APPEAL NO. 001546

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 May 26, 2000. With regard to the only issue before him, the hearing officer determined that the appellant's (claimant) first certification of maximum medical improvement (MMI) and zero percent impairment rating (IR) certified by Dr. W on September 13, 1999 (all dates are 1999 unless otherwise noted), became final under Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 130.5(e) (Rule 130.5(e)). The claimant appeals, contending that her treating doctor, Dr. K had timely disputed Dr. W's "findings" for her at her request, that she speaks only (language) and therefore could not dispute Dr. W's IR "directly to the Texas Workers' Compensation Commission [Commission]" and that the 1989 Act "does not differentiate between a 'Dispute' and a 'disagreement.'" As ancillary matters, the claimant also complains that the "Hearing officer's Decision is mostly a direct quote from the carrier's 'brief'" (emphasis in the original) which shows a bias by the hearing officer and that the "translator used by the [Commission] was very poor and hard to understand" and, therefore, the claimant felt that she "wasn't understood." The claimant requests that we reverse the hearing officer's decision and render a decision in her favor. The respondent (carrier) responds, repeating much of the information in its brief which was quoted by the hearing officer and urges affirmance.

DECISION

Reversed and rendered.

At the outset, we note that the claimant is _____ and does not speak, read, or write English. In that respect, we agree that the translation was very difficult to understand and the hearing officer, on several occasions, had to admonish the translator/interpreter to repeat only what the claimant said. (Upon a question being propounded to the claimant, the translator and the claimant would engage in a dialogue, with the translator then summarizing the conversation by saying "she said . . . ."). The claimant's daughter was present and had served as a translator in the claimant's dealings with the doctors but was not called as a witness or allowed to be the translator. While this had to be a less than optimal hearing, these problems do not, in themselves, constitute reversible error.

The claimant was employed by the employer doing some kind of assembly line "drilling" or machinery work. The claimant developed some kind of repetitive right shoulder, arm, elbow, and hand trauma. Dr. K treated the claimant with chiropractic manipulation and massage. The claimant was sent to Dr. W on September 13 and in a Report of Medical Evaluation (TWCC-69) and narrative of that date certified the claimant at MMI on September 13 with a zero percent IR. The carrier presented evidence that on October 27 Dr. W's report was sent to the claimant by both certified and regular mail and that the certified mail was not signed for but the regular mail was not returned. The hearing officer makes an unappealed finding applying Rule 102.4(h); however, the claimant does not dispute that she received the carrier's correspondence around October 28. The hearing

officer found that the 90th day after the receipt of Dr. W's report was January 30, 2000. Dr. K subsequently wrote that he received Dr. W's report on October 28.

It is undisputed that the claimant had an appointment with Dr. K on November 1, as documented by a form daily progress note signed by the claimant. Although it is relatively undisputed that Dr. W's report was discussed, exactly what was said is strenuously disputed. The claimant testified that she asked Dr. K, through her daughter, to dispute Dr. W's report. Exactly what she said was unclear as is the response to the carrier's question on cross-examination how she knew she could dispute Dr. W's report. Also undisputed is that Dr. K indicated his disagreement of Dr. W's MMI date and zero percent IR in block 22 of Dr. W's TWCC-69 and that form was filed with the Commission on November 4. We note, however, from the Dispute Resolution Information System notes in evidence as Hearing Officer Exhibit No. 2, that an EES 19 letter was not mailed until February 15, 2000. It is undisputed that the claimant's daughter called the Commission on February 17 or 18, 2000, inquiring why the claimant's checks had stopped and disputed Dr. W's certification of MMI and IR. Dr. K, in a letter dated April 7, 2000, wrote:

> On approximately October 28, 1999 I received, from [the carrier], a copy of a report from [Dr. W] concerning his evaluation of [the claimant] that took place on 9/13/99. With the report there was a TWCC 69 form filled out by [Dr. W]. On that form he indicated that [the claimant] was at MMI and had a 0% impairment.
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> On 11/1/99 I discussed this with [the claimant] and her daughter. I explained to them that I did not agree with [Dr. W's] findings. The patient and her daughter then indicated that they desired that I act on their behalf and disagree with [Dr. W's] findings. I did this by signing the TWCC 69 and mailing it to the commission on 11/3/99.

