APPEAL NO. 950402

On February 9, 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). With respect to the issues at the hearing the hearing officer determined that the first certification of maximum medical improvement (MMI) and impairment rating (IR) became final under Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 130.5(e) (Rule 130.5(e)); that the appellant (claimant) reached MMI on October 5, 1993; that the claimant has an eight percent IR; and that the claimant had disability from October 6, 1993, to August 15, 1994, but is not entitled to temporary income benefits after the date of MMI. The claimant appeals the decision that the first certification of MMI and IR became final. The respondent (carrier) requests affirmance with regard to MMI and IR, but contends that the claimant did not have disability for the period found by the hearing officer. Since the carrier's response was not filed within the 15-day statutory time period for filing an appeal, its contention regarding disability will not be considered. However, matters of a responsive nature in the response will be considered.

DECISION

Affirmed.

It is undisputed that the claimant sustained a compensable injury to his right knee on (date of injury); that his treating doctor, (Dr. L), performed arthroscopic surgery for a torn medial meniscus on May 10, 1993; that the claimant underwent physical therapy; that in August 1993 the claimant retained an attorney to represent him in his workers' compensation claim; and that in a Report of Medical Evaluation (TWCC-69) Dr. L certified that the claimant reached MMI on October 5, 1993, with an eight percent IR. It is undisputed that Dr. L's report was the first certification of MMI and IR. The claimant testified that on or about October 9, 1993, he received a letter from the carrier informing him of the IR assigned by Dr. L. In a letter dated October 20, 1993, the carrier advised the claimant that he was scheduled for an independent medical examination with (Dr. D) on November 2, 1993. The claimant said that the carrier canceled that appointment, but he had it rescheduled. In a TWCC-69 and narrative report dated November 3, 1993, Dr. D reported that he performed an independent medical examination on the claimant and certified that the claimant reached MMI on November 3, 1993, with a four percent IR.

The claimant testified that in December 1993 he called an adjustor for the carrier and told him that Dr. L's rating was not fair and that his attorney would handle it. The adjustor's telephone notes do not reflect any calls from the claimant in December 1993 nor any dispute of Dr. L's report of MMI and IR. The Texas Workers' Compensation Commission (Commission) sent the claimant a letter on December 22, 1993, which advised the claimant that his treating doctor had reported that he had reached MMI with an eight percent IR and that the certification of MMI and IR may be considered final if not disputed by March 18, 1994. The claimant testified that he received the Commission letter at the end of December

1993. He testified to the effect that he told his attorney in January 1994 to dispute Dr. L's report. He said he had a heart attack on (date), and that after he got out of the hospital on April 13, 1994, he talked to another adjustor for the carrier and was told his benefits had ended. He said that in May 1994 he learned that his attorney had not done anything so he called the Commission and disputed Dr. L's report. A Commission Dispute Resolution Information System (DRIS) note indicates that the claimant called the Commission on May 13, 1994, and informed the Commission that in December 1993 he had called the Commission and disputed Dr. L's report. The claimant also wrote a letter to the Commission in June 1994 advising that he told his attorney in November 1993 and in January 1994 to dispute the IR, that his attorney neglected to do so, and that he was disputing the IR. The Commission appointed (Dr. M) as the designated doctor and in a TWCC-69 dated August 15, 1994, he reported that the claimant reached MMI on August 15, 1994 (the date of the examination), with a four percent IR. Dr. M noted that he did not have the operative report of May 10, 1993, when he did his evaluation.

The issues at the hearing were: (1) whether the claimant had disability from October 6, 1993, to August 15, 1994; (2) whether the first certification of MMI and IR made by Dr. L on October 5, 1993, has become final; (3) what is the claimant's date of MMI; and (4) what is the claimant's correct IR. There has been no timely appeal of the hearing officer's determination that the claimant had disability from October 6, 1993, to August 15, 1994. The claimant appeals the hearing officer's determinations that the first certification of MMI and IR became final because neither party disputed it within 90 days, that the claimant reached MMI on October 5, 1993, and that his IR is eight percent. At the hearing the carrier contended that the first certification of MMI and IR by Dr. L became final under Rule 130.5(e). The claimant contended that he timely disputed Dr. L's report and thus it was not final. However, he also contended that the four percent IR assigned by the designated doctor was against the great weight of the medical evidence and that Dr. L's eight percent IR should be adopted, although he urged that the designated doctor's MMI date of August 15, 1994, was correct as opposed to Dr. L's MMI date of October 5, 1993.

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." We have held that if the IR becomes final, so does the underlying finding of MMI. Texas Workers' Compensation Commission Appeal No. 92670, decided February 1, 1993. We have also held that the certification of MMI and IR and the communication of such to the parties under Rule 130.5(e) require a writing. Texas Workers' Compensation Commission Appeal No. 94354, decided May 10, 1994. Whether the first IR was timely disputed is a question of fact. Texas Workers' Compensation Commission Appeal No. 93308, decided June 4, 1993. In Texas Workers' Compensation Commission Appeal No. 94379, decided May 12, 1994, we stated that an attorney employed to represent a claimant before the Commission is the agent of the claimant and that such attorney's actions or inaction within the scope of his or her employment are attributable to the claimant.

In her discussion of the evidence the hearing officer states that the claimant's attorney failed to dispute the MMI and IR certification of Dr. L and that although the claimant did communicate with the carrier, the evidence does not indicate that he advised the carrier of his disagreement with the MMI or IR certification of Dr. L. The hearing officer is the trier of fact in a contested case hearing 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). The hearing officer can believe all, part, or none of the testimony of any witness, and resolves conflicts in the evidence and determines what facts have been established. 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, even if the evidence would support a different result. 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:

Joe Sebesta
Appeals Judge

Alan C. Ernst
Appeals Judge