APPEAL NO. 000766

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 February 17, 2000, with the record closing on February 24, 2000. Originally, the issue concerned whether the first impairment rating (IR) assigned to the respondent (claimant), by Dr. S had become final. At the beginning of the CCH, it appeared that the parties disagreed as to which doctor issued the first IR and the issue was changed to wording as to whether the "first IR" became final, without identifying the doctor. Also, an issue as to waiver by the appellant (carrier) of its right to assert the finality of the first IR was raised.

The hearing officer determined that the certification of maximum medical improvement (MMI) and IR assigned by Dr. L, who he determined issued the first IR, did not become final under Tex. W.C. Comm=n, 28 TEX. ADMIN. CODE ' 130.5(e) (Rule 130.5(e)) because it was timely disputed. He further held, notwithstanding that it was the carrier's position that Dr. S issued the first IR and not Dr. L, that the carrier had not waived the right to raise the finality issue as to Dr. L's report.

The carrier appeals the determination that Dr. L's report was timely disputed and points out that claimant's unequivocal testimony that she had received Dr. L's report is at odds with the hearing officer's finding of a later date. There is no response from the claimant, and no appeal of the "waiver" issue.

DECISION

We affirm the hearing officer's decision based upon the record, specifically that Rule 130.5(e) cannot operate to finalize a "conditional" IR.

The claimant injured her back on _____, when a chair gave way and she fell on her buttocks. The claimant's doctor, Dr. G, felt that she had a herniated disc (confirmed by MRI to exist at L5) but due to claimant's disinclination to have surgery, Dr. G at some point referred the claimant to Dr. S for an IR. Dr. S's report, at the outset, state that if claimant decided to have surgery her IR could "of course" be rescinded. Claimant was examined by Dr. S on March 24, 1999. He reported that claimant had seen Dr. L, a doctor for the carrier, on March 15th but did not know the results of this.

As a result of Dr. S's examination, claimant was certified at MMI on March 24, 1999, with a nine percent IR. Dr. G signed the Report of Medical Evaluation (TWCC-69) indicating disagreement with this IR on April 9, 1999. Dr. S's narrative stated that claimant might require surgery and, if it resulted in material and substantial recovery, her MMI and IR would need adjustment.

In fact, claimant had gone to Dr. L and he completed a TWCC-69 which stated that claimant reached MMI on March 15th with a seven percent IR. In his six-page attached narrative, Dr. L makes the following observations:

1. that claimant "is considering" surgery due to her worsening condition;

2. that claimant had only minimal findings of disc disease and had nearly full hip range of motion;

3. that she should see Dr. G to consider surgery if she continued to have symptoms; and

4) that her MMI was valid for her present care, but that if she were to undergo surgery, the MMI date would be two months beyond surgery.

Dr. L's report noted that copies of it were sent to the parties.

For reasons never explained, Dr. L's report was not treated as the first IR by the parties up to the date of the CCH. However, the assistant for the claimant stated in opening argument that the claimant received this first IR during April 1999 and timely disputed it. Claimant testified not once, but several times, that she believed she received Dr. L's report within a few days after she received Dr. S's report, which would be sometime during the first or second week of April. Dr. S's report was mailed to claimant by both the Texas Workers' Compensation Commission (Commission), on April 14, 1999, and the carrier, on April 6 and July 29, 1999, with documents containing the advice to dispute this IR within 90 days to avoid finality.

According to the claimant, when she received the notice from the Commission she called the Commission right away to dispute this IR from Dr. S, and was told that only her doctor could dispute the IR. The Dispute Resolution Information System (DRIS) notes of the Commission show that a surgical recommendation was made and a second opinion requested by the carrier on April 19, 1999. The claimant had surgery in May and was told that she would receive another IR.

The DRIS notes show that claimant contacted the Commission on August 2, 1999, after receiving notice from the carrier that the nine percent IR had become final. She stated in this note that she had called the Commission in April and had been told that only her doctor could dispute. Further notes reflect that the carrier was paying impairment income benefits based on the nine percent IR.

