APPEAL NO. 991320

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 June 2, 1999. With respect to the issues before him, the hearing officer determined that the first certification of maximum medical improvement (MMI) and impairment rating (IR) assigned by Dr. JD became final pursuant to Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 130.5(e) (Rule 130.5(e)), and that, accordingly, the appellant (claimant) reached MMI on May 12, 1998, with an IR of two percent. In his appeal, the claimant essentially argues that his treating doctor's lateness in filing the dispute of Dr. JD's rating was not his fault and should not be held against him. In its response, the respondent (carrier) urges affirmance.

DECISION

Affirmed.

It is undisputed that the claimant sustained a compensable injury on _____. On May 12, 1998, Dr. JD examined the claimant at the request of the carrier. In a Report of Medical Evaluation (TWCC-69) dated May 15, 1998, Dr. JD certified that the claimant reached MMI on May 12, 1998, with an IR of two percent for loss of range of motion in his lumbar spine. The claimant received written notice of Dr. JD's certification on May 26, 1998. On May 27, 1998, Dr. G, the claimant's treating doctor, signed the TWCC-69, indicating that he disagreed with Dr. JD's certification of MMI and IR. In progress notes of a May 26th visit, Dr. G stated that the claimant was recently assigned a two percent IR and that "[a]t this time, I would have to disagree due to this patient being a surgical candidate . . . ." The TWCC-69 stating Dr. G's disagreement with Dr. JD's certification is date-stamped as having been received by the Texas Workers' Compensation Commission (Commission) on October 26, 1998. In a letter dated October 19, 1998, which was also received by the Commission on October 26, 1998, Dr. G stated that he consulted with the claimant about Dr. JD's certification, advised the claimant that he was in disagreement with the certification, that he signed the TWCC-69 so indicating, that he gave a copy of the document to the claimant and that "I mentioned that I would submit it directly to the insurance carrier and the commission, which was done on the following day." There was no evidence of when, if ever, the carrier received the TWCC-69 from Dr. G, purporting to dispute Dr. JD's rating.

The claimant first disputed Dr. JD's rating in person at the Commission on September 9, 1998, after he stopped receiving income benefits from the carrier. Based upon the claimant's receipt of notice of Dr. JD's certification on May 26, 1998, the 90-day period ended on August 24, 1998. Following the claimant's dispute, Dr. RD was selected by the Commission to serve as the designated doctor. In a TWCC-69 of January 8, 1999, Dr. RD certified that the claimant had not yet reached MMI.

In his appeal, the claimant essentially argues that his treating doctor's delay in sending in the dispute of Dr. JD's certification should not be attributed to him. We have

recognized that a treating doctor can effectively dispute the first certification of MMI and IR, where the claimant is involved in the decision to do so. Texas Workers' Compensation Commission Appeal No. 990864, decided June 9, 1999; Texas Workers' Compensation Commission Appeal No. 990790, decided May 19, 1999; Texas Workers' Compensation Commission Appeal No. 990201, decided March 19, 1999; Texas Workers' Compensation Commission Appeal No. 990046, decided February 25, 1999. However, where the claimant elects to rely on his treating doctor to dispute, he is bound by the treating doctor's inaction. There is simply no provision for relieving the claimant of the effects of Rule 130.5(e) where, as here, the doctor did not convey the dispute to either the Commission or the carrier within the 90-day period. Because Dr. G's dispute was not timely received, we need not reach the question of whether it was done with sufficient involvement of the claimant such that it would have been an effective dispute had it been received by either the Commission or the carrier prior to August 24, 1998.

Neither the claimant nor his treating doctor filed a dispute with either the Commission or the carrier within 90 days of May 26, 1998, the date the claimant received written notice of the first certification of MMI and IR. As such, the hearing officer properly determined that that certification became final pursuant to Rule 130.5(e) and that the claimant reached MMI on May 12, 1998, with an IR of two percent. The hearing officer's decision and order are affirmed.

_____
Elaine M. Chaney
Appeals Judge

CONCUR:

_____
Robert W. Potts
Appeals Judge

_____
Susan M. Kelley
Appeals Judge