APPEAL NO. 991669

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 26, 1999. With respect to the sole issue before her, the hearing officer determined that the certification of maximum medical improvement (MMI) and impairment rating (IR) assigned by Dr. S on October 14, 1998, has become final pursuant to Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 130.5(e) (Rule 130.5(e)). The appellant (claimant) appeals, urging that her IR was sufficiently disputed by her treating doctor, Dr. D, and that Dr. D did have authority to dispute the IR on her behalf. The respondent (self-insured) replies that the evidence indicates that Dr. D acted alone and without the claimant's specific authority or request, and the hearing officer's decision should be affirmed.

DECISION

Affirmed.

On _____, the claimant sustained a compensable injury. In July 1998, the claimant's treating doctor, Dr. D, referred the claimant to Dr. S for pain management. On October 14, 1998, Dr. S completed a Report of Medical Evaluation (TWCC-69) and certified the claimant reached MMI on October 14, 1998, with a five percent IR. In an attached report, Dr. S states that the claimant demonstrated a lack of interest and cooperation in treatment scheduling, and as a result, he considered her to be at MMI. It was undisputed that neither the claimant, nor her attorney, disputed Dr. S's certification within 90 days of receiving written notice. The claimant's position is that Dr. S's certification did not become final because it was disputed by Dr. D, who had the authority to dispute it on her behalf.

The claimant did not testify. Dr. D testified that he received Dr. S's TWCC-69 and felt that Dr. S should have contacted him prior to issuing the TWCC-69. Dr. D testified that he wrote a letter on or about October 22, 1998, disputing Dr. S's certification of MMI and IR, and sent the letter by facsimile to the Texas Workers' Compensation Commission (Commission), the claimant's attorney, and Ms. G, a case manager hired by self-insured to manage the claim. Dr. D testified that the letter was not a dispute on the claimant's behalf, but was to provide his own medical opinion that he disagreed with Dr. S's certification. The hearing officer took official notice that the claim file did not contain a dispute letter from Dr. D. In evidence was a facsimile cover sheet from Dr. D indicating four pages concerning the claimant were sent to Ms. G on October 22, 1998. The pages attached to the cover sheet include an undated letter written by Dr. D concerning Dr. S's certification of MMI and IR.

Rule 130.5(e) provides that the first IR assigned to an injured employee is considered final if the rating is not disputed within 90 days after the rating is assigned. The critical question is whether Dr. D disputed the rating on behalf of the claimant such that the initial certification did not become final under Rule 130.5(e). In Texas Workers' Compensation Commission Appeal No. 94747, decided July 25, 1994, the Appeals Panel 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 Kilgore 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." The Appeals Panel 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.

Whether the evidence establishes that a treating doctor is acting on behalf of a claimant is essentially a question of fact for the hearing officer to decide. Texas Workers' Compensation Commission Appeal No. 972362, decided December 29, 1997. The hearing officer found that the claimant did not request or authorize Dr. D to dispute Dr. S's certification of MMI and IR. This finding is supported by the testimony of Dr. D. Given this finding, it was not necessary for the hearing officer to determine whether Dr. D's letter was received by the Commission or the self-insured, or whether the letter was sufficient to constitute a dispute of the certification. The 1989 Act provides that the hearing officer is the sole judge of the weight and credibility of the evidence. Section 410.165(a). As an appeals body, we will not substitute our judgment for that of the hearing officer when the determination is not so against the overwhelming weight of the evidence as to be clearly wrong and unjust. Cain v. Bain, 709 S.W.2d 175, 176 (Tex. 1986); Texas Workers' Compensation Commission Appeal No. 950456, decided May 9, 1995. Applying this standard of review to the record of this case, we find the evidence sufficient to support the hearing officer's determination that the certification of MMI and IR assigned by Dr. S on October 14, 1998, has become final pursuant to Rule 130.5(e).

The decision and order of the hearing officer are affirmed.

_____
Dorian E. Ramirez
Appeals Judge

CONCUR:

_____
Tommy W. Lueders
Appeals Judge

_____
Judy L. Stephens
Appeals Judge