APPEAL NO. 991920

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 August 11, 1999. The issue at the CCH was whether the first certification of maximum medical improvement (MMI) and impairment rating (IR) assigned by (Dr. L) on March 13, 1998, became final pursuant to Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 130.5(e) (Rule 130.5(e)). The hearing officer concluded that this certification did not become final, finding it had been timely disputed by the respondent's (claimant) treating doctor. The appellant (carrier) files a request for review challenging specific findings of fact and conclusions of law of the hearing officer. The carrier argues that as a matter of law a treating doctor may not dispute the first certification of MMI and IR and that even if a treating doctor could do so the claimant in the present case failed to establish that his treating doctor's dispute was sufficient to prevent Dr. L's certification from becoming final. There is no response from the claimant to the carrier's request for review in the appeal file.

DECISION

Finding sufficient evidence to support the decision of the hearing officer and no reversible error in the record, we affirm the decision and order of the hearing officer.

Most of the relevant facts of the case are not in dispute and are set out in the hearing officer's decision. We adopt her rendition of the facts and will only briefly touch on the facts most germane to the appeal. The parties stipulated that claimant sustained a compensable injury on _____; that Dr. L certified the claimant reached MMI on March 11, 1998, with a 10% IR, and that Dr. L's certification was the first assigned to the claimant. The claimant testified through a translator that he received Dr. L's certification on or about March 14, 1998. The claimant testified that he went to see Dr. B, his treating doctor, shortly after receipt. A report from Dr. B indicated that he met with the claimant on March 22, 1998, and they discussed Dr. L's report. There was also an April 6, 1998, letter from Dr. B indicating that he received Dr. L's certification on March 23, 1998, and he was disputing it. Dr. B also signed Dr. L's Report of Medical Evaluation (TWCC-69) indicating his dispute. Also in evidence was a letter of clarification from Dr. B dated March 26, 1999, in which he stated he had discussed Dr. L's certification with the claimant on March 23, 1998, and the claimant had authorized Dr. B to dispute Dr. L's report on his behalf. There were in evidence computer records from the Texas Workers' Compensation Commission (Commission) which indicated that the claimant called the Commission once his income benefits had stopped. These computer records indicate that the claimant asked why his income benefits had stopped and upon being told it was due to Dr. L's certification, he indicated that he was unaware of Dr. L's certification.

The carrier asserts that the hearing officer committed reversible error in making the following findings of fact and conclusion of law:

FINDINGS OF FACT

1. The parties stipulated to the following facts:

   E. [Dr. L] certified that Claimant reached [MMI] on March 11, 1998 with a 10% [IR].

   F. [Dr. L's] certification was the first assigned to Claimant.

2. Claimant was examined by [Dr. L] on March 11, 1998. [Dr. L] certified that Claimant had reached [MMI] on March 11, 1998 with a 10% [IR].

3. Claimant received a copy of [Dr. L's] report on or about March 14, 1998 from an unknown source.

4. Claimant discussed [Dr. L's] report with his treating doctor, [Dr. B], on March 23, 1998.

5. Claimant did not read or speak English and authorized [Dr. B] to dispute [Dr. L's] report on his behalf.

6. [Dr. B] disputed [Dr. L's] report by signing the bottom of the TWCC 69 and sending a letter. Claimant was involved in the filing of the dispute.

7. Carrier received [Dr. B's] letter of dispute, filed on behalf of the Claimant, on April 18, 1998.

CONCLUSION OF LAW

3. The first certification of [MMI] and [IR] assigned by [Dr. L] on March 13, 1998 did not become final under Rule 130.5(e).

Rule 130.5(e) provides as follows:

The first [IR] assigned to an employee is considered final if the rating is not disputed within 90 days after the rating is assigned.

We have held that this time does not begin to run until a party has received written notice of the assignment of an IR. Texas Workers' Compensation Commission Appeal No. 951229, decided September 5, 1995. We have held that a treating doctor may dispute the first certification on behalf of a claimant. *See* Texas Workers' Compensation Commission Appeal No. 990790, decided May 19, 1999, and cases cited therein. The carrier argues that our prior cases permitting a treating doctor to dispute the first certification of MMI and

IR on the behalf of a claimant constituted a broad exception to Rule 130.5(e) of the type which the Texas Supreme Court indicated was not permitted in Rodriguez v. Service Lloyds Insurance Co., 997 S.W.2d 248 (Tex. 1999) (hereinafter Rodriguez). We do not read either Rule 130.5(e) or Rodriguez the same way as the carrier. As the carrier points out in its appeal, Rule 130.5(e) does not in its terms state the party who is to dispute but says the first certification of IR will not become final if it is disputed. The carrier also points out that the discussion of Rule 130.5(e) in the Texas Register only discusses disputes of the first certification by the carrier and not by the claimant or anyone else. We therefore do not find, in the terms of Rule 130.5(e) or in the commentary surrounding its adoption, anything inconsistent with our prior holdings to the effect that a treating doctor may dispute the first certification on behalf of a claimant. We note that we have previously rejected the argument that allowing a treating doctor to dispute a first certification for a claimant constitutes an exception Rule 130.5(e). Texas Workers' Compensation Commission Appeal No. 991946, decided October 15, 1999 (Unpublished).

