APPEAL NO. 000652

This appeal arises pursuant to the Texas Workers= Compensation Act, TEX. LAB. CODE ANN. ' 401.001 *et seq.* (1989 Act). A contested case hearing was held on March 8, 2000. In response to the only issue before him, the hearing officer determined that the first certification of maximum medical improvement (MMI) and impairment rating (IR) assigned by Dr. L had not become final under Tex. W.C. Comm=n, 28 TEX. ADMIN. CODE ' 130.5(e) (Rule 130.5(e)). The appellant (carrier) appeals, contending that the treating doctor=s check off disagreement on Dr. L=s report was without the involvement of the respondent (claimant) and, therefore, Dr. L=s certification should be considered final. Carrier requests that we reverse the hearing officer=s decision and render a decision in its favor. The claimant responds, urging affirmance.

DECISION

Affirmed.

Claimant=s duties and the circumstances of her injury are not readily apparent from the record other than she apparently sustained a low back injury Arotating plants@ on _____. Claimant=s treating doctor is Dr. I. Claimant was scheduled to be examined by Dr. L, carrier=s required medical examination doctor, who did so on April 6, 1998. In a Report of Medical Evaluation (TWCC-69) and narrative, both dated April 8, 1998, Dr. L certified MMI on April 6, 1998, with a zero percent IR. Dr. L=s report indicates that a copy of the report was sent to claimant, Dr. I, and the Texas Workers= Compensation Commission (Commission).[1] Claimant testified that she received Dr. L=s report shortly after the date of the report, April 8th, and called Dr. I=s office the same date and spoke with Mr. A, who is identified as Dr. I=s office manager. According to claimant, she told Mr. A that she disagreed with the rating and Mr. A told her to bring the report into the office, which she did on the same day. Claimant said that at that time Mr. A told her that Ahe would take care of it. And I said, what do I do? And he said nothing, we=ll take care of it.@ It is undisputed that claimant did not see Dr. I that date and the medical records indicate that Dr. I saw claimant before this date on March 30, 1998, and again the next time on July 13, 1998. In evidence is Dr. L=s TWCC-69 with Dr. I=s check marks indicating disagreement on both MMI and IR dated April 21, 1998.

The hearing officer references Rule 130.5(e) and summarizes several Appeals Panel decisions which hold that the treating doctor may dispute the first certification with the

[1]Also in evidence is a letter dated April 21, 1998, from carrier to claimant sending a copy of Dr. L=s report to claimant with instructions on how to dispute the report which was received by claimant, as evidenced by a green receipt card on April 22, 1998, and a letter (EES-19) dated April 24, 1998, from the Commission to claimant giving much the same information and warning on disputing.

Ainvolvement@ of claimant. The hearing officer then commented (and made a determination) that:

> The first certification of MMI and IR, by [Dr. L], was timely disputed by the Claimant=s treating doctor on behalf of the Claimant and did not become final under Rule 130.5(e).

Another finding explained that claimant Adid not dispute the MMI and IR herself because she relied on the assurance of [Mr. A] that they (her treating doctor) would.@

Carrier appeals the hearing officer=s decision on the basis that claimant did not actually see or speak with Dr. I before Dr. I disputed Dr. L=s first certification of MMI and IR and that there was Ano indication in any report from the doctor that the doctor was acting on the claimant=s behalf@ or with claimant=s involvement. Carrier cites Appeals Panel decisions that stand for the proposition that the doctor=s dispute must be with some involvement of claimant. Carrier seems to suggest that the dispute must come from claimant because the instruction letters from carrier and the Commission Areflect that the claimant was to dispute the assessment.@ In that regard, we would note that neither the 1989 Act nor Rule 130.5(e) specify who may dispute a first certification and that a treating doctor=s dispute on behalf of the claimant is the dispute of a party. Texas Workers= Compensation Commission Appeal No. 992277 (Unpublished), decided November 24, 1999.

Rule 130.5(e) provides that the first IR assigned to an employee is considered final if the rating is not disputed within 90 days after the rating is assigned. The Appeals Panel has stated that where a treating doctor acts on his or her own in disputing the first assigned IR, and not as the agent of and with the involvement of the claimant, such does not constitute a timely dispute by the claimant. Texas Workers= Compensation Commission Appeal No. 952151, decided February 5, 1996. We have held that there must be some indication that the claimant authorized the treating doctor to dispute on the claimant=s behalf or that claimant had some involvement in the dispute. Texas Workers= Compensation Commission Appeal No. 961569, decided September 23, 1996. The Appeals Panel has considered the question of the treating doctor=s dispute of the first certification of MMI and IR and has reached a consensus that generally accepts that the key factor for the fact finder to consider is whether the doctor was acting with the involvement and authority of the claimant in disputing the first certification of IR and how that involvement was specifically shown at the time. Texas Workers= Compensation Commission Appeal No. 990045 (Unpublished), decided February 25, 1999. This does not necessarily involve actually seeing or being examined by the treating doctor. In this case, it was claimant=s uncontroverted testimony, which could be believed by the hearing officer or not, that she disputed Dr. L=s report, that she communicated that information to Dr. I=s office manager and that the office manager assured her that Athey@ (the office manager and Dr. I) would take care of it. Although it would have been nice to have Mr. A=s testimony, or an affidavit from either Mr. A or Dr. I to that effect, those were matters for the hearing officer to consider and weigh. He did so and found that Dr. I=s dispute on April 21, 1998, was Aon behalf@ of claimant.

Upon review of the record submitted, we find no reversible error and we will not disturb the hearing officer=s determinations unless they are so against the great weight and preponderance of the evidence as to be clearly wrong or unjust. In re King=s Estate, 150 Tex. 662, 244 S.W.2d 660 (1951). We do not so find and, consequently, the decision and order of the hearing officer are affirmed.

Thomas A. Knapp
Appeals Judge

CONCUR:

Gary L. Kilgore
Appeals Judge

Dorian E. Ramirez
Appeals Judge