APPEAL NO. 990962

On April 6, 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 appellant (carrier) requests reversal of the hearing officer's decision that the first certification of maximum medical improvement (MMI) and impairment rating (IR) by Dr. L did not become final under Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 130.5(e) (Rule 130.5(e)). No response was received from claimant.

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.

The parties stipulated that claimant sustained a compensable injury on _____. According to reports of Dr. B, claimant sustained a left knee injury at work on that date and after an MRI was done Dr. B diagnosed claimant as having an internal derangement of the knee with a meniscus tear. Claimant underwent left knee surgery in August 1997. Dr. B noted in April 1998 that claimant was still having knee pain and swelling and recommended another operation. Dr. B noted in May 1998 that carrier did not approve the second operation and that that decision would be appealed. Dr. L examined claimant on August 10, 1998, at carrier's request and he certified that claimant reached MMI on August 10, 1998, with a seven percent IR. The parties stipulated that Dr. L certified that claimant reached MMI on August 10, 1998, with a seven percent IR and was the first doctor to do so. On August 20, 1998, carrier sent Dr. L's report to Dr. B and asked him for a response under Rule 130.3 regarding his agreement or disagreement with the report.

Claimant testified that Dr. B's office called him on August 25, 1998, to come to the office to go over Dr. L's report. Claimant said that he first saw Dr. L's report of MMI and IR at Dr. B's office on August 25, 1998. The parties stipulated that claimant first received written notice of Dr. L's MMI and IR certification on August 25, 1998. Claimant said that Dr. B went over Dr. L's report with him. Claimant said he told Dr. B that he disagreed with Dr. L's MMI date and IR because his leg was still hurting and they were still trying to get the second surgery approved. Claimant said Dr. B told him that he too did not agree with Dr. L's report. Claimant said he asked Dr. B what could be done and Dr. B told him that he, Dr. B, could file a report. Claimant said that he asked Dr. B to file a report disagreeing with Dr. L's certification of MMI and IR. Claimant said that he understood that Dr. B would take care of the dispute process for him and that Dr. B told him that he would file the report.

In the section at the bottom of Dr. L's report for the treating doctor to express agreement or disagreement, Dr. B checked that he disagreed with the certification of MMI and IR, signed that section of the report, and dated it August 25, 1998. The parties stipulated that Dr. B, claimant's treating doctor, signed Dr. L's report on August 25, 1998,

and indicated on that report his disagreement with Dr. L's certification of MMI and IR. In a report dated August 25, 1998, Dr. B wrote that he discussed Dr. L's report and the possibility of surgery with claimant, that he, Dr. B, does not feel that claimant is at MMI because of the potential to improve with surgery, and that "I explained to [claimant] that I plan to disagree with the assessment of [Dr. L], so that another opinion would be required. [Claimant] agrees with my assessment, that he is not at MMI." Dr. B noted at the bottom of this report that it was faxed to carrier on August 31, 1998.

Claimant said that his surgery was finally approved and an operative report reflects that claimant had left knee surgery performed on January 6, 1999. Claimant then underwent physical therapy. Dr. B noted in February 1999 that claimant had not been having any problems at that time.

The hearing officer found that on August 25, 1998, Dr. B faxed to the carrier his report of August 25, 1998, and Dr. L's report on which he, Dr. B, indicated he disagreed with Dr. L's certification of MMI and IR, and that in his report Dr. B gave the reasons he disagreed with Dr. L's report and indicated claimant's involvement with that disagreement as well as information indicating the certification was being disputed. The hearing officer found that the faxed copies of Dr. L's report (with Dr. B's disagreement thereon) and Dr. B's report were reasonable notice to carrier on August 25, 1998, that Dr. B was expressing the decision of claimant to dispute Dr. L's certification. The hearing officer concluded that the first certification of MMI and IR by Dr. L did not become final under Rule 130.5(e).

The carrier appeals the hearing officer's findings and conclusion as not being supported by the evidence; however, it does not contend that Dr. B's report of August 25, 1998, and Dr. L's report (with Dr. B's disagreement of MMI and IR noted thereon) were not faxed to it by Dr. B in August 1998 (although Dr. B noted in his report of August 25, 1998, that it was faxed to carrier on August 31, 1998, the hearing officer apparently overlooked that notation and found that it was faxed on August 25, 1998). Rather, carrier contends that, while the evidence supports that claimant was involved in Dr. B's expression of disagreement with Dr. L's MMI and IR certification, there is no indication that Dr. B was expressing claimant's dispute and that Dr. B's report does not indicate that he is disputing Dr. L's certification of MMI and IR on behalf of claimant.