The hearing officer, in his "Statement of the Evidence" along with a recitation and summary of the evidence, then adds, verbatim, two pages from the "Carrier's Brief of Relevant Law." While this does not, in itself, constitute reversible error, it has obviously, as evidenced by the claimant's appeal, created a perception of bias, and that the hearing officer instead of making an objective decision was simply parroting the carrier's position. Hearing officers should refrain from such actions, which may create a perception of lack of objectivity to a pro se claimant. The hearing officer, in his Statement of the Evidence, goes on to sum up his position thusly:

> [Dr. K] did not indicate that he told the Claimant that he could dispute [Dr. W's] findings for the Claimant, and it is unlikely that the Claimant and her daughter thought of it by themselves. Second, assuming that [Dr. K] disputed [Dr. W's] findings on behalf of the Claimant, neither the Claimant nor [Dr. K] then took any further action or made any inquiries about the matter. Third, [Dr. K] signed the TWCC-69 to show his <u>disagreement</u> and sent it to the Commission, where it was received on November 4, 1999.

However, nowhere on the TWCC-69 did [Dr. K] indicate that either he or the Claimant was disputing [Dr. W's] certification. [Emphasis in the original.]

The hearing officer made the following findings to support his conclusion that the first certification of MMI on September 13 and zero percent IR certified by Dr. W became final under Rule 130.5(e):

FINDINGS OF FACT

10. On November 3, 1999, [Dr. K] signed the TWCC-69 to show his disagreement and sent it to the Commission, where it was received on November 4, 1999; however, nowhere on the TWCC-69 did [Dr. K] indicate that either he or the Claimant was disputing [Dr. W's] certification.

11. [Dr. K's] letter disagreement with [Dr. W's] findings did not operate as a dispute of [Dr. W's] findings on behalf of the Claimant. [All emphasis in the original.]

Rule 130.5(e), the version in effect for this case, provides that "[t]he first [IR] assigned to an employee is considered final if the rating is not disputed within 90 days after the rating is assigned" which has been interpreted to be when a party receives written notice of it. The Appeals Panel, in a number of recent cases, has generally held that the treating doctor may dispute a Rule 130.5(e) first certification of IR on behalf of the injured employee, but the doctor must do so at the request or on behalf of the employee. In Texas Workers' Compensation Commission Appeal No. 94747, decided July 25, 1994, the Appeals Panel stated that in certain cases a treating doctor may act as an agent of the claimant in raising a dispute under Rule 130.5(e), but that it must be apparent from the facts and circumstances of a given case that the treating doctor, in expressing disagreement with another doctor's certification of MMI and IR, has done so with some involvement of the claimant and that only then can it reasonably be concluded that the treating doctor is expressing the decision of the claimant to dispute the first rating. In Texas Workers' Compensation Commission Appeal No. 990969, decided June 21, 1999, the Appeals Panel stated that "there must be some indication that it was the claimant, as well as the treating doctor, making the disagreement" and that "while the relationship between the treating doctor and claimant in this regard has been commonly referred to as an agency relationship, in Texas Workers' Compensation Commission Appeal No. 990323, decided April 5, 1999 (Unpublished), the Appeals Panel stated that '[n]o strict agency relationship is necessary.'" Appeals Panel decisions which have followed this line of reasoning include Texas Workers' Compensation Commission Appeal No. 990046, decided February 25, 1999, and Texas Workers' Compensation Commission Appeal No. 990790, decided May 19, 1999. To that end, *compare* Texas Workers' Compensation Commission Appeal No. 001563, decided August 14, 2000, where the Appeals Panel generally upheld the ability of the treating doctor to dispute the first certification of MMI and IR by marking his disagreement on the TWCC-69, but which in that case held that the first certification of MMI and IR had become final because the claimant, in that case, testified

that she never instructed the treating doctor to dispute the IR and MMI date, assuming he would do so and further, in that case, the treating doctor had indicated his disagreement before he spoke with the claimant and there were no elements of ratification present. We held that the dispute by the treating doctor must be with the involvement of the claimant. The reason for the requirement that the dispute be with the involvement and specific agreement of the claimant was discussed in Texas Workers' Compensation Commission Appeal No. 961866, decided November 6, 1996, citing other cases, where we stated:

> In our view, a treating doctor cannot adequately dispute the first IR to keep it from becoming final under Rule 130.5(e) through the doctor's own decision without involvement of the claimant. Unless it can be shown that the doctor acted with claimant's authority, or at claimant's request it cannot be said that the claimant disputed the rating. Further, if a doctor were able to dispute a rating without the claimant's authority, as in the present case without his knowledge, problems could arise in the future where the claimant later took the position he never authorized the dispute.

