APPEAL NO. 990670

On March 16, 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 certification of maximum medical improvement (MMI) and assignment of an impairment rating (IR) by Dr. P on August 27, 1998, should be considered final pursuant to Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 130.5(e) (Rule 130.5(e)). The appellant (claimant) requests reversal of the hearing officer's decision that the certification of MMI as of August 27, 1998, and assignment of a zero percent IR by Dr. P on August 27, 1998, are final pursuant to Rule 130.5(e). The respondent (carrier) requests affirmance.

DECISION

Reversed and rendered.

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. The parties stipulated that on _____, claimant sustained a compensable injury that included his low back area and his groin area. Claimant testified that Dr. K, D.C., has been his treating doctor since September 1997. Dr. K referred claimant to Dr. P for an opinion on spinal surgery. Dr. P examined claimant on January 6, 1998, diagnosed claimant as having a disc herniation at L5-S1 compressing the nerve root, and recommended lumbar spine surgery. Dr. P listed himself as the treating doctor and the surgeon on his spinal surgery recommendation. On May 5, 1998, Dr. A, the carrier's second opinion doctor on spinal surgery, concurred with Dr. P's surgery recommendation. On June 10, 1998, Dr. P recommended that claimant have cervical spine surgery and carrier waived its right to a second opinion on spinal surgery. Claimant was seen by Dr. P in office visits on June 23 and August 4, 1998. According to Dr. P's letter to the carrier of August 18, 1998, he reviewed a videotape of claimant sent to him by carrier. Dr. P also wrote that he had examined claimant on his last visit, which would have been August 4th, and that, after reviewing the videotape, he believed that claimant can function and go back to work without any operation and that as of August 18th, he would place claimant at MMI.

Claimant said that he was sent to Dr. P on August 27, 1998, to discuss the surgery date and that on that day Dr. P told him that he was not going to perform surgery on him because he had seen the videotape. Claimant said that Dr. P then told him to go next door for a test, but that he, claimant, left because he did not see any point in having another test if Dr. P was not going to perform surgery.

In a letter to the carrier dated August 27, 1998, Dr. P wrote that on that day claimant had returned to him for follow-up care, that he told claimant that in view of the videotape he did not feel comfortable performing an operation, that he told claimant he wanted to do an evaluation of him and after that "MMI him," that claimant refused to have the test performed, that claimant can be placed at MMI as of August 27th, and that claimant can

return to work. Attached to Dr. P's August 27th letter is a Report of Medical Evaluation (TWCC-69) dated August 28th, in which Dr. P certified that claimant reached MMI on August 27, 1998, with a zero percent IR and on which Dr. P noted that claimant had refused to be tested. The parties stipulated that on August 27, 1998, Dr. P certified that claimant had reached MMI as of that date and assigned claimant a zero percent IR, and that he was the first doctor to assign claimant an IR.

Claimant testified that on August 27, 1998, he called the Texas Workers' Compensation Commission (Commission) and told a Commission employee what Dr. P had told him and that he called the Commission on that date "about my disagreement." In evidence are Commission Dispute Resolution Information System (DRIS) entries. A DRIS entry dated August 27, 1998, notes that claimant called the Commission on that date and said that the "T-DR" told him that he no longer wanted to treat him because he saw a video of claimant and that he was going to put claimant at MMI and release him to return to work. The August 27th DRIS entry then states that claimant said that "we cannot allow the T-DR to do this." There is no evidence that Dr. K, claimant's treating doctor, had placed claimant at MMI on August 27th, that Dr. K had seen the videotape as of that date, or that Dr. K did not want to treat claimant as of that date. It is clear from the circumstances of this case that the August 27th DRIS entry, when referring to "T-DR," is actually referring to Dr. P. The hearing officer apparently understood that the August 27th DRIS entry was referring to Dr. P because he wrote in his Statement of the Evidence that on the same day Dr. P told claimant he was at MMI, August 27th, claimant called the Commission to stop Dr. P from declaring him to be at MMI.

The Appeals Panel has held that if the first IR assigned to a claimant becomes final under Rule 130.5(e), then so does the underlying certification of MMI. Texas Workers' Compensation Commission Appeal No. 92670, decided February 1, 1993. However, without a certification of MMI, an IR cannot be assigned or become final. Appeal No. 92670. A dispute of a doctor's MMI certification is a dispute of MMI and the assigned IR under Rule 130.5(e). Texas Workers' Compensation Commission Appeal No. 93570, decided August 24, 1993, and Texas Workers' Compensation Commission Appeal No. 961724, decided October 18, 1996.

Claimant testified that on September 8, 1998, he came in person to a Commission office to dispute the zero percent IR assigned by Dr. P, that he brought Dr. P's letter and report of a zero percent IR to the Commission on that date, and that he was told by a Commission employee on that date that Dr. P's report was invalid. According to a Commission DRIS entry of September 8, 1998, claimant came to a Commission office on that date with Dr. P's letter and TWCC-69, showed them to a Commission employee, and the Commission employee noted that Dr. P's report was not valid and that temporary income benefits (TIBS) should not be stopped. While it must be reasonably clear from the language used that a dispute is being made, no specific or magic language is required to dispute a first IR. Texas Workers' Compensation Commission Appeal No. 960456, decided April 22, 1996. With claimant coming to the Commission with Dr. P's report in hand and a Commission employee stating that the report was invalid, there is certainly corroboration of

claimant's testimony regarding the purpose of his visit to the Commission on September 8th.

BG, the adjustor for the carrier who is handling claimant's claim, testified that claimant did not tell him that he disputed Dr. P's report of MMI and IR, that the Commission did not tell him that claimant was disputing Dr. P's report of MMI and IR, and that it was not until after carrier suspended TIBS based on claimant's not having timely disputed Dr. P's report of MMI and IR that a Commission employee told him that she thought Dr. P's report was invalid.

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. The hearing officer states that claimant had little credibility, which was for the hearing officer to determine. However, with regard to claimant's testimony concerning his dispute of Dr. P's report, the Commission's DRIS entries of August 27th and September 8th provide corroboration of his dispute and they cannot be ignored. We conclude that the hearing officer's finding that claimant did not dispute Dr. P's determinations of MMI and IR within 90 days and his decision that Dr. P's certification of MMI and zero percent IR on August 27, 1998, became final under Rule 130.5(e) are so contrary to the overwhelming weight of the evidence as to be clearly wrong and unjust and we therefore reverse that finding and decision and we render a decision that Dr. P's certification of MMI and assignment of a zero percent IR did not become final under Rule 130.5(e) because claimant disputed Dr. P's certification of MMI and assignment of a zero percent IR within 90 days.

_____
Robert W. Potts
Appeals Judge

CONCUR:

_____
Gary L. Kilgore
Appeals Judge

_____
Dorian E. Ramirez
Appeals Judge