APPEAL NO.980050

This appeal arises pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act). A contested case hearing (CCH) was held on December 8, 1997. He (hearing officer) determined that the first certification of a date of maximum medical improvement (MMI) and an impairment rating (IR) by (Dr. J) became final pursuant to Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 130.5(e) (Rule 130.5(e)). The appellant (claimant) appeals this determination, expressing his disagreement with it. The respondent (carrier) replies that the claimant's appeal is inadequate as a matter of law and that, in any case, the decision of the hearing officer is correct, supported by sufficient evidence, and should be affirmed.

DECISION

Affirmed.

We consider the claimant's appeal adequate as an appeal. *See* Texas Workers' Compensation Commission Appeal No. 92292, decided August 18, 1992.

Rule 130.5(e) provides that the "first [IR] assigned to an employee is considered final if the rating is not disputed within 90 days after the rating is assigned." If the IR becomes final by virtue of this rule, the underlying date of MMI also becomes final. Texas Workers' Compensation Commission Appeal No. 92670, decided February 1, 1993. We have also held that the 90-day period under this rule begins to run on the date the disputing party receives written notice of the first IR. Texas Workers' Compensation Commission Appeal No. 94354, decided May 10, 1994. There was no disagreement that the first certification of a date of MMI of October 3, 1996, and a zero percent IR for purposes of Rule 130.5(e) was made by Dr. J in a Report of Medical Evaluation (TWCC-69) which he signed on October 3, 1996. The claimant signed a U.S. Postal Service card indicating receipt on November 2, 1996, of the carrier's mailing of a copy of this form.[1]

The claimant testified that when he saw Dr. J on October 3, 1996, Dr. J released him to return to work. According to the claimant, he told Dr. J that he was still in pain to which Dr. J replied that he could do nothing for him and he must live with the pain. The claimant further testified that he asked Dr. J for a referral to another doctor, but that Dr. J declined to do so. The claimant also testified that he spoke by telephone with. (Ms. B), the adjuster, several times during the 90-day period after he received a copy of Dr. J's certification to tell her he was still hurting. The claimant said that Ms. B told him that if Dr. J no longer would

[1]Also in evidence was a letter from the Texas Workers' Compensation Commission (Commission), dated October 29, 1996, which advised the claimant that Dr. J had certified a date of MMI and an IR and what the claimant must do if he did not agree with Dr. J.

see him, he, the claimant, would have to find another treating doctor and could go to an emergency room if the pain worsened. In the conversations, the claimant said, he "was going against" what Dr. J said.

Ms. B testified by telephone that she talked to the claimant and his daughter about Dr. J's certification and that she advised him of his "options." She said she understood that the claimant was still in pain and sent him an Employee's Request to Change Treating Doctors (TWCC-53). According to Ms. B, the claimant only expressed dissatisfaction with Dr. J and wanted a new treating doctor. She testified that he never said he was disputing the certification of a date of MMI and an IR.

Whether the claimant timely communicated a dispute of the first certification in order to avoid the finality provision of Rule 130.5(e) was essentially a question of fact for the hearing officer to decide. Texas Workers' Compensation Commission Appeal No. 93666, decided September 15, 1993. The hearing officer commented in his discussion of the evidence that he did not believe the claimant "fully understood the consequences of his failure to dispute within ninety days." He further concluded that neither the claimant nor his daughter in their discussions with Ms. B ever disputed the certification, but only expressed dissatisfaction with the treatment received from Dr. J. The fact that a party was not aware of the 90-day rule or its implication for the receipt of future benefits does not excuse the failure to comply with the rule. Texas Workers' Compensation Commission Appeal No. 94269, decided April 20, 1994. Also, a request to change treating doctor is not necessarily a dispute on initial certification. Texas Workers' Compensation Commission Appeal No. 93385, decided July 2, 1993. We will reverse a factual determination of a hearing officer, in this case that the claimant did not timely dispute Dr. J's certification, only if it is so against the great weight and preponderance of the evidence as to be clearly erroneous and unjust. Cain v. Bain, 709 S.W.2d 175, 176 (Tex. 1986); Pool v. Ford Motor Company, 715 S.W.2d 629, 635 (Tex. 1986). The question in this case is not the timing of the claimant's alleged dispute, but whether he actually communicated a dispute of Dr. J's certification. The hearing officer concluded that he did not. The claimant's testimony on this question was ambiguous at best and could be interpreted, as the hearing officer did, that the claimant did not dispute the certification, but only wanted a new treating doctor because of his dissatisfaction with Dr. J. Ms. B's testimony on this point was fairly clear and straightforward. Applying our standard of appellate review to the record of this case, we find the evidence sufficient to support the decision of the hearing officer that Dr. J's certification of a date of MMI and an IR become final and that, in accordance with this certification, the claimant reached MMI on October 3, 1996, and has a zero percent IR.

For the foregoing reasons, we affirm the decision and order of the hearing officer.

Alan C. Ernst
Appeals Judge

CONCUR:

Thomas A. Knapp
Appeals Judge

Tommy W. Lueders
Appeals Judge