

APPEAL NO. 990864

This appeal arises pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act). On March 31, 1999, a hearing was held. He determined that appellant's (claimant) doctor's communications were "not sufficient to dispute" the initial impairment rating (IR) assigned to claimant and, therefore, the initial IR became final in accordance with Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 130.5(e) (Rule 130.5(e)). Claimant asserts that Dr. H was acting as his agent in disputing the initial IR, and it did not become final because it was disputed within 90 days as provided. Respondent (carrier) replied that the decision should be affirmed.

DECISION

We reverse and remand.

Claimant testified through a translator. Claimant is not an educated, white collar worker. On _____, claimant fell into a ditch while carrying material involved in his work for (employer). The parties stipulated that carrier accepted liability for the _____, injury. On February 26, 1998, claimant was examined by Dr. L, D.C. at the request of the carrier. Dr. L's report is dated March 11, 1998. In it he certified that maximum medical improvement (MMI) occurred on February 26, 1998, with a seven percent IR. His narrative indicates that the seven percent IR was based on impairment to the spine, but Dr. L also noted that the right knee was tender.

Dr. H testified by telephone that she is claimant's treating doctor and that claimant brought his copy of Dr. L's Report of Medical Evaluation (TWCC-69), which assigned the initial seven percent IR, to her on March 19, 1998, when he came for an appointment. (The evidence indicates that Dr. H can speak Spanish.) She said that she read the report and disagreed with it; she said she explained it to claimant and stated that he disagreed with it. She said that she signed the TWCC-69 disagreeing with Dr. L's IR and gave it to claimant to take to the Texas Workers' Compensation Commission (Commission). She described claimant as a "shy" person. Dr. H also said that claimant agreed with her and that he asked for her help in regard to Dr. L's report. She testified that she meant the word "we" in referring to her letter of March 20, 1998, to be herself and claimant. That letter said in part:

We are not in agreement with [Dr. L's] 3/11/98 TWCC-69 in which he assessed a 7% whole person impairment with date of MMI 2/26/98.

Dr. H appeared to have testified on cross-examination that she meant the word "we" in the above quote as including the claimant. She did say that other letters and other points made in which she used the word "we" would refer to herself and her associates. An example within the same letter as the quote above is, "We feel the patient has not reached a permanent and stationary status" This letter was received by the Commission on March 24, 1998, well within the 90 days allowed to dispute by Rule 130.5(e). Other copies

of the same letter were received by the Commission on June 24, 1998, and July 28, 1998. All are included in Claimant's Exhibit No. 8.

Dr. H's use of the word, "we" could mean different things and was said to have done so within the same letter; this may certainly confuse whether Dr. H was indicating that she was "expressing claimant's dispute" within the March 20, 1998, letter itself, as appears to be called for in Texas Workers' Compensation Commission Appeal No. 981088, decided July 8, 1998.

After Appeal No. 981088 appeared, the author judge concurred in Texas Workers' Compensation Commission Appeal No. 982646, decided December 23, 1998, which followed Appeal No. 981088, *supra*. After that case, Texas Workers' Compensation Commission Appeal No. 982956, decided January 29, 1999, also followed Appeal No. 981088, *supra*, and, in reversing a determination that an initial IR did not become final, said that the treating doctor did "not note on the TWCC-69, or anywhere else . . ." that he was acting at claimant's request. There was a dissent by Judge Potts in Appeal No. 982956, *supra*.

Also since Appeal No. 982646, *supra*, Texas Workers' Compensation Commission Appeal No. 982770, decided January 8, 1999; Texas Workers' Compensation Commission Appeal No. 990046, decided February 25, 1999; Texas Workers' Compensation Commission Appeal No. 990201, decided March 19, 1999; and Texas Workers' Compensation Commission Appeal No. 990790, decided May 19, 1999, have been written, with Appeal No. 990046, *supra*, and Appeal No. 990790, *supra*, citing Appeal No. 981088, *supra*, but not following it. In considering these opinions, the dissent in Appeal No. 982956, *supra*, is particularly compelling in pointing out that Rule 130.5(e), which states in its entirety:

The first impairment rating assigned to an employee is considered final if the rating is not disputed within 90 days after the rating is assigned[.]

does not impose any requirement on the manner of dispute or state any limitation on who may dispute. (We note also that Rule 130.5(e) does not contain any reference to MMI or to notice to the parties that the first IR has been assigned.) That dissent also indicates that the Appeals Panel, for a number of years, has been considering whether a doctor who disputes the initial IR does so with the claimant's authority or at his request, with facts indicative thereof allowed to be shown at a contested case hearing. Hearing officers, for a number of years, have then weighed the facts and determined whether or not the dispute of the initial IR lodged by the treating doctor was done with the claimant's authority or at his request.

While it is clear that the Appeals Panel decisions cited in this opinion provide two views as to what evidence is needed to uphold a factual determination that an initial IR did not become final when disputed by a treating doctor with the authority or at the request of the claimant, the basis for our review of a factual determination should be whether or not the great weight and preponderance of the evidence is against the determination. See

Texas Workers' Compensation Commission Appeal No. 961918, decided November 7, 1996.

In the case under review, the hearing officer appears to have addressed the facts under the guidance set forth in Appeal No. 981088, *supra*, and its progeny; a finding of fact used the phrase, "did not specifically authorize"; and another finding of fact used the phrase, "[Dr. H's] letters" do "not specifically indicate that she is acting on behalf of the Claimant." Applying these standards is understandable, given the opinions cited in this opinion that have been issued during the last year. Nevertheless, the case is remanded for the hearing officer to determine whether a dispute made by Dr. H within the 90 days provided by Rule 130.5(e) was "with claimant's authority" or "at claimant's request." In reaching a decision on this issue, the hearing officer should consider all of the evidence, including that provided at the hearing. We note also that Appeal No. 990201, *supra*, rejected an argument that a claimant must have "expressly asked" or "expressly authorized" the doctor to dispute the rating, in order to find that the doctor acted with the claimant's authority or at his request.

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.

Joe Sebesta
Appeals Judge

CONCUR:

Elaine M. Chaney
Appeals Judge

Dorian E. Ramirez
Appeals Judge