APPEAL NO. 93684

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 in (city), Texas on July 5, 1993; the issue was stated as, "Did the claimant dispute the certification of Dr. S that the claimant reached maximum medical improvement (MMI) within 90 days of the claimant's knowledge of such certification." Hearing officer (hearing officer) determined that the claimant timely disputed (Dr. S') impairment rating of June 29, 1993, within 90 days of its assignment, and that therefore such certification never became final. The appellant, hereinafter carrier, contends the hearing officer erred in concluding that the claimant's request for a second treating doctor constituted a dispute of his impairment rating. The respondent, hereinafter claimant, basically responds that his dispute was timely and that the hearing officer's decision should be upheld.

DECISION

The decision of the hearing officer is reversed and a new decision rendered that the claimant failed to timely dispute the certification of MMI and the impairment rating in question.

It was not disputed that the claimant, who was employed by (employer) at the time of injury, (date of injury), suffered ankle and shoulder injuries in a forklift accident. Claimant was first sent by his employer to the (clinic) where he was treated for approximately one month. He said that because the clinic then referred him to a specialist due to continued swelling in his ankle, he began treating with (Dr. S), an orthopedic surgeon, on January 31, 1992, and continued to treat with Dr. S until June 29, 1992.

Medical evidence in the record shows that on May 11, 1992, Dr. S certified MMI for claimant's left lower extremity only, and assigned him a 4% impairment rating.[1] The same day, Dr. S wrote that the claimant was complaining of continued pain in his shoulder, and he recommended an MRI scan to rule out impingement. On June 29, 1992, Dr. S read the MRI report as normal, and in a Report of Medical Evaluation (Form TWCC-69) dated June 30, found the claimant to have reached MMI as of June 29, with a 4% whole body impairment attributable to his ankle injury; he found no impairment on account of claimant's shoulder. A Specific and Subsequent Medical Report (Form TWCC-64) signed by Dr. S and dated June 30 stated that claimant was being discharged from treatment. The claimant stated at the hearing that he received Dr. S's certification sometime around June 30.

The claimant testified that, around the middle of July, he had a telephone conversation with (Ms. P), carrier's representative, wherein he told Ms. P that he was going to seek another opinion because he was "still in pain...which I had already told [Dr. S] about."

[1]The parties agreed at the hearing that the May 11th certification was not at issue. We do not disagree, as it appears clear that the June 30th, certification, which rated both the ankle and the shoulder, was the first impairment rating for "a compensable injury." *See* Section 401.011(24).

An undated letter to the Commission from claimant (date stamped as received on July 22, 1992) stated, "I was informed by my worker comp ins. agent or rep. that this letter is to be presented to the Comm. If I changed Drs. or Phy. My present Dr. is Dr. C,[2] which wasn't able or qualified to do an impairment procedure on my behalf. Therefore I'm requesting the authorization from your office to change doctors. I have chosen Dr. L to be my qualified physician." An August 3rd letter to Ms. P from a Commission disability determination officer stated that claimant's request for change of doctor was enclosed, pursuant to Rule 126.7 (Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE §§ 126.7), which is the Commission rule on an injured employee's choice of doctor.

Also in evidence was a letter on the letterhead of (Dr. L), but signed by claimant and dated September 1, 1992. It stated as follows:

> Dear Sirs: I am the injured employee in the above referenced claim, and, under Rule 126.7(g), Texas Workers' Compensation Rules, hereby notify the Texas Workers' Compensation Commission of my change of doctors from my initially chosen treating doctor [Dr. S], to an orthopaedic surgeon, L, (address), Texas 77027, as my second choice of treating doctors. I am making this change out of concern for my health.

The claimant treated with Dr. L from August 3, 1992, until February 1993. He said Dr. L ordered another MRI and discussed the possibility of surgery, although claimant said he did not want to undergo surgery unless it was absolutely necessary. Dr. L released the claimant from treatment on February 15, 1993, finding that the claimant reached MMI on that date. Dr. L assigned a 20% whole body impairment rating, based on five percent due to fracture of the fibula, and 10% and 20% for limited motion in right shoulder and crepitus of right shoulder, respectively.

