APPEAL NO. 990358

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 January 27, 1999. She (hearing officer) determined that the first certification of a date of maximum medical improvement (MMI) and an impairment rating (IR) did not become final under Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 130.5(e) (Rule 130.5(e)). The appellant (carrier) appeals this determination, alleging legal and factual insufficiency. The respondent (claimant) replies that the decision is correct, supported by sufficient evidence, and should be affirmed.

DECISION

Affirmed.

The claimant sustained a compensable low back injury on _____. Dr. M, her treating doctor, began a course of conservative treatment. On July 19, 1991, a lumbar MRI showed herniation at L5-S1 and osteoarthritis at L4-5 and L5-S1. On December 17, 1991, Dr. MP performed a laminectomy at L5-S1. On July 19, 1993, Dr. M completed a Report of Medical Evaluation (TWCC-69) in which he certified that the claimant reached MMI on that date and assigned a 10% IR for a specific disorder of the lumbar spine (surgically treated lumbar disc lesion).

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. The 90 days begins to run on the date the disputing party receives written notice of the certification. Texas Workers' Compensation Commission Appeal No. 950666, decided June 12, 1995. It was not disputed that Dr. M's certification was the first assigned to the claimant for purposes of Rule 130.5(e). The parties stipulated that the claimant received written notice of this certification "on or about November 10, 1993."

The claimant testified that her condition did not improve after her first surgery. A myelogram and CT scan showed nerve root compression at L5-S1 and L4-5. On July 27, 1994, she underwent a laminectomy at L4-5 and a repeat laminectomy at L5-S1. Another myelogram and CT scan on October 11, 1995, disclosed recurrent herniation at L4-5. On January 16, 1996, the claimant underwent fusion from L4 to S1. The claimant said that at some time after this third operation, Dr. M asked her if she ever was assigned a new IR in light of the additional surgeries. The claimant said she was not, so Dr. M began the process of assigning her a new IR. On June 30, 1998, he wrote that based upon the need for further surgery and recurrent disc herniation as noted in the myelogram and CT scan after the second surgery, "the previous findings of [MMI] and [IR] need to be reassessed in that they failed to address this previously undiagnosed condition." The undiagnosed condition was presumably herniation at L4-5. He further wrote that he believed a "re-rating"

was necessary because claimant was not "medically stable" at the time of the first IR. On August 18, 1998, Dr. M completed a second TWCC-69 in which he certified MMI on that date and assigned a 32% IR.

With regard to the matter in issue, the claimant testified that when she received Dr. M's first certification, she called the carrier to ask what it was about. She said that her usual adjuster was not available that day, but she spoke with another person who told her there was nothing more the carrier could do. When asked what she should do, she said, she was told to "file for SSI." She said she was never advised she could contact the Texas Workers' Compensation Commission (Commission). Also in evidence was the claimant's written answer under oath to a carrier interrogatory which asked when, to whom, and how she disputed Dr. M's first certification which stated:

> I called the insurance carrier on or about December 15, 1993 and communicated that I disagreed with the [IR]. Insurance adjuster advised me there was nothing I could do.

When asked on cross-examination about the apparent discrepancy in her testimony about when she disputed the first certification and the answer to the interrogatory, she said she did not recall at the CCH when she made the call to the carrier, but the interrogatory was "truthful." She denied that a December 14, 1993, letter from the Commission which advised her of Dr. M's certification and the need to timely dispute it if she disagreed with it, triggered her telephone call to the carrier. She also testified that the call was not to dispute the certification and that "[she] didn't dispute it" when she called. She further said it took so long to pursue a new rating because she was told by the carrier that it could do nothing further and Dr. M kept saying she would get better. The stipulation that she received written notice of the first certification on or about November 10, 1993, was apparently based on a letter from the carrier transmitting to the claimant a copy of the TWCC-69 prepared by Dr. M, but not otherwise explaining the effect of Rule 130.5(e).