In Texas Workers' Compensation Commission Appeal No. 94747, decided July 25, 1994, an Appeals Panel noted that it had recognized that, in certain cases, a treating doctor may act as agent of the claimant in raising a dispute pursuant to Rule 130.5(e), but stated that "it must be apparent from the facts and circumstances of a given case that the treating doctor, in expressing agreement or disagreement with another doctor's certification of MMI and IR, has done so with some 'involvement' of the claimant . . ." and that "[o]nly then can it reasonably be concluded that the treating doctor is expressing the decision of the claimant to dispute or not dispute the first rating." In Texas Workers' Compensation Commission Appeal No. 941195, decided October 20, 1994 (Judge dissenting), the majority decision stated that "a treating doctor cannot adequately dispute the first IR to keep it from becoming final under Rule 130.5(e) through the doctor's own decision without involvement

of the claimant" and that "[u]nless it can be shown that the doctor acted with the claimant's authority, or at claimant's request, it cannot be said that the claimant disputed the rating." That decision noted that, if a doctor were able to dispute a rating without the claimant's authority, problems could arise in the future where the claimant later takes the position that he never authorized the dispute.

In Texas Workers' Compensation Commission Appeal No. 981088, decided July 8, 1998, which is cited by carrier, an Appeals Panel held that, even where a claimant is involved in the treating doctor's disagreement with another doctor's certification of MMI and IR, the treating doctor's disagreement does not act as a dispute on behalf of the claimant unless it is communicated to the carrier or the Texas Workers' Compensation Commission (Commission) within the 90-day dispute period that the dispute is on behalf of the claimant. *See also* Texas Workers' Compensation Commission Appeal No. 982646, decided December 23, 1998, and Texas Workers' Compensation Commission Appeal No. 982956, decided January 29, 1999 (Judge dissenting), which followed the holding in Appeal No. 981088, *supra.*

However, in Texas Workers' Compensation Commission Appeal No. 981266, decided July 22, 1998, the Appeals Panel suggested, but did not require, that the treating doctor communicate to the carrier or the Commission that he is acting on behalf of the claimant when he disagrees with a first IR, and, in that case, an Appeals Panel affirmed a hearing officer's decision that the first certification of MMI and IR did not become final, where the claimant was involved in the decision to disagree with the first IR, even though there was no mention of the treating doctor's having, in any way, noted that he was acting at the claimant's request when he checked on the certifying doctor's report that he disagreed with the MMI date and IR. *See also* Texas Workers' Compensation Commission Appeal No. 990046, decided February 25, 1999, wherein an Appeals Panel noted that Appeal No. 981266, *supra*, did not require that evidence of an "agency relationship" must be provided to the carrier and the Commission within the 90-day period for disputing the first IR in order for a hearing officer to find that the treating doctor had timely disputed the first IR at the request of the employee and declined to impose such a requirement in the case that was under review.

In the instant case, claimant testified as to his involvement in Dr. B's disagreement with Dr. L's certification of MMI and IR and said that he, claimant, did not think he was at MMI and asked Dr. B to file a report disagreeing with Dr. L's report. In addition, Dr. B's report of August 25, 1998, states that he had discussed Dr. L's report with claimant along with the possibility of further surgery, that he explained to claimant that he planned to disagree with Dr. L's assessment, and that claimant agreed with his assessment that he was not at MMI. It is not contended that that report, along with Dr. L's report with Dr. B's disagreement noted thereon, was not received by carrier in August 1998, and carrier notes that Dr. B did respond to Dr. L's report.

The 1989 Act makes the hearing officer the sole judge of the relevance and materiality of the evidence offered and of the weight and credibility to be given to 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, under the particular facts of this case, if Appeal No. 981088, *supra*, were to be applied or if Appeal No. 990046, *supra*, were to be applied, there is sufficient evidence to support the hearing officer's findings (except that the fax was done on August 31, 1998), conclusion, and decision, and that his findings, conclusion, and decision are 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

Tommy W. Lueders
Appeals Judge