

## APPEAL NO. 991325

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 12, 1999. The issue at the CCH was stated as whether the first certification of maximum medical improvement and the impairment rating (IR) assigned to the appellant (claimant) by Dr. S on August 19, 1998, became final under Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 130.5(e) (Rule 130.5(e)) because it was not disputed within 90 days.

The hearing officer found that the certification of IR became final, and that there was no major misdiagnosis, substantial change in condition, or improper medical treatment that would prevent the operation of Rule 130.5(e).

The claimant has appealed. She argues that there was a timely dispute because her treating doctor was acting as her agent to dispute the IR. She states that she came to the Texas Workers' Compensation Commission (Commission) and delivered a written dispute soon after the IR was received and reviewed by her doctor. The respondent (carrier) responds that the factual determination of the hearing officer that delivery of a timely dispute to the Commission was not proven should not be disturbed on appeal.

### DECISION

Affirmed.

The claimant testified through an interpreter that she was injured early in the morning on \_\_\_\_\_, when she slipped on some oil and fell backwards. She was an employee of (employer) on that date. She said that she hurt her neck, back, elbow, and wrist. The claimant's treating doctor was Dr. R. At the request of the insurance company, she was examined by Dr. S in August 1998. She said that on August 28, 1998, she received a copy of a Report of Medical Evaluation (TWCC-69) completed by Dr. S, which gave her a zero percent IR. She said she did not agree with this because she was still not feeling well. When Dr. S examined the claimant, he noted that symptoms involving her neck and back had disappeared. The claimant had only slightly deficient range of motion in her left wrist and complained of numbness in the fingers of her left hand. However, her test results yielded a zero percent IR even with the slight deficit. She later said that she brought the report to Dr. R and, after he read it to her, she did not agree with it.

In any case, the claimant said she went to Dr. R's office and took him the TWCC-69 and he did not agree with it either. He signed it, gave it back to her, and sent her to the Commission. The claimant testified that she went to the Commission with the TWCC-69 on the day she received it, August 28th. She said she left the report with the lady who did not speak Spanish, and so she did not tell her what she wanted to do with the report. The claimant also said that this lady apparently just received the report and said nothing to her. The claimant was questioned at length during cross-examination concerning her

knowledge of English, as she had resided in this country nearly 20 years. She stated that, while she could read and write a little English, her speaking ability was limited.

The record includes a copy of Dr. S's TWCC-69 that was received by the Commission on September 10, 1998 (superimposed over a September 1, 1998, date-stamp). The copy on which Dr. R indicated his disagreement, however, is not date-stamped, but was sent by facsimile transmission to the Commission on December 2, 1998. This was the same day that the Dispute Resolution Information System (DRIS) notes of the Commission show that the claimant came in to inquire about her dispute and asserted that she had indicated that she wanted to dispute the rating back on August 29th. This is the first DRIS note in the file that follows the notation of receipt of Dr. S's report in September.

Finally, the record includes a letter that the carrier sent to the claimant on September 2, 1998, informing her of the first IR and telling her that she needed to dispute it within 90 days. This letter told her to dispute within 90 days of her receipt of "this letter."

Rule 130.5(e) states that a first IR assigned to an injured worker will become final if not disputed within 90 days. The Appeals Panel has held that the 90 day-period begins to run from the date that the party receives the IR in writing. The claimant unequivocally testified that this was August 28, 1998. The 90th day after this was November 26th, a holiday, so the claimant had until the following business day, November 29th, to file a dispute. The hearing officer, who is the sole judge of the weight and credibility of the evidence, chose not to believe that she delivered a dispute to the Commission on August 28th or 29th, as stated. The first notation of a dispute was December 21, 1998, and this was after 90 days were up. As the Texas Supreme Court has emphasized in Rodriguez v. Service Lloyds Insurance Company, 42 Tex. Sup. Ct. J. 900 (July 1, 1999) (motion to extend time to file a motion for rehearing extended to August 16, 1999), the "90 day rule" is not subject to interpretation and has no exceptions. The December 2nd dispute was untimely and the IR of Dr. S became final.

Accordingly, we affirm the hearing officer's decision and order.

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Susan M. Kelley  
Appeals Judge

CONCUR:

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Thomas A. Knapp  
Appeals Judge

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Alan C. Ernst  
Appeals Judge