The claimant testified at the hearing that he did not "officially" know about the requirements of Rule 130.5(e), which states that "the first impairment rating assigned to a employee is considered final if the rating is not disputed within 90 days after the rating is assigned." He also said he was never told by anyone with carrier or the Commission that he had to "put it in writing specifically that I hereby dispute the impairment ratings from [Dr. S];" however, he said that he was under the impression that it was "understood" between himself and Ms. P that he should see another doctor.[3] Claimant's testimony included the

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[2]Claimant's only testimony regarding this doctor was that he had done claimant's first MRI.

[3]We have previously held that, even where a claimant is unaware of the 90-day requirement of Rule 130.5(e), that rule contains no good cause exception for failure to timely dispute, Texas Workers' Compensation Commission Appeal No. 93139, decided April 8, 1993. However, this panel has not required that a dispute must be registered with the Commission in writing. Texas Workers' Compensation Commission Appeal No. 93200, decided April 14, 1993.

following exchange on cross-examination:

Claimant:...I mean, as far as the dispute was concerned, [Ms.P] and I already knew that I disputed it because I kept telling her that there's something wrong with my shoulder. It was--you know, between she and I it was obvious that, you know, I wanted somebody else to treat me for the shoulder. I mean, to me that was as much as of (sic) dispute as ever.

Carrier:You said that earlier in your opening statement and said at the time of your direct testimony that it was obvious that you disagreed because you wanted another doctor?

Claimant:Yes, I wanted to see somebody else.

Carrier:But other than the fact that you wanted another doctor, you never specifically said anything about the dispute of the impairment rating, did you?

Claimant:To [Ms. P] on the telephone, yes, I did, you know. I told her that I didn't think it was fair. I said wanted (sic) to see somebody else, simple as that.

Carrier:Well, now you never...indicated that in the writing that you filed with the Commission. When you filed the request for the change in treating doctors, you just wanted another doctor; isn't that right?

Claimant:Yes, I did.

Carrier:Okay. And you have never claimed at anytime that you disputed this impairment rating verbally to [Ms. P], have you? You never claimed it at the Benefit Review Conference, did you?

Claimant:At the Benefit Review Conference I think I mentioned the fact that [Ms. P] and I had talked about the fact that I didn't agree with [Dr. S] giving me zero on the shoulder. No, I don't ever remember agreeing on that because I knew it was something wrong. It was always a dispute there as far

as the shoulder was concerned.

* * * * *

It was a disagreement...of the opinion of her doctor...

Carrier:The way--the way you expressed the disagreement was you wanted another doctor?

Claimant:There you go. That's it.

Also made part of the record were Ms. P's activity log comments, which reflected activity with regard to claimant's file and notes from telephone conversations. Among other things, the log reflects that on July 29, 1992, that Ms. P received Dr. S's TWCC-69 and "we don't appear to have any disputes with the impairment rating." A note of August 10 stated, "Recd letter from TWCC enclosing clmt's request for change of doctor. Clmt is asking to change to [Dr. L] to be physician." A March 8, 1993 entry noted receipt of Dr. L's TWCC-69, and stated, "In reviewing file, it is noted that [Dr. S] gave 4% PPI on 6/29/92 and clmt never disputed this rating. There is a letter from TWCC in August advising clmt was changing Tx doctors to [Dr. L]. Nothing is mention (sic) about disputing PPI. Writing TWCC advising that we are showing clmt did not dispute his PPI from [Dr. S] and that rating should stand as it is over 90 days old."

In holding for claimant, the hearing officer made the following pertinent findings of fact and conclusions of law:

FINDINGS OF FACT

5.On May 12, 1992, [Dr. S] completed a TWCC-69 Form certifying that the claimant had reached MMI on May 11, 1992, with 4% impairment. [Dr. S] stated on his form that the certification of MMI and the impairment rating pertained only to the claimant's left lower extremity. On May 11, 1992, [Dr. S] noted in another report that he was recommending that an MRI be done on the claimant's shoulder to rule out impingement.

6.At some point after May 11, 1992, and before June 19, 1992, the claimant began treatment with [Dr. C] for his right shoulder. The claimant spoke to the carrier's adjuster on June 23, 1992 regarding the claimant's belief that [Dr. C] would be unable to give an impairment rating.

