APPEAL NO. 990969

This appeal arises pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act). A contested case hearing was held on April 12, 1999. He determined that the appellant's (claimant) first certification of maximum medical improvement (MMI) and an impairment rating (IR) assigned by Dr. M on May 15, 1998, became final under Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 130.5(e) (Rule 130.5(e)). The claimant appeals this determination, arguing that the decision is contrary to the great weight of the evidence and erroneous as a matter of law. The appeals file contains no response from the respondent (carrier).

DECISION

Reversed and a new decision rendered.

Rule 130.5(e) provides that "[t]he first [IR] assigned to an employee is considered final if the rating is not disputed within 90 days after the rating is assigned." Whether, and, if so, when, a first IR is disputed is a question of fact for the hearing officer to decide. Texas Workers' Compensation Commission Appeal No. 94255, decided April 15, 1994. The 90-day period for triggering the dispute period is calculated from the date the party disputing the report receives written notice of the certification. Texas Workers' Compensation Commission Appeal No. 94354, decided May 10, 1994.

The background facts of this case are largely undisputed. The claimant, a teacher, sustained a compensable back injury on _____. Dr. M became her treating doctor. On May 13, 1998, Dr. M completed a Report of Medical Evaluation (TWCC-69) in which he certified MMI on that date and assigned a zero percent IR. The parties agreed that this was the first certification of IR for purposes of Rule 130.5(e). The claimant testified that she saw Dr. M on May 14, 1998, at which time he released her to return to work. It is not clear from her testimony whether he expressly told her about his certification or not. In any case, the claimant said she was unhappy with Dr. M at this point for a number of reasons, including his releasing her to return to work. That same day, May 14, 1998, she obtained an appointment with Dr. S, D.C. She discussed this dissatisfaction with Dr. S, who then prepared an Employee's Request to Change Treating Doctors (TWCC-53). Both he and the claimant signed this form. The Texas Workers' Compensation Commission (Commission) received it on May 19, 1998, and approved the request on May 21, 1998. The reasons for the request included:

> Seeking alternative treatment methods . . . I was told to go back to work by [Dr. M] because he felt I was on WC too long . . . my work does not have light duty and I continue to have significant pain. I feel like I have been blown off and have been to the emergency room several times because of pain. I feel like I have been brushed aside by [Dr. M]. I continue to have pain and want [Dr. S] to be my treating physician, get the proper tests ordered, find out exactly what is wrong, get the proper treatment, and get back to work.

The parties stipulated that the claimant received Dr. M's certification on May 21, 1998. On May 27, 1998, Dr. S signed the bottom of Dr. M's TWCC-69 and checked the blocks indicating his disagreement with Dr. M's certification both of MMI and IR. The Commission received this on June 4, 1998. The claimant wrote a letter which she dated May 25, 1998, and in which she disputed Dr. M's certification. She testified that she mailed this letter to the Commission by regular mail. A search of Commission files failed to find it. The letter contained no identifying information other than the claimant's name.

The claimant testified that she was aware of the requirements of Rule 130.5(e) to dispute a first certification of MMI and IR. It was her position that the TWCC-53, Dr. S's statement of disagreement on the TWCC-69, and her letter of May 25, 1998, either singly or cumulatively constituted a timely dispute in this case. The hearing officer found to the contrary, that is, that the TWCC-53 did not by its terms reasonably convey a dispute, that the statement of disagreement on the TWCC-69 did not constitute a dispute because it did not sufficiently convey to the Commission or the carrier that Dr. S was disputing on behalf of or with the involvement of the claimant, and that the letter of May 25, 1998, was not received by the Commission. He then commented without further explanation that, considered cumulatively, the evidence "falls far short of even a reasonable indication there is a dispute of [D. M's] MMI/IR certification."

We find the evidence sufficient to support and affirm the determination that the May 25, 1998, letter was not received by the Commission, and therefore played no role in the dispute of Dr. M's certification. Of greater concern is the determination of the hearing officer that Dr. S's disagreement did not constitute a dispute because there was no explicit communication to the Commission or the carrier within the 90-day period that Dr. S was acting on behalf of the claimant. In Texas Workers' Compensation Commission Appeal No. 94747, decided July 25, 1994, a case which affirmed a hearing officer's finding of finality despite an expression of disagreement by the treating doctor, we noted that it must be apparent from the facts and circumstances of a given case that the treating doctor who expresses disagreement does so on behalf of the claimant or with the involvement of the claimant and not simply as the opinion of the treating doctor. Stated another way, there must be some indication that it was the claimant, as well as the treating doctor, making the disagreement. Texas Workers' Compensation Commission Appeal No. 950977, decided July 31, 1995. *See also* Texas Workers' Compensation Commission Appeal No. 951864, decided December 21, 1995; Texas Workers' Compensation Commission Appeal No. 952151, decided February 5, 1996; and Texas Workers' Compensation Commission Appeal No. 960462, decided April 19, 1996 (Unpublished). While the relationship between the treating doctor and claimant in this regard has been commonly referred to as an agency relationship, in Texas Workers' Compensation Commission Appeal No. 990323, decided April 5, 1999 (Unpublished), the Appeals Panel stated that "[n]o strict agency relationship is necessary." *Id.*

