APPEAL NO. 990046

This appeal arises pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act). On December 10, 1998, a contested case hearing (CCH) was held. She (hearing officer) determined that the first certification of maximum medical improvement (MMI) and impairment rating (IR) assigned by Dr. S on February 5, 1998, did not become final pursuant to Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE 130.5(e) (Rule 130.5(e)). Appellant (carrier) appeals, contending that the hearing officer erred in determining that the first certification did not become final. Carrier contends that the evidence did not establish that the treating doctor of the respondent (claimant) disputed on claimant's behalf. The claim file does not contain a response from claimant.

DECISION

We affirm.

Carrier contends the hearing officer erred in determining that the first certification did not become final in this case. Carrier contends that the evidence did not sufficiently establish that claimant's treating doctor, Dr. T, disputed the first certification on claimant's behalf.

The parties stipulated that: (1) on February 5, 1998, Dr. S, carrier's choice of doctor, assigned the first certification for the claimant; (2) Dr. S assigned a four percent IR and an MMI date of February 5, 1998; (3) claimant received his first written notice of the first certification "at least by February 19, 1998"; and (4) on February 13, 1998, carrier received a copy of Dr. S's TWCC-69 on which Dr. T had indicated that he disagreed with the first certification. Claimant testified that he sustained a compensable injury to his wrist, shoulder, neck, and back on _____. He said his treating doctor is Dr. T and that he had surgeries to his shoulder in 1997 and 1998. Claimant said he received Dr. S's TWCC-69 on February 11, 1998. Claimant testified that he and Dr. T discussed Dr. S's TWCC-69 and that he asked Dr. T to dispute the first certification on his behalf. Claimant said Dr. T told him not to worry and that he would dispute it and send a copy to carrier and to the Commission. The attorney for carrier stated that on February 13, 1998, carrier received the TWCC-69 on which Dr. T indicated his disagreement with the first certification. The record does not contain a writing created within the 90-day period to show that Dr. T notified the carrier and the Commission that he is disputing the first certification "on claimant's behalf."

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. The Appeals Panel has stated that where a treating doctor acts on his or her own in disputing the first assigned IR, and not as the agent of and with the involvement of the claimant, such does not constitute a timely dispute by the claimant. Texas Workers' Compensation Commission Appeal No. 952151, decided February 5, 1995. We have held that there must be some indication that the claimant authorized the treating doctor to dispute on the claimant's behalf or that claimant had some involvement in the dispute. Texas Workers'

Compensation Commission Appeal No. 961569, decided September 23, 1996; Texas Workers' Compensation Commission Appeal No. 950977, decided July 31, 1995; Texas Workers' Compensation Commission Appeal No. 950928, decided July 21, 1995; Texas Workers' Compensation Commission Appeal No. 94519, decided June 14, 1994.

The hearing officer determined that: (1) on or about February 12, 1998, claimant spoke with Dr. T and asked him to dispute the first certification on claimant's behalf; (2) on February 12, 1998, Dr. T signed block 22 of Dr. S's TWCC-69, indicating a disagreement regarding the first certification; (3) Dr. T was acting on claimant's behalf in disputing the first certification; (4) on February 12, 1998, the dispute was mailed to the Commission and to carrier; (5) the Commission received the dispute "no later than February 19, 1998"; and (6) the first certification did not become final.

The carrier contends that the finding of an agency relationship between the claimant and Dr. T is not supported by the evidence. Carrier asserts that, "for a treating doctor's dispute on behalf of a claimant to be effective, it must be communicated to the carrier or Commission that the dispute is on behalf of the claimant." We acknowledge our prior holdings in Texas Workers' Compensation Commission Appeal No. 981088, decided July 8, 1998; Texas Workers' Compensation Commission Appeal No. 982646, decided December 23, 1998; and Texas Workers' Compensation Commission Appeal No. 982956, decided January 29, 1999. However, in Texas Workers' Compensation Commission Appeal No. 981266, decided July 22, 1998, the Appeals Panel affirmed a hearing officer's decision that the first IR assigned to the employee did not become final under Rule 130.5(e) because the treating doctor had timely disputed that rating on behalf of the employee. In that case we suggested that if a doctor is going to dispute the first IR at the claimant's request, the doctor *should* communicate that fact in his report and noted that failure to do that may jeopardize an otherwise timely dispute of the first IR. In Appeal No. 981266 we did not *require* that evidence of an "agency relationship" must be provided to the carrier and the Commission within the 90-day period for disputing the first IR in order for a hearing officer to find that the treating doctor had timely disputed the first IR at the request of the employee and we decline to impose such a requirement in the case before us. The hearing officer is the judge of the weight and credibility to be given to the evidence. Section 410.165(a). 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. Texas Workers' Compensation Commission Appeal No. 950084, decided February 28, 1995. We conclude that the hearing officer's findings, conclusions, and decision are supported by sufficient evidence and are not so contrary to the overwhelming weight of the evidence as to be clearly wrong and unjust.

We affirm the hearing officer's decision and order.

_____
Judy Stephens
Appeals Judge

CONCUR:

_____
Robert W. Potts
Appeals Judge

_____
Susan M. Kelley
Appeals Judge