APPEAL NO. 990323

This appeal arises under the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq*. (1989 Act). On January 8, 1999, a contested case hearing (CCH) was held. With respect to the issues before him, the hearing officer determined that the first certification of maximum medical improvement (MMI) and impairment rating (IR) assigned by Dr. A on April 13, 1998 (all dates are 1998 unless otherwise stated), did not become final under Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 130.5(e) (Rule 130.5(e)).

Appellant (carrier) appeals, contending that "the claimant [respondent] did not contact the Commission [Texas Workers' Compensation Commission] to dispute the [IR] and assessment of [MMI] until August 14, 1998, outside the 90 day time frame" and that claimant's treating doctor's actions were insufficient to dispute the first certification on claimant's behalf. Carrier requests that the hearing officer's decision be reversed and that we render a decision in carrier's favor. The file does not contain a response from claimant.

DECISION

Affirmed.

The facts are fairly undisputed. Claimant had been employed as a carpenter since 1987 and on _____, sustained a compensable injury when a board (a "beam") he was walking on broke and he fell about 12 feet "onto a cement wall." Claimant sustained injuries to his head, shoulders, back and left leg. Claimant was treated for his injuries and apparently saw Dr. A for an independent medical examination for the first time on December 1, 1997. Dr. A recommended "an aggressive therapy program" and did not assess an MMI date or IR at that time. Subsequently, claimant began treating with Dr. M, who became claimant's treating doctor on or about March 31st. In a letter of that date, Dr. M recommended a revised treatment plan to carrier. Carrier then referred claimant back to Dr. A for a medical evaluation.

Dr. A saw claimant on April 9th and, in a Report of Medical Evaluation (TWCC-69) dated April 13th and narrative dated April 9th, certified claimant to be at MMI on April 8th with a 14% IR. It is undisputed that this report constituted the first certification of MMI and IR. Claimant testified that he received a copy of that report sometime before April 24th, when he had an appointment with Dr. M. Claimant testified, through a translator, that he has only a sixth-grade level Mexican education and does not read much English. Claimant testified that he asked Dr. M, whose staff is bilingual, to explain the TWCC-69 and to dispute it on his behalf. In a letter dated April 24th, addressed to the carrier, with a copy to the Commission, Dr. M wrote:

> My specific dispute with [Dr. A], based on my interview with the patient today include:
>
> * * * *

- [Dr. A] did not have translation available and forced the patient to speak English . . . .

  This patient continues having difficulties both in his shoulder and in his leg.

* * * *

Because of the problems you indicate in receiving information from this office, we will provide this information to you today both *via fax and certified mail* [emphasis in the original] so that there can be no question regarding receipt of this dispute and the ongoing appeal process regarding treatment for this gentleman. [Emphasis added.] As you are aware, the case continues in review in (City 1).

It is undisputed that carrier received this letter on or about May 14th.

On April 29th, carrier mailed a copy of Dr. A's TWCC-69 report and narrative to claimant by certified mail, return receipt requested. Claimant received this copy on May 1st. Claimant testified that he had received two copies of Dr. A's report. Carrier offered into evidence the Commission's Dispute Resolution Information System (DRIS) notes, which show that an "EES 19 letter printed 04/20/98; mailed 04/30/98" was sent to claimant. A DRIS note dated August 14th states, "Clmt in the office. Wanted to know what and how to dispute MMI/Rating . . . . He is past 91 day." Subsequently, in a letter dated August 18th, Dr. M wrote the carrier, stating:

> Acting as the patient's agent on 4/24/98, I sent a note specifically noting that I disputed the determination of MMI and the 14% [IR]. I was the treating doctor at that time and continue as the patient's treating doctor and agent in this matter.

The hearing officer made the following appealed findings:

FINDINGS OF FACT

10. On April 24, 1998, the Claimant initiated a conversation with [Dr. M], expressing his dissatisfaction with the [IR] assigned by [Dr. A]. The Claimant asked [Dr. M] to write a letter on his behalf disputing the [IR]. [Emphasis in the original.]

* * * *

17. The Claimant was sufficiently involved in the decision to file a dispute to the first certification of [MMI]/[IR] assigned by [Dr. A]; and trusted

that his treating doctor "would write a letter disputing the [IR] on his behalf." [Emphasis in the original.]

18. [Dr. M] (Claimant's treating doctor) was acting with Claimant's authority, and on Claimant's behalf when disputing the first certification of [MMI]/[IR] assigned by [Dr. A].

19. The Claimant's treating doctor properly disputed the first certification of [MMI]/[IR], and therefore the initial certification did not become final under Rule 130.5(e).

Rule 130.5(e) provides that the first IR assigned to an employee becomes final if not disputed within 90 days. Carrier appealed the hearing officer's findings, contending that claimant (personally) never disputed Dr. A's first certification of MMI and IR and that Dr. M's April 24th letter to carrier and the Commission was insufficient to dispute Dr. A's report because Dr. M did not specifically say that he was acting on behalf of the claimant or that he was acting as claimant's agent at that time, as he later did on August 18th. We have recently addressed the issue of a doctor's dispute of the first IR on claimant's behalf a number of times. Carrier, at the CCH, cites Texas Workers' Compensation Commission Appeal No. 982646, decided December 23, 1998, a case where the Appeals Panel remanded the case for the hearing officer to determine whether the claimant had ratified his doctor's disagreement within 90 days of receiving the first certification of MMI/IR. Although the facts are distinguishable, Appeal No. 982646 was cited in Texas Workers' Compensation Commission Appeal No. 982956, decided January 29, 1999, which contains a survey of recent Appeals Panel decisions on a treating doctor's dispute of the first assigned MMI/IR on behalf of the claimant. Those cases have usually focused on the fact that the treating doctor left unclear whether he was disputing the first assigned MMI/IR pursuant to Rule 130.3 or on behalf of the claimant, by only marking the disagreement blocks on the TWCC-69. That is clearly not the case in the matter before us. The hearing officer could, and apparently did, find that both claimant's testimony and Dr. M's April 24th letter show that claimant was involved in the decision to dispute Dr. A's first certification. Appeal No. 982956 also cited Texas Workers' Compensation Commission Appeal No. 981088, decided July 8, 1998 (also cited by carrier in its appeal), and quoted:

> However, as was stated in Texas Workers' Compensation Commission Appeal No. 94747, decided July 25, 1994, "it must be apparent from the facts and circumstances of the 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."

Those cases, and others cited therein, speak only to the doctor's dispute "on behalf of, or with the involvement of, or at the claimant's request, etc." (Appeal No. 982956, *supra.*) No strict agency relationship is necessary. Dr. M's mention of a dispute being based on the interview of the claimant that claimant continues to have difficulties and a reference to a

dispute and "the ongoing appeal process" are sufficient support for the hearing officer's finding of fact that the April 24th letter was written on "behalf" of the claimant and that the claimant "was sufficiently" involved in the decision-making process of disputing Dr. A's first certification of MMI/IR.

Upon review of the record submitted, we find no reversible error and we will not disturb the hearing officer's determinations unless they are so against the great weight and preponderance of the evidence as to be clearly wrong or unjust. In re King's Estate, 150 Tex. 662, 244 S.W.2d 660 (1951). We do not so find and, consequently, the decision and order of the hearing officer are affirmed.

_____
Thomas A. Knapp
Appeals Judge

CONCUR:

_____
Robert W. Potts
Appeals Judge

_____
Elaine M. Chaney
Appeals Judge