No further specification of the details of the evidence needed to establish the involvement of the claimant in a treating doctor's dispute existed until Texas Workers'

Compensation Commission Appeal No. 981088, decided July 8, 1998. That decision reversed and remanded a finding of timely dispute because there was "no evidence that either the [Commission] or the carrier was informed within the 90 day period that [the treating doctor] was disputing . . . on the claimant's behalf." The decision further held that for the treating doctor's dispute on behalf of a claimant to be effective, "it must be communicated to the carrier or the [Commission] that the dispute is on behalf of the claimant." Simply signing the TWCC-69 with an expression of disagreement was not considered sufficient because this contained no evidence of the involvement of the claimant. This opinion was followed in Texas Workers' Compensation Commission Appeal No. 982646, decided December 23, 1998, and Texas Workers' Compensation Commission Appeal No. 982956, decided January 29, 1999. However, in Texas Workers' Compensation Commission Appeal No. 981266, decided July 22, 1998, the Appeals Panel affirmed a finding of non-finality based on a dispute by the treating doctor. In that case, the treating doctor discussed the first certification by a carrier doctor and advised the claimant that he would dispute it. Affirmance was based on a theory of ratification of the treating doctor's action by the claimant within 90 days. The hearing officer, in his decision and order in the case we now consider, commented that Appeal No. 981266 appeared to be a lone exception to the holding of Appeal No. 981088, *supra*, and its progeny up to Texas Workers' Compensation Commission Appeal No. 990201, decided March 19, 1999. He expressly declined to follow Appeal No. 981266, *supra*.

Our review of Appeal No. 990201*, supra,* leads us to question whether in fact it simply followed Appeal No. 981088, *supra*. Rather, Appeal No. 990201*, supra,* is, we believe, consistent with our decision in Texas Workers' Compensation Commission Appeal No. 990046, decided February 25, 1999. This latter decision represented a significant clarification of existing precedent. In that case, we affirmed a finding of non-finality even though there was no writing created with the 90-day period to show that the treating doctor notified the carrier and the Commission that he was disputing on the client's behalf in conjunction with his statement of disagreement on the TWCC-69. This decision affirmed the requirement that the treating doctor dispute on behalf of and with the involvement of the claimant, and that such involvement must be affirmatively proved. It noted that the preferable method of proof was by writing (sort of a statute of frauds notion), but did not require a writing to the carrier or Commission within the 90-day period. It remained, of course, for the hearing officer as fact finder to determine if the dispute was on behalf of the claimant. In Texas Workers' Compensation Commission Appeal No. 990790, decided May 19, 1999, the Appeals Panel again rejected the notion that a writing within 90 days was required and commented that "our opinion in Appeal No. 990046 reconciles these decisions and clearly states the law in this area" and the "controlling" precedent.[1] Finally, the recent decision in Texas Workers' Compensation Commission Appeal No. 990864, decided June 9, 1999, recognized the competing viewpoint of Appeal No. 981088, *supra*, and concluded that Appeal No. 990046, *supra*, Appeal No. 990201, *supra*, and Appeal No. 990790, *supra*, represent the current prevailing viewpoint that Rule 130.5(e) "does not impose any requirement on the manner of dispute or state any limitation on who may dispute."

[1] A vigorous dissent in this case makes no mention of Appeal No. 990046.

