APPEAL NO. 991281

This appeal arises pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act). A contested case hearing (CCH) was held on May 18, 1999. The issues at the CCH were whether the first certification of maximum medical improvement (MMI) and impairment rating (IR) by Dr. S on August 25, 1998, became final under Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 130.5(e) (Rule 130.5(e)), and whether the respondent (claimant) sustained an injury to her right knee and right ankle in addition to her left knee and left ankle on _____. This latter issue was resolved by stipulation of the parties. The hearing officer found as fact that the claimant verbally disputed the August 25, 1998, certification of Dr. S on September 23, 1998, when she told JF (a carrier adjuster), that she disagreed with the certification at a benefit review conference (BRC) held on that day. The hearing officer also found as fact that claimant had shown she did not have treatment for parts of her injury, "which clearly translates into inadequate treatment for the purpose of setting aside Dr. S's certification under Rule 130.5(e)." Appellant (carrier) appeals these two findings, and two other findings concerning extent of injury and the dispute thereof, and the conclusion that the first certification of MMI and IR did not become final under Rule 130.5(e). Carrier asserts that the hearing officer erroneously determined that because of a dispute as to the compensable injury, the claimant received inadequate treatment thus the certification was not valid under Rule 130.5(e). Carrier further asserts that the evidence does not support that the claimant verbally disputed the MMI/IR on September 23, 1998, as the issue at the BRC was whether the claimant sustained a compensable injury (as opposed to an arthritic condition that was an ordinary disease of life) and that any dispute was directed toward that aspect of the report. As indicated, no response has been filed.

DECISION

Affirmed in part, reversed in part.

Regarding the finding of no treatment for parts of her injury, "which clearly translates into inadequate treatment for the purpose of setting aside Dr. S's certification under Rule 130.5(e)," we reverse this finding and set it aside. In the recent Supreme Court of Texas decision in Rodriguez v. Service Lloyds Insurance Company, 42 Tex. Sup. Ct. J 900 (July 1, 1999) (motion to extend time to file motion for rehearing extended to August 16, 1999), the court, in a 5 to 4 decision, stated that "[t]he plain language of the 90-day Rule does not contain exceptions" and overturned exceptions to the 90-day rule created by Appeals Panel decisions. That would apply with equal force to an exception based upon inadequate treatment. Thus, regarding the majority opinion as binding on the Appeals Panel, we reverse this finding and set it aside. Texas Workers' Compensation Commission Appeal No. 991307, decided July 28, 1999.

The hearing officer found as fact that the claimant disputed the first certification rendered by Dr. S within the 90-day time frame set out in Rule 130.5(e). Carrier disputes this as not supported by the evidence. Dr. S examined the claimant for a required medical

evaluation on behalf of the carrier on August 25, 1998, and rendered a report that opined that the claimant's condition was an ordinary disease of life and certified that she reached MMI on August 25, 1998, with a zero percent IR. An undisputed finding of fact was that the claimant received this report no later than September 10, 1998. The claimant testified at the CCH that at a BRC held on September 23, 1998, where the issue concerned whether she sustained a compensable injury and had disability, she talked to JF, the carrier representative, about Dr. S's report. She replied to the question "at the BRC did you tell JF anything about Dr. S's report" as follows:

> I feel that I did–I don't know the exact words because I didn't agree with it and I told them these words–arthritis condition I dealt with it and I dealt with the injury–the arthritis pain is different from the injury pain and I dealt with them both and its in there–I told them–and I don't agree with that.

In answer to a question by the hearing officer "and you told him what" the claimant stated:

> I told him about different conditions, you know, like I just said. And I don't agree with it–I don't agree with it . . . .

The hearing officer, apparently giving a broad interpretation to the claimant's testimony, found that this was a verbal dispute of the first MMI/IR certification rendered in Dr. S's August 25, 1998, report. Clearly, different inferences might well be drawn from the testimony of the claimant regarding the dispute of the first certification of MMI/IR as found by the hearing officer; however, we have stated that just because a different inference could be made is not a sufficient basis to set aside a factual finding. Texas Workers' Compensation Commission Appeal No. 94466, decided May 25, 1994. *See also* Garza v. Commercial Insurance Company of Newark, New Jersey, 508 S.W.2d 701 (Tex. Civ. App.-Amarillo 1974, no writ). Further, we have held that a verbal dispute by a claimant is sufficient to dispute a first certification of MMI/IR. Texas Workers' Compensation Commission Appeal No. 93810, decided October 26, 1993. Whether there has been an effective dispute under Rule 130.5(e), is generally a fact question for the hearing officer's determination. Texas Workers' Compensation Commission Appeal No. 93666, decided September 15, 1993; Section 410.165(a). Only were we to conclude based upon our review of the evidence, that the determination of the hearing officer was so against the great weight and preponderance of the evidence as to be clearly wrong or unjust would

here be a sound basis to reverse such determination. Employers Casualty Company v. Hutchinson, 814 S.W.2d 539 (Tex. App.-Austin 1991, no writ). We cannot reach that ultimate conclusion here. Since this results in a dispute having been made within 90 days, the report and certification of Dr. S did not become final under Rule 130.5(e). On this basis, the decision of the hearing officer can be and is affirmed.

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Stark O. Sanders, Jr.
Chief Appeals Judge

CONCUR:

_____
Thomas A. Knapp
Appeals Judge

_____
Alan C. Ernst
Appeals Judge