

APPEAL NO. 990643

This appeal is brought pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act). A contested case hearing was held on March 3, 1999. It is undisputed that in a Report of Medical Evaluation (TWCC-69) dated November 3, 1997, Dr. D rendered the first certification of maximum medical improvement (MMI) and impairment rating (IR) for the respondent's (claimant) compensable injury sustained on _____. The hearing officer made the following findings of fact and conclusions of law:

FINDINGS OF FACT

2. In November or December, 1997, Claimant authorized [Dr. M], his treating doctor, to dispute the first [IR] assigned by [Dr. D] on November 3, 1997.
3. In November or December, 1997, [Dr. M] disputed the first [IR] assigned by [Dr. D] on November 3, 1997.

CONCLUSIONS OF LAW

3. Because Claimant disputed the first [IR] assigned by [Dr. D] on November 3, 1997, within 90 days, it did not become [sic] final under Rule 130.5(e) [Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 130.5(e)].
4. Because the first [IR] did not become final, Claimant is entitled to the appointment of a designated doctor.

The appellant (carrier) requested review, contended that the evidence clearly established that Dr. M disputed the first certification without the claimant's knowledge or involvement, urged that the determination that the claimant disputed the first certification within 90 days is against the great weight and preponderance of the evidence, and requested that the Appeals Panel reverse the decision of the hearing officer and render a decision that the first certification of MMI and IR became final. In the alternative, the carrier requested that the Appeals Panel reverse the decision of the hearing officer and remand the case to him. A response from the claimant has not been received.

DECISION

We reverse and remand.

The claimant testified that he injured his neck and back unloading a dolly on _____; that he was seen by a company doctor and followed up with his doctor, Dr. M; that at the request of the carrier, he was seen by Dr. D in late October or early November

1997; that he received Dr. D's report sometime in November 1997; that he was unaware of what a zero percent IR meant, so he immediately took Dr. D's report to Dr. M; that he talked with Dr. M about the report; that Dr. M told him that "he would dispute the claim, disagree with the claim"; and that he asked Dr. M to do so. During cross-examination the claimant stated that he does not remember the exact date he received the TWCC-69 issued by Dr. D; that a couple of days after he received the TWCC-69, he took it to Dr. M; that he asked Dr. M what he should do about it; that Dr. M said not to worry about it and that as my doctor, he would dispute it for me; and that Dr. M examined him the day that they discussed the TWCC-69.

Dr. M testified that a couple of months ago he disputed the report of Dr. D for the claimant; that before that he disagreed with the report of Dr. D, the claimant disagreed with the report of Dr. D, and the claimant asked him to disagree with the report of Dr. D for him; that he did so sometime within a recent period after November 3, 1997; and that he faxed the disagreement to the carrier sometime in November 1997. During cross-examination, Dr. M stated that it was his general practice to make a notation of treatment in his records; that generally he does not reference nonphysical examination type material in his notes; that if he discussed an IR with a patient, he generally did not document that as part of his examination; that he provided all of his records concerning the claimant when they were subpoenaed; that he did not see the claimant in November 1997; that Dr. S, who works with him, saw the claimant on October 29, 1997, and November 13, 1997; that he saw the claimant on December 1, 1997; that nothing in his notes concerning the December 1, 1997, visit mentions the TWCC-69 or the IR; that he generally would not document such type information as part of his examination; that if a patient gives him authority to act on the patient's behalf as his or her agent, he does not document that because it is a patient-doctor confidentiality and his patients trust him to act on their behalf and he does so; that he signed the TWCC-69 stating disagreement with the report of Dr. D; and that he cannot tell specifically when he indicated that he disagreed with the report of Dr. D. Dr. M said that all of his reports concerning the claimant may not have been provided in response to the subpoena; that if he had performed a physical examination of the claimant, there would be a record in his notes; that his records indicate that Dr. S saw the claimant in November 1997, but that he did not; and that if he examined the claimant the day that he disputed the IR for him, that could not have occurred in November 1997. The hearing officer offered the parties the opportunity to have the record kept open to receive additional records concerning the claimant from Dr. M. Both parties indicated that they did not want to keep the record open.

The TWCC-69 signed by Dr. D is dated November 3, 1997. The section of the TWCC-69 below the signature of Dr. D has an "X" before "I DISAGREE with the above doctor's certification of [MMI]." and "I DISAGREE with the above doctor's assigned [IR]." and what appears to be Dr. M's signature. In the space for the date signed appears "11/03/97" and that date appears to have been placed on the TWCC-69 by using the same typewriter used to place "11/03/97" in the space for the date of the report. The carrier filed a Payment of Compensation or Notice of Refused/Disputed Claim (TWCC-21) dated November 24, 1997, in which it wrote:

Carriers [sic] IME [independent medical examination] doctor, [Dr. D], shows claimant reached MMI on 10-28-97 with a 0% impairment. The claimants [sic] primary treating doctor, [Dr. M], disagrees with our IME. We are requesting that the TWCC [Texas Workers' Compensation Commission (Commission)] designate a doctor to clear up the dispute. See TWCC 69 attached.

In a Notice of Maximum Medical Improvement/Impairment Rating Dispute (TWCC-32) dated March 18, 1998, the carrier indicated that it received the TWCC-69 with Dr. M's disagreement on it on November 21, 1997, and that in a TWCC-21 dated November 24, 1997, it had requested the appointment of a designated doctor, stating that Dr. M had disagreed with the MMI date and IR of Dr. D and that it again requested the appointment of a designated doctor to resolve the dispute. The parties agreed that a designated doctor had not been appointed by the Commission.

It is clear that the carrier received notice that Dr. M disagreed with the date Dr. D certified that the claimant reached MMI and the IR assigned by Dr. D no later than the date on the TWCC-21, November 24, 1997. The claimant did not dispute that the carrier filed the TWCC-21 on that date and did not contend that Dr. M filed more than one dispute of the report of Dr. D. In view of this evidence, the findings of fact of the hearing officer that in November or December 1997 the claimant authorized Dr. M to dispute the first IR assigned by Dr. D and that in November or December 1997 Dr. M disputed the first IR assigned by Dr. D do not resolve the disputed issue. Finding of Fact No. 3 is not supported by the evidence and we disregard Findings of Fact Nos. 2 and 3 as surplusage. We reverse Conclusions of Law Nos. 3 and 4, the decision, and the order of the hearing officer and remand for him to make findings of fact, conclusions of law, and a decision that resolve the disputed issue and to enter an appropriate order.

Pending resolution of the remand, a final decision has not been made in this case. However, since reversal and remand necessitate the issuance of a new decision and order by the hearing officer, a party who wishes to appeal from such new decision must file a request for review not later than 15 days after the date on which such new decision is received from the Commission's Division of Hearings, pursuant to Section 410.202. See Texas Workers' Compensation Commission Appeal No. 92642, decided January 20, 1993.

Tommy W. Lueders
Appeals Judge

CONCUR:

Stark O. Sanders, Jr.
Chief Appeals Judge

Joe Sebesta
Appeals Judge