The hearing officer made the following findings of fact and conclusions of law, which have been appealed by the carrier:

FINDINGS OF FACT

3. Claimant's credible testimony established that Claimant called Carrier's adjuster on the same day she received [Dr. M's] findings and inquired about income benefits as a result of [Dr. M's] findings. Claimant was told there was nothing more she could do through [the Commission] and was not advised of her right to dispute the findings. Claimant's call to the adjuster rises to the level of a dispute of [Dr. M's] findings.

8. Since the parties stipulated to on or about November 10, 1993 as the date Claimant received [Dr. M's] findings on MMI and IR, [Dr. M's]

records dated March 1, 1994 showing that [Dr. M] suspected Claimant had a herniated disc at L4-5 fall outside the 90 day time frame in which Claimant had to dispute a previously undiagnosed condition, if she had in fact known of the undiagnosed condition within the 90 day time period.

CONCLUSIONS OF LAW

3. The first certification of [MMI] and [IR] by [Dr. M], did not become final under Rule 130.5(e), because Claimant timely disputed the findings.

4. The first certification of [MMI] and [IR] by [Dr. M], did not become final under Rule 130.5(e), because of a previously undiagnosed condition.

In its appeal of the finding of timely dispute, the carrier stresses the claimant's testimony as "quite clear" that she did not dispute the certification in her telephone call to the carrier. Whether and, if so, when, an employee disputes a first certification is a question of fact for the hearing officer to decide. Texas Workers' Compensation Commission Appeal No. 94519, decided June 14, 1995. The evidence of a dispute in this case is somewhat confused and admits of varying inferences. The carrier stresses the claimant's testimony where she said she did not dispute the certification in her telephone call to the carrier presumably because she did not know what the effect of the TWCC-69 would be on her benefits and was not aware of the need to timely dispute. This testimony is at odds with the answer to the interrogatory, which the claimant likewise insists was truthful, that she expressed disagreement with the certification in her telephone call. The matter is further complicated by the reference in the interrogatory to a December 15, 1993, telephone call, a stipulation of receipt of written notice on November 10, 1993, and testimony that the call was made at the time of receipt of the written notice.

The Appeals Panel has held that notice of a dispute does not have to contain precise "magic words" like "I dispute," but there must be some meaningful conveyance of a dispute. Texas Workers' Compensation Commission Appeal No. 971545, decided September 18, 1997. In that case, which affirmed the finding of the hearing officer that the claimant timely disputed the first certification, the claimant called the carrier repeatedly and wrote the carrier saying she did not understand how she could be assigned a 10% IR when she was in constant pain. Similarly, in Texas Workers' Compensation Commission Appeal No. 961092, decided July 22, 1996, we affirmed a finding of timely dispute based on a telephone call to the adjuster in which the claimant said she did not like the rating and did not think it was right. In the case we now consider, it was a very close question whether the claimant's telephone call to the carrier rose to the level of a dispute. Certainly different hearing officers could reach opposite conclusions based on the evidence presented. The hearing officer in this case could have interpreted the testimony of the claimant as referring only to the formal use of the word "dispute" when she said she did not dispute the first certification and find the answer to the interrogatory that she expressed disagreement more reflective of the contents of the telephone call. In this latter case, a statement of

disagreement is akin to an expression that the IR was "not right" as was the case in Appeal No. 961092. The hearing officer was the sole judge of the weight and credibility of the evidence. Section 410.165(a). It was her responsibility to weigh the evidence and to determine what facts have been established. We will reverse a factual determination of a hearing officer only if that determination is so against the great weight and preponderance of the evidence as to be clearly wrong 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). Having reviewed the record in this case, we conclude that there was more than a scintilla of evidence to support the hearing officer's finding that the claimant timely disputed Dr. M's certification and for that reason decline to reverse that determination on appeal.

Because of our affirmance of the finding of timely notice, we need not and do not decide the carrier's other point on appeal. Texas Workers' Compensation Commission Appeal No. 94579, decided June 22, 1994.

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

_____
Alan C. Ernst
Appeals Judge

CONCUR:

_____
Stark O. Sanders, Jr.
Chief Appeals Judge

_____
Robert W. Potts
Appeals Judge