APPEAL NO. 991682

This appeal arises pursuant to the Texas Workers' Compensation Act of 1989, TEX. LAB. CODE ANN. § 401.001 *et seq*. (1989 Act). On July 12, 1999, a hearing was held. He (hearing officer) determined that respondent's (claimant) initial impairment rating (IIR) did not become final under the provisions of Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 130.5(e) (Rule 130.5(e)). Appellant (carrier) asserts that findings of fact which support this determination are in error and states that the treating doctor's reply to the IIR did not constitute a dispute. Carrier also states that claimant knew of the total injury during the 90-day period and did not dispute it. Claimant replied that the decision should be affirmed.

DECISION

We affirm.

Claimant worked for (employer) on _____, as a salesman. On that date he was in an automobile accident. The parties stipulated that carrier accepted liability for the injury on that date. Claimant testified that his injury included a punctured lung, broken ribs, and a concussion. He was treated by Dr. B. Dr. B referred him to Dr. F about the lung injury; to Dr. P, a neurologist; and to Dr. J, an ophthalmologist, about claimant's diminished eyesight. Claimant said that he told Dr. J his eyesight was blurry since the accident. According to claimant, Dr. J told him he had a normal astigmatism and gave him a prescription for glasses.

There was no evidence from either party as to why Dr. J then decided to file a Report of Medical Evaluation (TWCC-69) stating that claimant had a zero percent IIR. Claimant agreed that the TWCC-69 which was signed on September 15, 1998, was received before the end of September 1998 and that he then talked to Dr. B about it on October 1, 1998.

The TWCC-69 itself does not expressly say it is "limited" to only one area of injury, such as is seen in Texas Workers' Compensation Commission Appeal No. 941098, decided September 29, 1994. It does contain entries indicating that it considered only one area as opposed to having possibly considered several areas of injury but only rating one (such an impairment rating (IR) may become final if claimant knew of the other areas of injury--*see* Texas Workers' Compensation Commission Appeal No. 941748, decided February 13, 1995). In addition to entering in ink in item 16 the words, "was in auto accident _____ now (9/8/98) has blurry vision," Dr. J shows that he considered only <u>one</u> injury, by entering only one diagnosis code, "367.4," relating to "presbyopia," which means a change in eye power due to advancing age.

After claimant saw Dr. B on October 1, 1998, Dr. B wrote across the bottom of the TWCC-69, as treating doctor, the words, "This applies only for his visual problems" and checked that he agreed with zero percent IIR and maximum medical improvement (MMI) as of "9/9/98."

There is a statement from Dr. B dated March 17, 1999, in which he agreed that claimant and he discussed the IIR on October 1, 1998, and that he told claimant that Dr. J was only referring to the eye test and he would "send an explanation to Workers' Compensation Commission to clarify" that. He relates also that he commented on a letter from carrier dated October 8, 1998. (Dr. B's October 8, 1998, or thereafter, comments entered on a copy of a carrier letter he received were not shown to have been received by carrier, but are consistent with his later explanation in March 1999; Dr. B addressed carrier's comment that it had received Dr. B's comment on the TWCC-69 and sought clarification; Dr. B wrote, "he has not reached MMI for his neck yet; [Dr. J] was only referring to eyesight.") There was no ambiguity to Dr. B's comment on the October 8, 1998, letter of carrier; it said that MMI had not been reached and it therefore shows that an IIR could not be assigned. *See* Texas Workers' Compensation Commission Appeal No. 93046, decided March 5, 1993, which said that a dispute of the underlying certification of IR was a dispute of the IR.

We therefore have a TWCC-69 which contains Dr. J's comment about claimant having "blurry vision," along with Dr. J's single diagnosis of presbyopia, plus a comment by Dr. B that "this applies only to his visual problems" all in carrier's hands by October 8, 1998, as shown by carrier's letter to Dr. B on October 8, 1998. Taken as a whole, the TWCC-69 that carrier had in its possession within one month of its creation showed that it was limited to only one part of the injury. *See* Appeal No. 941098, *supra*, which stated that an IIR for "only neurological" did not provide a whole body IR. *See also* Section 401.011(24) which defines "[IR]" (the same "[IR]" as is addressed in Rule 130.5(e)) as the "percentage of permanent impairment of the whole body resulting from a compensable injury." (Emphasis added.) We note that while the Supreme Court in Rodriguez v. Service Lloyds Insurance Company, 42 Tex. Sup. Ct. J. 900 (July 1, 1999, motion for rehearing denied) said that there were no exceptions (such as misdiagnosis, changed condition, and inadequate treatment) to Rule 130.5(e), it did not say that Rule 130.5(e) defined "[IR]" any differently than the statute which it addressed and which defined "[IR]" as described herein.

The hearing officer is the sole judge of the weight and credibility of the evidence. *See* Section 410.165. He found that the TWCC-69 evaluated only claimant's vision, which is sufficiently supported by the evidence. He also found that Dr. B was acting with the claimant's consent and participation in pointing out that Dr. J's IIR was "only" for the eyes. This, too, is sufficiently supported by the evidence. *See* Texas Workers' Compensation Commission Appeal No. 990864, decided June 9, 1999, in regard to a treating doctor acting to dispute an IIR on behalf of a claimant. The hearing officer then found that Dr. B's "communications" disputed the IIR and were made within 90 days of the IIR. As written, this finding of fact does not say that "communications taken together" disputed the IIR, but indicates that each communication disputed the IIR. *See* Texas Workers' Compensation Commission Appeal No. 971545, decided September 18, 1997, which said that no magic words are required to dispute and that the hearing officer is the fact finder; taken in the context of what the TWCC-69 was limited to by Dr. J, Dr. B's comment that it applied only to "visual" could be reasonably considered to be disputing that the "whole body impairment" was zero percent. While there was no date stamp on the October 8, 1998, letter from carrier to Dr. B, which Dr. B then commented upon in writing (as previously discussed), this

inquiry was generated by the carrier and there was no evidence that carrier ever wrote again to Dr. B for clarification of the TWCC-69. In addition, the need for clarification of the TWCC-69 by carrier indicates that some language may have been ambiguous. Texas Workers' Compensation Commission Appeal No. 970522, decided April 30, 1997, said that an ambiguous TWCC-69 provides "nothing for either party to dispute"; in the case under review, carrier was only considering Dr. B's comment to be ambiguous; the statements of Dr. J were not ambiguous and showed that he was limiting his IIR only to claimant's eyesight.

Carrier cited Texas Workers' Compensation Commission Appeal No. 970001, decided February 18, 1997, but in that case in which one body part was rated and another was not, the claimant knew of the injury to the unrated body part, the doctor who performed the IIR told carrier within the 90 days provided by Rule 130.5(e) that the claimant had received no treatment for the other body part, and no communication was made within 90 days that was even suggested to be a dispute. We do not consider Appeal No. 970001 to be controlling of the case under review.

Finding that the decision and order are sufficiently supported by the evidence, we affirm. *See* In re King's Estate, 150 Tex. 662, 244 S.W.2d 660 (1951).

_____
Joe Sebesta
Appeals Judge

CONCUR:

_____
Stark O. Sanders, Jr.
Chief Appeals Judge

_____
Elaine M. Chaney
Appeals Judge