APPEAL NO. 991946

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 9, 1999. With regard to the issue at the CCH, he (the hearing officer) determined that the certification of maximum medical improvement (MMI), and five percent impairment rating (IR), assessed by Dr. T, on January 25, 1999, (the first certification) did not become final pursuant to Rule 130.5(e) (Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 130.5(e)). The appellant self-insured (referred to as "carrier" herein) appeals, seeks a reversal of the decision and argues the respondent (claimant) did not timely dispute Dr. T's certification. The claimant responds and seeks an affirmance of the decision.

DECISION

We affirm.

It was undisputed that claimant received a written notice of the first certification on January 30, 1999, that it was the first certification of MMI and IR, and that claimant did not personally contact the carrier or the Commission to dispute within 90 days. The claimant testified that he took the first certification to his doctor, Dr. A, on February 2, 1999, and told him that he disagreed with it. He indicated that Dr. A said he already disagreed with it and that he did not have to do anything else in order to be sent to a designated doctor. Dr. A's office notes dated February 2, 1999, indicate that he and claimant discussed the first certification and that Dr. A told claimant he disagreed with it. In a signed affidavit, an employee of Dr. A stated that, "[claimant] was advised on February 2, 1999, that the insurance company [sic] and the Texas Workers' Compensation Commission were being notified that [Dr. A] and [claimant] disagreed with and were disputing the [first certification]." Dr. A checked the box on Dr. T's TWCC-69 indicating that he disagreed with the first certification and sent a copy to the Commission. This was received by the Commission on January 29, 1999.

The first IR assigned to an injured worker will become final if not disputed within 90 days after the doctor assigned it. Rule 130.5(e). The 90 days runs from the date the parties receive written notice of the first certification. Texas Workers' Compensation Commission Appeal No. 960220, decided March 20, 1996. An employee's treating doctor may affect a dispute of the first certification of MMI and IR if his actions in disputing the certification is as the employee's agent and at the employee's behest. Texas Workers' Compensation Commission Appeal No. 94519, decided June 14, 1994. There must be some level of involvement by the employee for an effective dispute and a treating doctor's own actions, alone, do not affect a dispute. Texas Workers' Compensation Commission Appeal No. 952151, decided February 5, 1996. A treating doctor's dispute of the initial certification of MMI and IR is recognized as a claimant's dispute if the treating doctor is authorized to do so by the claimant or if the claimant ratifies the dispute within the 90-day

period. Texas Workers' Compensation Commission Appeal No. 961866, decided November 6, 1996.

Whether claimant ratified a dispute affected by Dr. A was a question of fact for the hearing officer to determine. 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. Section 410.165(a). There is conflicting evidence as to whether claimant ratified and participated in the dispute of the first certification. 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 (Tex. Civ. App.-Amarillo 1974, no writ). The trier of fact may believe all, part, or none of the testimony of any witness. Aetna Insurance Company v. English, 204 S.W.2d 850 (Tex. Civ. App.-Fort Worth 1947, no writ). We conclude that the hearing officer determinations are not so against the great weight and preponderance of the evidence as to be clearly wrong and manifestly unjust. Cain v. Bain, 709 S.W.2d 175, 176 (Tex. 1986). The determination the first certification by Dr. T did not become final is not so against the great weight and preponderance of the evidence as to be clearly wrong or manifestly unjust.

Carrier contends that Dr. A's medical office notes do not confirm that Dr. A told claimant that he disputed on claimant's behalf and that claimant would not have to do anything further. However, there was evidence in the record from which the hearing officer could determine that Dr. A and claimant met to discuss a dispute and that claimant adopted Dr. A's dispute as his own.

Carrier asserts that there was no dispute on claimant's behalf because Dr. A did not communicate to carrier or to the Commission that he was disputing "on claimant's behalf." However, there is nothing in the statute or rule requiring such communication. Both require that the first certification be disputed, and the hearing officer determined that the first certification was disputed.

Carrier contends that only a party may dispute a first certification. We first note that the statute and the 90-day rule do not specify who may dispute a first certification. The 90-day rule states that "[t]he first impairment rating assigned to an employee is considered final if the rating *is not disputed* within 90 days after the rating is assigned." [Emphasis added.] Further, the Appeals Panel has stated that a claimant's treating doctor may dispute on behalf of a claimant. In effect, then, this is the dispute *of a party*. It is merely done by a third person on behalf of a party. The Appeals Panel has not stated that a treating doctor's unilateral dispute of a first certification is effective where the claimant was not involved and did not approve of or ratify the dispute. We disagree that the Appeals Panel's interpretation regarding "disputes" and the 90-day rule is "plainly erroneous or inconsistent with" the 90-day rule. Again, the 90-day rule does not specify who may dispute the first certification.

Carrier asserts that the Appeals Panel has made a broad ad hoc exception to the 90-day rule by permitting a treating doctor to dispute on behalf of a claimant. If the 90-day

rule had specified that only certain persons or entities may dispute, and then the Appeals Panel permitted others not listed in the rule to dispute, then it would be arguable that the Appeals Panel had created an "exception." Such is not the case here and we reject carrier's contention.

Carrier appears to assert that the Commission should know immediately if there has been a dispute of a first certification and that such communication to the Commission is imperative and required. However, there are many cases where there has been a dispute by a claimant, but this is not established until the parties had gone through the dispute resolution process. In interpreting the 90-day rule, we considered the perceived need for immediate notice of a dispute and also the need for the IR to be decided by an impartial designated doctor where there has been a dispute regarding the first-certified IR. We note that, when there is a dispute regarding an IR, it does not mean that the disputing party has "won," it merely means that an impartial designated doctor will then certify the claimant's IR.

Carrier contends that the hearing officer's determination means that if a claimant merely "thinks" he disputes a first certification, then this is effective as a dispute. Carrier also asserts that the hearing officer's determination implies that a treating doctor's unilateral dispute, without involvement of the claimant, is also effective as a dispute. We disagree and we do not so hold.

We affirm the hearing officer's decision and order.

Judy Stephens
Appeals Judge

CONCUR:

Susan M. Kelley
Appeals Judge

Thomas A. Knapp
Appeals Judge