7.On June 29, 1992, [Dr. S] saw the claimant, and on June 30, 1992, he completed a TWCC-69 Form certifying that the claimant reached MMI on June 29, 1992 with 4% impairment. [Dr. S] noted on the form that an MRI

performed on the claimant's shoulder was reported to be normal, and the claimant had no impairment in connection with his shoulder.

8.By July 7, 1992, the claimant had received [Dr. S's] final medical report.

9.[Dr. S's] final reports in evidence consist of a TWCC-69 Form and a TWCC-64 Form, both of which are dated June 30, 1992 and showed that the claimant reached MMI on June 29, 1992, and had no impairment in connection with his right shoulder.

10.On July 22, 1992, the Texas Workers' Compensation Commission received the claimant's letter requesting to change doctors (from [Dr. C] to [Dr. L]) because [Dr. C] was unable "to do an impairment procedure." On that form the claimant stated that his injury included a fractured left ankle and a rotator cuff tear of the right shoulder.

11.At some point in July, 1992, the claimant spoke with [Ms. P], who is an adjuster for the carrier, and informed her that he wanted a second opinion on his status because he still had pain and that he wanted to obtain treatment from [Dr. L].

12.On August 10, 1992, the carrier received a letter from the Texas Workers' Compensation Commission enclosing the claimant's request described in Finding of Fact #10 above.

CONCLUSIONS OF LAW

4.While under Art. 8308-4.63(e) of the Texas Workers' Compensation Act [now Section 408.022(d)] it is improper to change doctors to secure a new impairment rating, such a request for that purpose may constitute a dispute of an existing impairment rating.

5.Under TWCC Rule 130.5 and TWCC Appeal No. 93200, decided April 14, 1993, the claimant timely disputed [Dr. S's] impairment rating assigned on June 29, 1992.

6.Since the claimant timely disputed [Dr. S's] assigned impairment rating, under TWCC Appeal Nos. 92670, decided February 1, 1993, and 93377, decided July 1, 1992, [Dr. S's] certification that the claimant reached MMI on June 29, 1992 never became final.[4]

[4]Appeal No. 92670 holds that Rule 130.5(e), which addresses only impairment ratings, applies with equal force to the designation of MMI that accompanies the impairment rating; Appeal No. 93377, citing Appeal No. 92670, states that if the first impairment rating has not become final because of timely dispute, it follows that under Rule

Carrier's sole point of error is the fact that the hearing officer relied upon the claimant's request for a second treating doctor as a dispute of the claimant's impairment rating. The carrier contends this cannot be the basis of such a dispute, citing Texas Workers' Compensation Commission Appeal No. 93385, decided July 2, 1993.

Appeal No. 93385 is one case concerning the sufficiency, as a dispute of MMI or impairment, of a claimant's communications and involved a fact situation similar to the instant one. Evidence in that case included communication to and from the Commission concerning claimant's request to change treating doctors; while that request stated the reason as "to obtain another evaluation regarding [claimant's] current back condition and impairment rating," claimant's attorney's testimony regarding his lack of knowledge and information at the time the request was made cast doubt upon the letter's actual intent. Evidence in that case also showed that the claimant was informed in writing that he had 90 days to dispute MMI or the impairment rating and that claimant clearly and concisely did so, well after the 90 days had passed. We held that the overwhelming weight of the evidence in that case indicated that the claimant did not timely dispute the impairment rating.

A common element in this case and Appeal No. 93385 concerns both claimants' contention that a request for a change of treating doctors constituted a dispute of MMI and impairment. While Section 408.022(d) of the 1989 Act provides that "A change of doctor may not be made to secure a new impairment rating or medical report," we agree with the hearing officer's Finding of Fact No. 4, which provides that such a request for that purpose may constitute a dispute of an existing impairment rating (emphasis added). We have previously held that whether a claimant or a carrier timely disputed an impairment rating is a fact-specific question. Texas Workers' Compensation Commission Appeal No. 93047, decided March 5, 1993; No. 92542, decided November 30, 1992. 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.

