APPEAL NO. 001255

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 May 4, 2000. With regard 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. C on August 24, 1999, became final under Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 130.5(e) (Rule 130.5(e)). The appellant (carrier) appealed, arguing that the definition of an IR requires a compensable injury and that a prior CCH and Appeals Panel decision had determined that the diagnosis of "spasmodic dysphonia" was not part of the compensable injury (the carrier had stipulated to a compensable injury); and that the IR was based on the spasmodic dysphonia and therefore Rule 130.5(e) has not been triggered and did not require a dispute. The carrier requests that we reverse the hearing officer's decision and render a decision in its favor. The respondent (claimant) responded, urging affirmance.

DECISION

Affirmed.

Initially, we note that no witnesses testified at the CCH and that the carrier's appeal and the claimant's response accurately and almost completely sum up their respective positions at the CCH. Also in evidence is Texas Workers' Compensation Commission Appeal No. 000157, decided March 10, 2000, the Appeals Panel decision affirming that the stipulated compensable vocal cord strain did not include the claimant's "spasmodic dysphonia." That case also gives a detailed recitation of the background facts applicable to this case.

Very briefly, the claimant was a telemarketer for the employer and developed hoarseness. The claimant also had polio as a child which had a bearing on the spasmodic dysphonia. Dr. C, the claimant's treating doctor, in a Report of Medical Evaluation (TWCC-69) and narrative both dated August 24, 1999, certified MMI on that date and assessed a 24% IR. Dr. C assessed the 24% IR using Table 6 of Chapter 9, page 174 of the Guides to the Evaluation of Permanent Impairment, third edition, second printing, dated February 1989, published by the American Medical Association (AMA Guides), which is a speech classification chart. That chart allows for impairments ranging from 0% to 100%, which are converted into impairments of the whole person IR in Table 7. Dr. C does not mention spasmodic dysphonia in his report. The carrier received Dr. C's report on or about September 30, 1999. In evidence is a Payment of Compensation or Notice of Refused/Disputed Claim (TWCC-21) dated October 18, 1999, where the carrier disputes Dr. C's MMI certification and 24% IR; however, it is undisputed that that TWCC-21 was never filed. The hearing officer found that neither party disputed the first certification of MMI and IR assigned by Dr. C on August 24, 1999, within 90 days after receipt of written notification and that Dr. C's certification had become final under Rule 130.5(e), the 1991 version in effect when Dr. C's MMI and IR certification became final on December 29, 1999.

Rule 130.5(e) provides (as interpreted by the Appeals Panel) that the first IR assigned to an employee is considered final if the rating is not disputed within 90 days of the date of written notice of the rating. Both parties cite Rodriguez v. Service Lloyds Ins. Co., 997 S.W.2d 248 (Tex. 1999) for the proposition that there are no exceptions to Rule 130.5(e). The carrier argues that the key term is IR, which is defined as "the percentage of a permanent impairment of the whole body resulting from a compensable injury" and that since spasmodic dysphonia had been determined not to be part of the compensable injury in Appeal No. 000157, *supra*, Dr. C's report did not trigger Rule 130.5(e) because "[Dr. C] CLEARLY rates the spasmotic dysphonia" and in this case "there was never an [IR] for a compensable injury . . . ."

We disagree with the carrier's contention on several grounds. First, Dr. C does not mention spasmodic dysphonia in his report and the AMA Guides do not have an assessment for a diagnosis of spasmodic dysphonia. Dr. C's IR was assigned for speech impairment for the vocal cords and as such was arguably included under the stipulated "vocal cord strain" compensable injury. Appeal No. 000157.

Further, as the claimant points out and cites, there have been numerous cases where the injured employee has contended that the first certifying doctor did not rate the whole injury so that the first certification of MMI and IR was invalid. The Appeals Panel has fairly consistently said that if a party did not believe the whole injury had been rated then the IR should have been disputed. The claimant cites Texas Workers' Compensation Commission Appeal No. 980382, decided April 10, 1998, and Texas Workers' Compensation Commission Appeal No. 992816, decided January 20, 2000, a post-Rodriguez *supra,* case. The carrier is now arguing the reverse, that if more than the compensable injury is rated (something that is not all that clear to us) somehow that does not constitute an IR as defined in Section 401.011(24). In this case, Dr. C certified the MMI date and 24% IR some months before Appeal No. 000157, *supra*, was heard. If the carrier thought the IR was based on a diagnosis which was not compensable (as the carrier's adjuster obviously did based on the unfiled October 18, 1999, TWCC-21) the carrier should have disputed the IR.

Finally, the claimant points out that the benefit review conference that resulted in Appeal No. 000157 was held on October 25, 1999; that the carrier at that time knew the extent of the claimant's assertions including the compensability of the spasmodic dysphonia; that the carrier was still within the 90 days to dispute; and that the carrier still did not dispute the MMI date and 24% IR. The claimant contends that the carrier's real argument is that the 24% IR is too high and that the carrier simply failed to timely dispute Dr. C's 24% IR.

Upon review of the record submitted, we find no reversible error. 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:

Tommy W. Lueders
Appeals Judge

Judy L. Stephens
Appeals Judge