

## APPEAL NO. 950365

This appeal arises under the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act). On January 31, 1995, a contested case hearing (CCH) was held in (city), Texas, with (hearing officer) presiding as hearing officer. The issue unresolved from the benefit review conference (BRC) was whether the claimant's first impairment rating (IR) became final because she did not dispute it within 90 days. The claimant is (claimant), who was injured on (date of injury), in the course and scope of her employment with (employer).

The hearing officer determined that claimant had become aware of the IR sometime after April 15, 1994, when her treating doctor certified maximum medical improvement (MMI) with an eight percent IR, and that she disputed that rating sometime in May 1994. The hearing officer ordered that the designated doctor process should start.

The carrier has appealed, arguing that the first IR of eight percent became final by operation of Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 130.5(e) (Rule 130.5(e)), and that the great weight and preponderance of the evidence is against the hearing officer's determination that claimant disputed the IR in May 1994. No response has been filed.

### DECISION

We reverse the hearing officer's determination that claimant timely disputed her first IR as against the great weight and preponderance of the evidence, and render a decision that the IR became final in accordance with Rule 130.5(e).

Claimant, who required translation of her testimony at the CCH, stated that she became aware that her treating doctor, (Dr. C), had given her an eight percent IR when she saw that percentage on her checks. She could not recall the date that this occurred. Under cross-examination, she indicated she received a Payment of Compensation or Notice of Refused or Disputed Claim (TWCC-21) from the carrier, which was dated April 27, 1994. This form stated that the carrier was initiating impairment income benefits (IIBS), based upon an eight percent IR and MMI date of April 12, 1994, as certified in an "attached" report of Dr. C.

Concerning the dispute of that IR, claimant contended she came in to the field office of the Texas Workers' Compensation Commission (Commission) in May 1994, on a date she could not remember, and talked to a Commission employee named (Mr. P). According to claimant, Mr. P told her she could dispute the IR, and that there would be a hearing, but he did not provide her with any forms. She stated many times that she talked to Mr. P or came into the Commission offices, only once prior to receiving an October 28, 1994, notice from the Commission setting a BRC. Claimant specifically and repeatedly denied she had been to the Commission in October 1994, and stated both that she either could not recall when she had been to the Commission prior to October 28th, or that she came to the Commission in May 1994.

Claimant was unable to recall when her IIBS checks stopped. When pressed in cross-examination for an estimate, she stated she believed they stopped in October or November 1994. When asked when the BRC took place, claimant said she was unable to recall and guessed it occurred in November or December 1994. Claimant stated that she came in shortly before the BRC to prepare for it, but could not recall the date.

The injury, as described in a July 1, 1993, report of Dr. C, affected claimant's hand and wrist, and occurred while she was cleaning copper wires in a machine. He diagnosed the condition as overuse syndrome with bilateral tendinitis, and possible early mild carpal tunnel syndrome. Dr. C ultimately based his IR on a 15% upper extremity impairment to the left wrist, for a total body IR of eight percent. Dr. C's report was the first and only IR for claimant's injury.

The records of the Commission's Dispute Resolution Information System state that on October 3, 1994, claimant came to the Commission to dispute her IR. The employee who made the entry was "[JP]" (Mr. P). A dispute resolution worksheet was filled out that same day, by Mr. P, styled as a request for a BRC to dispute Dr. C's IR. On October 28, 1994, a notice of the BRC setting for December 7, 1994, was sent. The BRC report indicated that claimant's position at the BRC was: "The claimant feels that eight percent [IR] is too low for her injury." According to the date that IIBS were initiated, and given that three weeks of IIBS are due for each percentage of IR, the last day that IIBS were due to be paid to claimant was September 27, 1994.

There was no evidence presented that Mr. P, through negligence or intent, altered the date on the log of his contact with claimant. The claimant testified that she expected that the records of the Commission would show when she came into the office.

The hearing officer recited claimant's testimony as the basis for his finding that claimant disputed first IR "in May 1994." Against this, however, is claimant's further testimony and insistence that she saw Mr. P only once and at that time discussed disputing the IR; Mr. P's entry (part of the official records of the Commission) on October 3, 1994, reflecting that a dispute to the IR was begun; the BRC request filled out that same day; the BRC set notice dated October 28, 1994; the fact that claimant's benefits would have ended shortly before October 3rd; and essentially claimant's lack of recollection of the precise months when other significant events occurred, such as when her IIBS checks stopped, or when the BRC was held. Frankly, the great weight and preponderance of the credible evidence establishes that claimant first came to dispute her IR October 3, 1994, and her statement that she came in May 1994 is a failure of recollection.

While a hearing officer may chose to believe a claimant's testimony, we note that in this case claimant's statement that she disputed the IR in May 1994 was inextricably tied to her testimony that she saw Mr. P once and had not been to the Commission in October

1994 before receiving the BRC setting notice. In order to credit claimant's testimony that she disputed her IR on an unrecalled date in May 1994, the hearing officer would have had to believe that the official record of the Commission showing first contact on October 3, 1994, was false. There was no evidence that it was and, indeed, claimant testified that she believed the records of the Commission would show her first contact. Moreover, the integrity of the October 3, 1994, date is corroborated by the fact that it occurred shortly after claimant's IIBS check would have stopped, an occurrence that could be expected to trigger contact with the Commission, and evidence that the dispute was subsequently processed as a BRC request. While we note that no record is taken at the BRC, the BRC report included in the record as a hearing officer exhibit reflects that the description of claimant's position at the BRC on the sole issue of finality under Rule 130.5(e) is shown as a dispute to the accuracy of the eight percent IR, and not that a dispute was made within 90 days. This is not merely a case of conflicting evidence, but one where belief of a May 1994 contact with the Commission necessitates a disbelief of every other piece of evidence, including official records of the Commission.

The decision of the hearing officer will be set aside only if the evidence supporting the hearing officer's determination is so weak or against the overwhelming weight of the evidence as to be clearly wrong or manifestly unjust. Atlantic Mutual Insurance Company v. Middleman, 661 S.W.2d 182 (Tex. App.-San Antonio 1983, writ ref'd n.r.e.). We believe that situation exists here. Consequently, we reverse the decision of the hearing officer and render a decision that the first IR of eight percent, rendered by claimant's treating doctor, became final because it was not disputed within 90 days as required by Rule 130.5(e); that therefore claimant reached MMI on April 12, 1994, with an eight percent IR; and IIBS are due based upon that IR and applicable statutes.

---

Susan M. Kelley  
Appeals Judge

CONCUR:

---

Stark O. Sanders, Jr.  
Chief Appeals Judge

---

Lynda H. Nesenholtz  
Appeals Judge