

APPEAL NO. 990201

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 on January 17, 1999. With respect to the single issue before him, the hearing officer determined that the first certification of maximum medical improvement (MMI) and impairment rating (IR) did not become final under Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 130.5(e) (Rule 130.5(e)). In its appeal, the appellant (self-insured) asserts error in that determination, contending that the evidence did not establish that the respondent's (claimant) treating doctor disputed the initial certification on the claimant's behalf. In his response, the claimant urges affirmance.

DECISION

Affirmed.

The parties stipulated that the claimant sustained a compensable injury on _____; that Dr. C examined the claimant as the self-insured's required medical examination doctor; that Dr. C certified MMI on January 20, 1998, with an IR of zero percent; and that Dr. C's certification was the first one assigned to the claimant. The claimant testified that he received Dr. C's certification of MMI and IR in late March. The self-insured offered a return receipt card demonstrating that the claimant received written notice of the certification on March 27, 1998.

The claimant stated that when he received Dr. C's rating he did not agree with it because the zero percent indicated that he was alright and he knew that he was not because he was still hurting. He testified that he called Dr. S, his treating doctor, and told Dr. S that he did not agree with Dr. C's assessment of MMI and IR; that he took Dr. C's Report of Medical Evaluation (TWCC-69) with him to his next appointment with Dr. S, that he and Dr. S discussed the rating; that he again told Dr. S he disagreed with the rating; that Dr. S told the claimant that he Dr. S also disagreed with Dr. C's certification; and that Dr. S told him not to worry about the rating because "he would take care of it." The claimant testified that he did not specifically ask Dr. S to dispute the rating for him, but he also testified that he believed that Dr. S would do so based upon his assurances to that effect and that he agreed to permit Dr. S to take care of it for him. On cross-examination, the claimant testified that he did not tell Dr. S he was counting on him to dispute Dr. C's rating and that he did not give Dr. S express authority to do so, although he maintained that he expressed his disagreement with Dr. C's certification to Dr. S. In response to questioning from the hearing officer, the claimant stated that the appointment with Dr. S where they discussed Dr. C's rating was not a regularly scheduled appointment and that it was scheduled in response to the telephone call he made to Dr. S after he received Dr. C's certification of MMI and IR wherein he first told Dr. S that he did not agree with the certification.

On April 21, 1998, Dr. S completed the bottom portion of Dr. C's TWCC-69 stating his disagreement with Dr. C's MMI date and his zero percent IR. That document is date-stamped as having been received by the self-insured's third-party administrator on April 23, 1998. Ms. T testified at the hearing that she was the adjuster handling the claimant's claim for the third-party administrator from its inception until mid-August 1998. Ms. T stated that she never had a conversation with the claimant where he expressed disagreement with Dr. C's MMI and/or IR. Ms. T also testified that she received the TWCC-69 where Dr. S expressed his disagreement with Dr. C's certification and that she had no conversation with either Dr. S or anyone from Dr. S's office, advising her that Dr. S had disputed the certification on behalf of the claimant.

Rule 130.5(e) provides that the first IR assigned to an injured employee is considered final if the rating is not disputed within 90 days after the rating is assigned. The claimant acknowledged that he received notice of Dr. C's certification of MMI and IR on March 27, 1998, and there was no dispute that the self-insured received the TWCC-69 containing Dr. S's disagreement with the certification within the 90-day dispute period. Thus, the critical question is whether Dr. S disputed the rating on behalf of the claimant such that the initial certification did not become final under Rule 130.5(e). The hearing officer determined that "[Dr. S's] disagreement was made with the involvement of the Claimant and was an effective dispute pursuant to Rule 130.5(e)." In making his determination that Dr. S's dispute was effective, the hearing officer relied on Texas Workers' Compensation Commission Appeal No. 961569, decided September 23, 1996. The self-insured argues that the hearing officer's reliance on that case is misplaced; however, we find no merit in that contention. Appeal No. 961569 is a strikingly similar case. In that case, as here, the claimant testified that she contacted her treating doctor after she received the initial certification of MMI and IR and expressed her disagreement with the certification and the treating doctor told the claimant to send him the report so he could "take care of it." Appeal No. 961569 affirmed the hearing officer's determination that the first certification did not become final because it was timely disputed by the treating doctor on behalf of the claimant. Specifically, that case stated:

[c]onsidering claimant's testimony and the content of [the treating doctor's] January 3, 1996, written response to the carrier, we are satisfied that the evidence is sufficient to support the challenged finding that claimant notified [the treating doctor] on or about December 22, 1995, and voiced her disagreement with the IR. We are similarly satisfied that the evidence sufficiently supports the finding that [the treating doctor] disputed the IR on January 3, 1996, with claimant's authority and on her behalf.

In Texas Workers' Compensation Commission Appeal No. 94747, decided July 25, 1994, we stated that in order for a treating doctor to dispute on behalf of the claimant "it must be apparent from the facts and circumstances of a given case that the treating doctor in expressing agreement or disagreement with another doctor's certification of MMI and IR, has done so with some 'involvement' of the claimant Only then can it reasonably be concluded that the treating doctor is expressing the decision of the claimant to dispute or not dispute the first rating." See *also* Texas Workers' Compensation Commission Appeal

No. 990046, decided February 25, 1999, for a discussion of circumstances where a treating doctor's dispute of the first certification of MMI and IR will be an effective dispute.

The self-insured argues that because the claimant neither expressly asked nor expressly authorized Dr. S to dispute the rating, the hearing officer could not determine that Dr. S disputed the certification on behalf of the claimant. The self-insured emphasizes the language in Texas Workers' Compensation Commission Appeal No. 941195, decided October 20, 1994, that "unless it can be shown that the doctor acted with the claimant's authority, or at the claimant's request, it cannot be said that the claimant disputed the rating." The self-insured's reading of that language is too narrow. There is no absolute requirement that the claimant's authority be expressly stated; rather, as we noted in Appeal No. 94747, *supra*, "it must be apparent from the facts and circumstances of a given case that the treating doctor in expressing agreement or disagreement with another doctor's certification of MMI and IR, has done so with some 'involvement' of the claimant" In this instance, the evidence supports the hearing officer's determination that the claimant contacted his treating doctor after he received Dr. C's certification of MMI and IR and expressed his disagreement with the certification to Dr. S; that the claimant took a copy of Dr. C's TWCC-69 to Dr. S; that Dr. S also did not agree with the certification; that Dr. S assured the claimant that he would "take care of it"; and that Dr. S completed the bottom portion of Dr. C's TWCC-69, expressing his disagreement and faxed it to the self-insured's third-party administrator. Those factors provide sufficient support for the hearing officer's determination that Dr. S's dispute was made on claimant's behalf. Our review of the record does not demonstrate that the hearing officer's determination in that regard is so contrary to the great weight and preponderance of the evidence as to be clearly wrong or manifestly unjust; therefore, no sound basis exists for us to reverse that determination on appeal. Pool v. Ford Motor Co., 715 S.W.2d 629, 635 (Tex. 1986); Cain v. Bain, 709 S.W.2d 175, 176 (Tex. 1986). Accordingly, the hearing officer properly determined that the first certification did not become final under Rule 130.5(e) because it was timely disputed.

The hearing officer's decision and order are affirmed.

Elaine M. Chaney
Appeals Judge

CONCUR:

Robert W. Potts
Appeals Judge

CONCURRING OPINION:

I concur in the result.

Philip F. O'Neill
Appeals Judge