In the case we now consider, we believe the hearing officer's reliance on Appeal No. 981088, *supra*, and its progeny, was misplaced to the extent that he required written notice to the carrier or Commission that Dr. S was disputing on behalf of the claimant. Finding of Fact No. 5 simply states that there was "insufficient evidence to establish that either the Commission or the Carrier had sufficient information to know that . . . [Dr. S] was doing so with either Claimant's involvement or on Claimant's behalf" and that Dr. S's statement of disagreement "did not constitute a dispute" of Dr. M's certification. While this finding of fact is somewhat ambiguous as to what degree of proof the hearing officer required, we conclude that in the context of his discussion he was requiring written proof within the 90-day period. For the reasons stated above, we believe that the hearing officer erred in imposing this requirement. We thus reverse his determination of finality as based on error of law. Because there was no evidence contradicting the claimant's testimony about Dr. S acting on her behalf and this involvement is supported by the more or less contemporaneous request to change treating doctors for the reasons quoted above, we render a decision that the claimant, through the actions of Dr. S, timely disputed Dr. M's first certification.[2]

The decision of the hearing officer that the claimant's first certification of MMI and IR by Dr. M became final is reversed and a new decision rendered that the first certification did not become final. A designated doctor should be appointed to resolve the MMI and IR dispute.

_____
Alan C. Ernst
Appeals Judge

CONCURRING OPINION:

I write separately to in no way disagree with Judge Ernst's well-written and well-reasoned majority opinion, but to briefly address what I view as the continued clinging to error expressed in the dissenting opinion. When the Appeals Panel first considered the issue of whether or not a treating doctor could dispute the first certification of impairment rating (IR), the question was raised as to the dangers of a treating doctor disputing an IR with which a claimant did not disagree. I personally viewed this danger as remote as it appeared to me that if a claimant had entrusted his health to a treating doctor that this indicated sufficient trust in the judgment of the treating doctor to determine whether or not an IR was correct. Also, it would appear to me that a doctor is in a better position than a

[2]To the extent that this decision is inconsistent with Appeal No. 981088, *supra*, and its progeny, we reject that decision. However, we believe this competing line of cases can be reconciled in this case and the precedent on which it relies by virtue of the Commission's receipt of the TWCC-53 within the 90-day period. This document, in our opinion, fairly meets any requirement for a confirmatory writing as suggested by Appeal No. 981088. *See* Texas Workers' Compensation Commission Appeal No. 94816, decided August 10, 1994.

lay person to determine whether or not an IR was correct under the protocols of the Guides to the Evaluation of Permanent Impairment, third edition, second printing, dated February 1989, published by the American Medical Association (AMA Guides). This appeared to me to be one of the rationales behind the position often taken by the Appeals Panel that it is generally necessary to have medical evidence, as opposed to lay evidence, to overcome a certification of IR.

I also note that Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 130.5(e) (Rule 130.5(e)) does not state in its terms who is to dispute a certification of IR, but states that a certification will become final within 90 days "if the rating is not disputed." It would seem to me that if the commissioners intended the rule to mean that it could only be disputed by the parties that it would have been easy enough for them to have explicitly said so. Also, it has always been unclear to me why Rules 130.3 and 130.3(f) require a treating doctor to express an opinion regarding certifications of IR if this procedure is meant to have no effect. Finally, I would think that if there were a certification of IR with which the treating doctor disagreed but with which the claimant actually agreed, it would be a fairly simple matter for the claimant and the carrier to enter into an agreement concerning IR.

In any case, with some reluctance I finally agreed to the proposition that proof of authorization by the claimant was required to make a dispute of IR by the claimant's treating doctor effective. This was certainly more than sufficient in my view to provide protection against the situation where a treating doctor might dispute an IR against the wishes of the claimant, a situation, by the way, that has never arisen in any case brought before the Appeals Panel.

The majority in Texas Workers' Compensation Commission Appeal No. 981088, decided July 8, 1998, was apparently not satisfied that this was sufficient protection against a situation that had never arisen and decided to incorporate its understanding of the law of agency into the requirement that a claimant authorize a dispute. Whatever doctrine of agency the majority sought to incorporate apparently is missing some of the elements of traditional agency law, most notably the doctrine of ratification. I personally agree with Judge Potts' well-reasoned dissenting opinion in Appeal No. 981088.

Consideration of this fact pattern by a number of Appeals Panel decisions has sought to correct the erroneous view expressed by the majority in Appeal No. 981088. These cases are cited in the majority opinion and I see no need to cite them again. I merely state my own view that Appeal No. 981088 is in error in equating authorization with agency and in its understanding of what the law of agency actually entails. I believe that a hearing officer, based upon the evidence, can determine whether or not a claimant has authorized a treating doctor to dispute a certification of IR without reference to whether the treating doctor was the agent of the claimant in any formal legal sense.

Gary L. Kilgore
Appeals Judge

DISSENTING OPINION:

I dissent for the reasons stated in my dissent in Texas Workers' Compensation Commission Appeal No. 990790, decided May 19, 1999.

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Philip F. O'Neill
Appeals Judge