The carrier argues that reading Rule 130.6(a) in conjunction with Rule 130.5(e) shows that it was the intention of the commissioners that only the carrier or the claimant could dispute the first certification. This argument has nothing to do with the means that may be used by either of the parties to dispute the first certification and does not establish that a claimant cannot authorize another to dispute the first certification, which is exactly what the hearing officer found the claimant did in the present case when he authorized Dr. B to dispute Dr. L's report on his behalf.

The carrier argues that the evidence was insufficient to support the finding of the hearing officer that the claimant authorized Dr. B to dispute Dr. L's certification. There was conflicting evidence in regard to this matter. Section 410.165(a) provides that the hearing officer, as finder of fact, is the sole judge of the relevance and materiality of the evidence as well as of the weight and credibility that is to be given the evidence. It was for the hearing officer, as trier of fact, to resolve the inconsistencies and conflicts in the evidence. Garza v. Commercial Insurance Company of Newark, New Jersey, 508 S.W.2d 701, 702 (Tex. Civ. App.-Amarillo 1974, no writ). This is equally true regarding medical evidence. Texas Employers Insurance Association v. Campos, 666 S.W.2d 286, 290 (Tex. App.-Houston [14th Dist.] 1984, no writ). The trier of fact may believe all, part, or none of the testimony of any witness. Taylor v. Lewis, 553 S.W.2d 153, 161 (Tex. Civ. App.-Amarillo 1977, writ ref'd n.r.e.); Aetna Insurance Co. v. English, 204 S.W.2d 850 (Tex. Civ. App.-Fort Worth 1947, no writ). An appeals level body is not a fact finder and does not normally pass upon the credibility of witnesses or substitute its own judgment for that of the trier of fact, even if the evidence would support a different result. National Union Fire Insurance Company of Pittsburgh, Pennsylvania v. Soto, 819 S.W.2d 619, 620 (Tex. App.-El Paso 1991, writ denied). When reviewing a hearing officer's decision for factual sufficiency of the evidence we should reverse such decision only if it is so contrary to the overwhelming weight of the evidence as to be clearly wrong and unjust. Cain v. Bain, 709 S.W.2d 175, 176 (Tex. 1986); Pool v. Ford Motor Co., 715 S.W.2d 629, 635 (Tex. 1986). Applying this standard

we find sufficient evidence to support the hearing officer's finding that the claimant authorized Dr. B to dispute Dr. L's certification of MMI and IR.

Finally, we note that the carrier argued that there was sufficient evidence to support the hearing officer's Finding of Fact No. 7 that the carrier received Dr. B's letter of dispute on April 18, 1998. We note that as a fact finder the hearing officer may draw reasonable inferences from the evidence. Applying the standard of review discussed above, we find sufficient evidence in the record to support this factual finding by the hearing officer.

The decision and order of the hearing officer are affirmed.

_____
Gary L. Kilgore
Appeals Judge

CONCUR:

_____
Elaine M. Chaney
Appeals Judge

DISSENTING OPINION:

I dissent because I believe the precedent in Texas Workers' Compensation Commission Appeal No. 981088, decided July 8, 1998, should be followed as it was in Texas Workers' Compensation Commission Appeal No. 982646, decided December 23, 1998; Texas Workers' Compensation Commission Appeal No. 982956, January 28, 1999; and Texas Workers' Compensation Commission Appeal No. 990535, decided April 22, 1999 (Unpublished). Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE §§ 130.3 and 130.3(f) (Rules 130.3 and 130.3(f)) require a treating doctor to indicate agreement or disagreement with the certification and evaluation of another doctor who certifies that a claimant has reached maximum medical improvement and the Report of Medical Evaluation (TWCC-69) form contains a block for the treating doctor to comply with these rules. However, with regard to a dispute of the first assigned impairment rating (IR) under Rule 130.5(e), the Appeals Panel has long held that a dispute by the treating doctor under Rule 130.5(e) must be done with the involvement of the claimant; that is, as the claimant's agent. Were it otherwise, a treating doctor could dispute an IR with which a claimant did not disagree for whatever reason. In Appeal No. 981088, *supra*, the Appeals Panel required that some evidence of the claimant's involvement in the treating doctor's dispute of a first assigned IR be communicated to the carrier or the Texas Workers' Compensation Commission within

the 90-day period of Rule 130.5(e) to be an effective dispute by the claimant. Otherwise, a treating doctor's mere indication of disagreement on the bottom of a TWCC-69, without more, would indicate no more than the treating doctor's own compliance with Rules 130.3 and 130.3(f). A basic tenet of agency law is that the agency relationship be communicated to third parties to be affected by that relationship. The decision in Texas Workers' Compensation Commission Appeal No. 990535, decided April 22, 1999, clearly demonstrates this problem.

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Philip F. O'Neill
Appeals Judge