APPEAL NO. 990342

On January 20, 1999, a contested case hearing (CCH) was held. The CCH was held under the provisions of the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq*. (1989 Act). The issue at the CCH was whether the first certification of maximum medical improvement (MMI) and impairment rating (IR) assigned by Dr. S on January 9, 1998, became final under Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 130.5(e) (Rule 130.5(e)). Appellant (claimant) requests reversal of the hearing officer's decision that the first certification of MMI and IR assigned by Dr. S on January 9, 1998, became final under Rule 130.5(e). Respondent (carrier) requests affirmance.

DECISION

Affirmed.

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. Claimant appeared at the CCH but did not testify. The parties stipulated that claimant sustained a compensable injury on _____. Medical reports state that he injured his back at work on that day Dr. SU, D.C., is claimant's treating doctor and he referred claimant to Dr. C. Dr. C diagnosed claimant as having musculoligmentous injury of the cervical, thoracic, and lumbar spine; degenerative disc disease at L4; degenerative retrolisthesis at L4; mild spondylolisthesis at L5; and lumbar facet syndrome at L5, and wrote in October 1997 that if facet blocks and facet rhizotomies do not give claimant significant relief, then he could be considered for a surgical procedure. Dr. C wrote in December 1997 that claimant had an excellent response from facet blocks at L5 and that claimant was not at MMI.

Claimant was examined by Dr. S at carrier's request on January 9, 1998, and in a Report of Medical Evaluation (TWCC-69) dated January 9, 1998, Dr. S certified that claimant reached MMI on January 9, 1998, with a five percent IR. The five percent IR assigned by Dr. S was for a specific disorder of the lumbar spine. Dr. S noted that he tested claimant's range of motion (ROM) and that all measurements were within normal limits and no deficit in ROM was revealed. Dr. S reviewed the x-ray and MRI reports and reports of Dr. SU and Dr. C. Dr. S diagnosed claimant as having degenerative disc disease of the lumbar spine, spondylolysis of the lumbar spine, and a history of a non-radicular low back injury. The parties stipulated that Dr. S was the first doctor to certify that claimant was at MMI and to assign claimant an IR, and that claimant received notice of Dr. S's certification of MMI and IR on or about February 3, 1998.

In a TWCC-69 dated January 26, 1998, with an attached narrative report that was received by the Texas Workers' Compensation Commission (Commission) on January 27, 1998, Dr. SU reported that claimant had not reached MMI; that no IR could be given at that time; that he, Dr. SU, consulted with Dr. C; that facet injections were more effective than reported by Dr. S; and that he, Dr. SU, disagrees with the date of MMI and IR reported by Dr. S. In an office note dated February 2, 1998, which was received by the Commission on

February 9, 1998, Dr. C wrote that he totally disagrees with Dr. S's determination that claimant is at MMI because claimant was still in the evaluation and treatment phase and an evaluation for surgery was planned, with a discogram being scheduled for the following week. He noted that Dr. S had failed to indicate that claimant got almost 100% relief with injections at L5. On July 27, 1998, Dr. C wrote that both he and Dr. SU had questioned the MMI date as not being appropriate and that "evidently, the patient, never did request review of this officially and I did discuss this with the patient though he was not the one that brought it up and I can say with fairly good confidence that he did not understand what had been done, what the procedure meant or what his responsibilities were."

Claimant was examined by Dr. D on September 3, 1998, and Dr. D wrote that claimant's discograms were unremarkable, that his CT scan showed a disc bulge at L4-5 and a disc protrusion at L3-4 with stenosis, that the MRI showed a mild disc bulge at L4-5 and a disc protrusion at L3-4, and that an EMG showed mild L5 radiculopathy. Dr. D diagnosed claimant as having spondylolisthesis at L5-S1 and spinal stenosis at L3-4 and L4-5. Dr. D wrote that he discussed surgery with claimant. Claimant underwent lumbar spine surgery on October 16, 1998, which included lumbar laminectomies at L3-4, L4-5, and L5-S1, and a fusion at L5-S1. The preoperative and postoperative diagnoses were traumatic spondylosis at L5-S1, entrapment neuropathy, and an L3-4 bulging disc.

There is no evidence that claimant personally disputed Dr. S's certification of MMI and IR within 90 days of February 3, 1998. Claimant contended that Dr. SU and Dr. C disputed Dr. S's certification of MMI and IR on his behalf and that he was misdiagnosed by Dr. S. There is no appeal of the hearing officer's finding that there is insufficient medical evidence that claimant's condition was misdiagnosed at the time Dr. S certified MMI and IR. The hearing officer found that Dr. SU and Dr. C disputed Dr. S's certification of MMI and IR within 90 days of that certification, but that they did not dispute Dr. S's certification of MMI and IR as agents for or at the behest of claimant and that claimant did not dispute Dr. S's certification of MMI and IR within 90 days of his receipt of notice of that certification. The hearing officer concluded that the first certification of MMI and IR assigned by Dr. S on January 9, 1998, became final under Rule 130.5(e). Claimant contends on appeal that Dr. SU disputed Dr. S's certification of MMI and IR for him.

In Texas Workers' Compensation Commission Appeal No. 94747, decided July 25, 1994, the Appeals Panel stated that in certain cases a treating doctor may act as an agent of the claimant in raising a dispute pursuant to Rule 130.5(e), but that it must be apparent from the facts and circumstances of a given case that the treating doctor, in expressing disagreement with another doctor's certification of MMI and IR, has done so with some involvement of the claimant and that only then can it reasonably be concluded that the treating doctor is expressing the decision of the claimant to dispute the first rating. In Texas Workers' Compensation Commission Appeal No. 952151, decided February 5, 1996, the Appeals Panel held 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.

The hearing officer is the judge of the weight and credibility of 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 decision is supported by sufficient evidence and is not so contrary to the overwhelming weight of the evidence as to be clearly wrong and unjust.

The hearing officer's decision and order are affirmed.

_____
Robert W. Potts
Appeals Judge

CONCUR:

_____
Stark O. Sanders, Jr.
Chief Appeals Judge

_____
Alan C. Ernst
Appeals Judge