APPEAL NO. 950360

On February 6, 1995, a contested case hearing was held in (city), Texas, with (hearing officer) presiding as the hearing officer. The hearing was held under the provisions of the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq*. (1989 Act). In response to the issues at the hearing, the hearing officer determined that the first certification of maximum medical improvement (MMI) and impairment rating (IR) assigned by (Dr. Z) on November 12, 1993, became final under Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 130.5(e) (Rule 130.5(e)), and she decided that the appellant (claimant) reached MMI on November 12, 1993, with a nine percent IR. The claimant appeals the decision. The respondent (carrier) requests affirmance.

DECISION

Affirmed.

It is undisputed that the claimant sustained a compensable injury on (date of injury). Dr. Z, the treating doctor, diagnosed left carpal tunnel syndrome and left rotator cuff tendinitis. A left carpal tunnel release was performed on June 14, 1993, and the claimant underwent physical therapy. In a Report of Medical Evaluation (TWCC-69) dated November 16, 1993, Dr. Z certified that the claimant reached MMI on November 12, 1993, with a nine percent IR. The parties stipulated that Dr. Z's TWCC-69 is the only certification of MMI and IR, and that the claimant received Dr. Z's TWCC-69 on November 23, 1993. The claimant, who testified that she does not speak English (the hearing was translated by a Spanish-speaking translator), said that she went to an attorney on December 5, 1993, the attorney read the TWCC-69 to her, and he told her that her IR was too low. She said she did not agree with the IR and so she went to a Texas Workers' Compensation Commission (Commission) field office and filed an Employee's Request to Change Treating Doctors (TWCC-53) on December 7, 1993. The TWCC-53 is date stamped as having been received by the Commission on December 7, 1993. She testified that she believed she was disputing the IR when she filed the TWCC-53 with the Commission. The claimant filled out the TWCC-53 in Spanish. In item 11 which requests the name of the alternate treating doctor, the claimant did not set forth the name of a doctor. According to the translator at the hearing, the claimant wrote in item 11 "for the percentage of impairment and I need a doctor." In item 13 of the form, which requests the reason for requesting a change of treating doctor, the translator stated that the claimant wrote:

I have a lot of pain. I don't feel well. He did not give me any medication for the pain or for the inflammation. And I need another opinion of another doctor. I feel bad. I don't know what to do. I need a doctor, and I'm desperate.

At the bottom of the TWCC-53 appears the Commission order which denied the claimant's request to change treating doctors. The reason for denial is stated to be: "Please resubmit your request and indicate on #11 which doctor you wish to change to."

Also in evidence is another TWCC-53 dated December 22, 1993, which was received by the Commission on December 22, 1993. In this TWCC-53, the claimant wrote in item 11 that the alternate treating doctor is (Dr. H). In item 13 she wrote the reason for her change of treating doctor in Spanish and no translation of the reason was made at the hearing. However, in the Commission order at the bottom of the TWCC-53 wherein the Commission approved the request to change treating doctors, the disability determination officer who approved the request gave the following translation of item 13:

Translation: I have pain and my left arm is swollen. At night I cannot sleep because of the pain and I have no pills. I want to see another doctor to see if I get better.

The claimant testified that after she filed her TWCC-53s, the next time she contacted the Commission was in September 1994. A dispute resolution information system (DRIS) log indicated that the claimant contacted the Commission on September 28, 1994, to advise the Commission that she had disputed Dr. Z's IR in her request to change treating doctors.

The claimant contended at the hearing that her TWCC-53 of December 7, 1993, gave notice that she disputed Dr. Z's IR. The hearing officer found that the claimant's TWCC-53 of December 7, 1993, did not provide notice of a dispute of either MMI or IR; that the claimant did not dispute the first certification of MMI and IR until September 28, 1994; and that the claimant did not dispute the first certification of MMI and IR within 90 days. The hearing officer concluded that the first certification of MMI and IR assigned by Dr. Z on November 12, 1993, became final under Rule 130.5(e), and that the claimant reached MMI on November 12, 1993, with a nine percent IR. The claimant contends on appeal that the December 7th TWCC-53 gave notice of her dispute of IR.

Rule 130.5(e) provides that "[t]he first [IR] assigned to an employee is considered final if the rating is not disputed within 90 days after the rating is assigned." Whether a claimant or a carrier timely disputed an IR is a fact-specific question. Texas Workers' Compensation Commission Appeal No. 93684, decided September 21, 1993. The facts of this case are analogous to the facts in Appeal No. 93684, *supra*, where the claimant contended that he had timely disputed the first IR by stating in his request to change treating doctors that his present doctor "wasn't able or qualified to do an impairment procedure on my behalf." The hearing officer decided that the request to change treating doctors constituted a dispute of the first IR. The majority decision on appeal reversed the decision of the hearing officer and rendered a decision that the first IR was final under Rule 130.5(e). The dissent would have affirmed. The majority recognized that Section 408.022(d) provides that a change of doctor may not be made to secure a new IR or medical report, but that such a request may constitute a dispute of an IR. The majority opinion stated:

However, it is not enough for a party to hold a subjective belief that he intends to see another doctor to re-evaluate impairment as well as treatment; that belief must also be communicated. Whether a request for a second treating doctor

meaningfully and with clarity conveyed a dispute over MMI or impairment thus must be determined in each situation, on a case by case basis.

The majority opinion went on to state:

> We caution that in many cases a carrier's or the Commission's failure to understand that a claimant means to dispute an [IR] or finding of MMI will not mean that whatever words the claimant used could not reasonably be understood to convey his or her dissatisfaction with the rating or certification; there are no "magic words" that are required. By the same token, the nature and form of the communication must be such as would apprise, or reasonably should have apprised, the appropriate party as to what relief the claimant was seeking. We believe that the overwhelming weight of the evidence in this case shows that this was not the case.

The hearing officer is the trier of fact and is the sole judge of the relevance and materiality of the evidence offered and of the weight and credibility to be given to the evidence. Section 410.165(a). Whether the claimant's request to change treating doctors meaningfully and with clarity conveyed a dispute over MMI or IR was a fact question for the hearing officer to resolve from the evidence presented at the hearing. The hearing officer determines what facts have been established from the conflicting evidence. Texas Workers' Compensation Commission Appeal No. 950084, decided February 28, 1995. An appellate level body is not a fact finder and does not normally pass upon the credibility of witnesses or substitute its judgment for that of the trier of fact. Appeal No. 950084, *supra*. When reviewing a hearing officer's decision to determine the factual sufficiency of the evidence, we should set aside the decision only if it is so contrary to the overwhelming weight of the evidence as to be clearly wrong and unjust. Appeal No. 950084, *supra*. We conclude that the hearing officer's decision is supported by sufficient evidence and is not so contrary to the overwhelming weight of the evidence as to be clearly wrong and unjust.

The hearing officer's decision and order are affirmed.

Robert W. Potts
Appeals Judge

CONCUR:

Stark O. Sanders, Jr.
Chief Appeals Judge

Susan M. Kelley
Appeals Judge