Other prior cases in which this panel examined the content of a communication have included Texas Workers' Compensation Commission Appeal Nos. 93046, decided March 5, 1993, and 93089, decided March 18, 1993. In Appeal No. 93046, a carrier's statement on a Notice of Refused/Disputed Claim (Form TWCC-21), attacking a doctor's Form TWCC-69 on the grounds that the doctor did not do the certification, was held as disputing whether MMI was properly certified and an impairment rating thereby established, and in effect disputing the rating. The Appeals Panel affirmed, stating in part that "an attack upon the underlying statutory requirements of certification should be considered an attack upon the

130.5(e), there is no basis to determine that MMI has become final.

result of that certification." In Appeal No. 93089 the panel upheld a finding of timely dispute based on evidence which included the claimant's request for a benefit review conference giving the reason as "Cessation of weekly compensation benefits since April 30, 1992." In addition, the claimant testified that he spoke with a disability determination officer about disputing the doctor's certification of MMI and impairment rating, testimony which was borne out by a dispute resolution form signed by the same officer and stating "Disputed issue(s)...date of MMI and impairment rating."

A case cited by the hearing officer in support of her conclusion of law that claimant timely disputed Dr. S's impairment rating is Texas Workers' Compensation Commission Appeal No. 93200, decided April 14, 1993, which held that despite that claimant's failure to notify the Commission of a dispute, "uncontroverted and clear notice of a dispute to the carrier's representative would be sufficient notice." (Evidence in that case included claimant's testimony that he contacted carrier's representative by telephone and told her he did not agree with and did not want to accept the impairment rating.) A concurring opinion stated that the decision "should not be construed as 'carte blanche' for finding in far weaker cases that an MMI or impairment dispute was raised, based upon mere expressions of discontent to any bystander with a doctor's opinion." That opinion went on to state that there should be "clear evidence of the expression of a dispute," hopefully bolstered with medical evidence against the MMI finding.

Our review of the evidence in this case leads us to the inescapable conclusion that, similar to the case in Appeal No. 93385, *supra*, the overwhelming weight of the evidence in this case does not support a determination that claimant's actions following receipt of the June 29, 1992, impairment rating from Dr. S constituted a communication of a dispute to the carrier or the Commission. Claimant's own testimony indicates that he still had pain and was seeking another doctor after Dr. S released him; his communication with Ms. P appears to convey only a request for another treating doctor; and Ms. P's responses clearly indicate action based upon this type request.

Regardless of claimant's stated intent and belief, his own testimony at the hearing, as well as his written communication to the carrier and the Commission, consistently indicate only a desire for further treatment. (We note that the pertinent finding of fact states that the claimant spoke with the adjuster seeking "a second opinion" because "he still had pain" and "to obtain treatment.") We caution that in many cases a carrier's or the Commission's failure to understand that a claimant means to dispute an impairment rating 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 decision and order of the hearing officer are reversed and a new decision is rendered that the claimant did not timely dispute Dr. S's certification of MMI and impairment rating, and that such have accordingly become final pursuant to Rule 130.5(e).

Lynda H. Nesenholtz
Appeals Judge

CONCUR:

Susan M. Kelley
Appeals Judge

DISSENTING OPINION:

In spite of the deep respect which I hold for my colleagues, I feel constrained to dissent in the present case. My reading of the evidence is that there is evidence in the record, both in the testimony of the claimant and in the letter he wrote to the Commission, showing that he disputed the impairment rating of Dr. S. I understand that the evidence in this case is somewhat ambiguous. However, I believe that sorting out of factual matters is for the hearing officer. I believe that the majority is invading the fact finding function of the hearing officer under the guise of finding the great weight andpreponderance of the evidence is against the findings of the hearing officer. In my viewthere is no evidence contrary to the finding of the hearing officer except the subjective opinion of the handling adjuster reflected, not through her live testimony, but through the murky mirror of a computer printout of file notes that appear to be on their face incomplete. It seems to me that to hold that such evidence constitutes the great weight and preponderance of the evidence against the determination of the hearing officer does violence to the proper standard of appellate review.

I would affirm the hearing officer.

Gary L. Kilgore
Appeals Judge