On September 3, 1999, the ombudsman entered a note commenting on the sequence of events and noting that Dr. S's report says that it will be rescinded if there is further surgery. A designated doctor appointment was scheduled. There was apparently a benefit review

conference on or around this date. A note made by the ombudsman on September 8th commented that the carrier never acted on the first IR and that the parties agreed to have the claimant sent to a designated doctor. The adjuster at this time (and earlier times) was Ms. M, who filed a Payment of Compensation or Notice of Refused/Disputed Claim (TWCC-21) on September 14, 1999, protesting the appointment of the designated doctor. The designated doctor stated that claimant was not at MMI. A DRIS note dated December 22, 1999, recorded a conversation with Ms. B, the succeeding adjuster to Ms. M, stating that while the carrier may have agreed to a designated doctor appointment, that carrier still reserved the right to assert finality of the first IR.

The hearing officer was aware that his fact finding that claimant was first informed in writing of Dr. L's IR on September 3, 1999, and disputed it that day was at odds with the claimant's testimony. He stated in his discussion that Dr. L's report was "apparently" sent only to the Commission, and that claimant was "mistaken" in her testimony about receiving Dr. L's report around the time she received Dr. S's report. We agree with the carrier that such findings are against the great weight and preponderance of the evidence. There is simply no evidence of a mistake, even in the other evidence. The evidence plainly shows that the Commission (and possibly the carrier) received Dr. S's report first and therefore treated it as the first IR. What is never commented upon by the hearing officer, curiously, was the claimant's continuing testimony that she called the Commission and disputed her IRs shortly after receiving them, and was told that her doctor had to take action.

We will uphold the hearing officer's judgment if it can be sustained on any reasonable basis supported by the evidence. Daylin, Inc. v. Juarez, 766 S.W.2d 347, 352 (Tex. App.-El Paso 1989, writ denied); Texas Workers' Compensation Commission Appeal No. 950791, decided July 3, 1995. Our reason for supporting the hearing officer's ultimate decision that Dr. L's report did not become final is that it is, by its own terms in the narrative, a conditional report of IR. Surgery was under active consideration by the claimant, as Dr. L acknowledged, and was, in fact, performed in May 1999, well before the 90 days expired.

In Texas Workers' Compensation Commission Appeal No. 991489, decided August 27, 1999, we reiterated the principal that Rule 130.5(e) does not operate to finalize conditional IRs:

> We have previously recognized that conditional certifications have not been finalized under Rule 130.5(e), when the condition is subsequently met. That is, where, as here, the certifying doctor clearly articulates that the rating is subject to change upon the occurrence of an event, Rule 130.5(e) does not operate to finalize the certification when the event has transpired. *See, e.g.,* Texas Workers' Compensation Commission Appeal No. 990799, decided June 2, 1999; Texas Workers' Compensation Commission Appeal No. 971771, decided October 22, 1997; Texas Workers' Compensation Commission Appeal No. 970522, decided April 30, 1997; and Texas Workers'

> Compensation Commission Appeal No. 961178, decided July 31, 1996. . . . The determination that Rule 130.5(e) does not operate to finalize conditional ratings is not premised upon there being exceptions to Rule 130.5(e). To the contrary, we have stated that conditional ratings simply are not certifications that trigger the duty to dispute. Appeal No. 971771, *supra*. As we noted in Appeal No. 990799, *supra*, "a contingent IR that indicates that it is provisional or temporary pending the occurrence of further specified treatment or surgery which ultimately occurs could be interpreted as an IR which falls by its own terms because it was provisional from the outset."

Because the certification of Dr. L is conditional, was made conditional on an assessment of her present care, and would change "if she were to undergo surgical intervention," Rule 130.5(e) does not operate to finalize this report. Accordingly, we affirm the conclusion of law that the certification of IR and MMI by Dr. L did not become final, for the reasons stated in this decision.

The decision and order of the hearing officer are affirmed.

Susan M. Kelley
Appeals Judge

CONCUR:

Judy L. Stephens
Appeals Judge

Dorian E. Ramirez
Appeals Judge