing officer also determined that the claimant's CTS is a result of a compensable injury sustained on (date of injury). The burden of proof is on the claimant to prove by a preponderance of the evidence that he sustained an injury in the course and scope of employment, Texas Workers' Compensation Commission Appeal No. 91028, decided October 23, 1991; and the extent of the injury, Texas Workers' Compensation Commission Appeal No. 94851, decided August 15, 1994. Dr. G testified that CTS is the result of repetitive trauma and there is no evidence in the record of another cause for the claimant's CTS. The claimant testified that he first noticed the symptoms of CTS on (date of injury). A finding of fact by a hearing officer should not be overturned unless it is so against the great weight and preponderance of the evidence as to be manifestly wrong or unjust. Atlantic Mutual Insurance Co. v. Middleman, 661 S.W.2d 182 (Tex. App.-San Antonio 1983, writ ref'd n.r.e.). We find the evidence to be sufficient to support the determination that the claimant's CTS is a result of a compensable injury sustained on (date of injury).

We next move to the question of whether the first certification that the claimant reached MMI on June 11, 1993, with a five percent IR became final under the provision of Rule 130.5(e) because it was not disputed by either party within 90 days. The claimant testified that he did not dispute the IR; however, his position is that the carrier disputed the

IR when it filed a Request for Setting a Benefit Review Conference (TWCC-45) dated August 10, 1993. In item 6, "Disputed issue(s) requiring a Benefit Review Conference. Briefly describe each issue." the carrier entered:

1.Whether or not claimant reached MMI - MEO Dr. certifies 06-11-93.

2.Impairment rating if any. MEO Dr. rate 5% Impairment.

MEO Dr.'s TWCC 69 was sent to treating Dr. [G] on 07-14-93 with no response to date.

Rule 130.5(a) through (d) provide:

(a)An insurance carrier that disputes an [IR] shall file with the commission a statement of disputed impairment income benefits [IIBS] that gives the insurance carrier's reasonable assessment of the correct rating. A copy of the statement shall be sent to the employee, and employee's representative, at the same time as it is filed with the commission.

(b)If the carrier does not begin paying [IIBS], the statement shall be filed no later than five days after receiving the report from the certifying doctor.

(c)If the carrier begins payment of [IIBS], the statement shall be filed no later than three weeks after the carrier receives the report from the certifying doctor.

(d)If the carrier elects not to perform its own reasonable assessment, the carrier may file a request for selection of a designated doctor to assess impairment. . . .

The carrier stated that Rule 130.5 establishes what a carrier must do to dispute an IR and that the carrier did none of them. It also stated that in Texas Workers' Compensation Commission Appeal No. 92374, decided August 28, 1992, the Appeals Panel stated that temporary income benefits (TIBS) cannot be suspended solely by certification of MMI by a doctor requested by the carrier. Based on this guidance, the carrier wrote to Dr. G on July 14, 1993, advising Dr. G of Dr. D's certification of MMI on June 11, 1993, with a five percent IR; enclosing a copy of Dr. D's report; and stating "[p]lease advise whether or not you agree with Dr. [T's] opinion, and if appropriate, please forward a TWCC-69 in this case." The carrier did not receive a response and requested a BRC on August 10, 1993. On September 21, 1993, the Commission wrote a letter to the carrier advising that the request for a BRC was denied and attached a copy of a letter dated September 16, 1993, in which the Commission gave the parties 10 days to agree on a designated doctor after

which the Commission would select a designated doctor under the provisions of Rule 130.6. The carrier contends that it was not disputing the IR assigned by Dr. D when it requested the BRC. The carrier paid TIBS until the claimant reached statutory MMI in November 1993 and then began paying IIBS. The hearing officer made a finding of fact and a conclusion of law on the issue. In Finding of Fact No. 14, the hearing officer found "[o]n August 10, 1993, Carrier requested a BRC listing that a disputed issue existed as to whether Claimant had reached [MMI] and [IR]." In Conclusion of Law No. 4 the hearing officer concluded "[s]ince the Carrier disputed the first certification of [MMI] and [IR] within 90 days, it could not become final under Rule 130.5(e)." In a case such as the one before us where both parties present evidence on an issue, the hearing officer must look to all of the relevant evidence to make a factual determination and the Appeals Panel must consider all of the relevant evidence to determine whether a factual finding is 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 judgment for that of the fact finder, even if the evidence would support a different result. Soto, *supra*. This is so even though, were we fact finders, we might have drawn other inferences and reached other conclusions. Salazar v. Hill, 551 S.W.2d 518 (Tex. Civ. App.-Corpus Christi 1977, writ ref'd n.r.e.). We find the evidence to be sufficient to support the determination of the hearing officer that the carrier disputed the first IR within 90 days.

Lastly, we address the 14% IR assigned by the designated doctor and awarded by the hearing officer. The report of the designated doctor states that he provided an IR for the claimant's back injury but did not provide an IR for the claimant's CTS. The only evidence on the relationship of the claimant's back injury and his CTS injury is from Dr. G. In his letter dated February 3, 1992, Dr. G stated that the only relationship of the two injuries is that he injured both at the same time. Dr. G testified that CTS results from repetitive trauma. We reform Findings of Fact Nos. 16 and 17, Conclusion of Law No. 5, and the decision and order to reflect that the 14% IR is for the back only. Neither the hearing officer nor the Appeals Panel were asked to determine the IR for the CTS, including whether the first IR for the CTS became final under the provisions of Rule 130.5(e). It is premature for this Appeals Panel to render a decision on the claimant's request that Dr. B, the designated doctor, provide an IR for his CTS.

The decision and order of the hearing officer, as reformed, is affirmed.

Tommy W. Lueders
Appeals Judge

CONCUR:

Joe Sebesta
Appeals Judge

Gary L. Kilgore
Appeals Judge