That rationale was repeated and clarified in a dissenting opinion in Appeal No. 990790, *supra*. Incidentally, the amended Rule 130.5(e) and (f) effective March 13, 2000, state:

> (e) The first certification of MMI and [IR] assigned to an employee is final if the certification of MMI and/or the [IR] is not disputed within 90 days after written notification of the MMI and IR is sent by the Commission to the parties, as evidenced by the date of the letter, ...
>
> [Three exceptions not applicable to this case.]
>
> (f) This rule applies to certifications of MMI and [IRs] that have not become final prior to the effective date of this rule.

In this case, the claimant spoke with Dr. K two or three days after they had both received Dr. W's report; the claimant testified that she asked Dr. K to dispute the report in her behalf, although the circumstances of that conversation are unclear, and Dr. K in a subsequent letter supports the claimant's testimony, explaining that he, Dr. K, explained Dr. W's rating to the claimant and the claimant (and her translator daughter) "then indicated that they desired that I [Dr. K] act on their behalf and disagree with [Dr. W's] findings." This constitutes ample evidence that Dr. K explained the rating and that he would dispute on the claimant's behalf.

Contrary to the carrier's appeal and the hearing officer's comment, nowhere in the Commission rules is there a requirement that after disputing the first certification of MMI and IR the claimant or the treating doctor take "any further action or [make] any inquiries about the matter." There is no such additional requirement and we decline to add such a requirement even if we were empowered to do so, which we are not. *See* Rodriguez v. Service Lloyds Insurance Company, 997 S.W.2d 248 (Tex. 1999).

Lastly, we take exception to the hearing officer's findings, advanced by the carrier, that Dr. K's disagreement on the TWCC-69 was only done for purposes of Rule 130.3 and did not operate as a dispute of Dr. W's report for purposes of Rule 130.5(e). We have not made such a distinction in the past and decline to do so now. We have frequently noted that "magic words" are not needed, particularly in this case where a non-English speaking pro se claimant is expected to distinguish the fine points of semantics between a disagreement and a dispute. We would further note that most of the Appeals Panel decisions appear to treat the words as synonymous and we decline to do otherwise until directed by an appellate court.

Accordingly, for the reasons stated, we reverse the hearing officer's decision that Dr. W's first certification of MMI and IR has become final under Rule 130.5(e) as being against the great weight and preponderance of the evidence and render a new decision that the first certification of MMI and zero percent IR certified by Dr. W did not become final under Rule 130.5(e).

Thomas A. Knapp
Appeals Judge

CONCUR:

Robert W. Potts
Appeals Judge

CONCURRING OPINION:

I concur in the result. I write separately to note that in Texas Workers' Compensation Commission Appeal No. 981088, decided July 8, 1998, a decision which reversed and remanded for further determinations, the Appeals Panel stated that it agreed with the carrier's contention that while the evidence supported the contention that the claimant in that case was involved in the treating doctor's expression of disagreement on the bottom of the Report of Medical Evaluation (TWCC-69) with another doctor's impairment rating (IR), "there was no indication on that document that Dr. W was expressing claimant's dispute as distinguished from Dr. W's disagreement in compliance with Rule 130.3(b) [Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 130.3(b)]." This decision stood for the proposition that the treating doctor's mere checking the disagreement block on the bottom of a TWCC-69 does not act as a dispute on behalf of the claimant unless there is evidence that the doctor communicated to the carrier or to the Texas Workers' Compensation Commission (Commission) within the 90-day period that the dispute was on behalf of the claimant. The obvious salutary benefit of such an

evidentiary requirement is to discourage the practice of converting a treating doctor's checkoff of the disagreement block on the bottom of a TWCC-69 into a dispute by the claimant by creating evidence, after the 90-day period has expired, that the treating doctor was actually conveying the claimant's dispute of the first assigned IR. The panel in Texas Workers' Compensation Commission Appeal No. 982646, decided December 23, 1998, followed Appeal No. 981088, *supra*, as did the majority of the panel in Texas Workers' Compensation Commission Appeal No. 982956, decided January 29, 1999. *And see* Texas Workers' Compensation Commission Appeal No. 981266, decided July 22, 1998. However, in Texas Workers' Compensation Commission Appeal No. 990046, decided February 25, 1999, a panel simply declined to follow this precedent, citing an earlier decision, which "suggested" but did not "require" that a doctor communicate that he or she is disputing the IR on behalf of the claimant. The decision in Texas Workers' Compensation Commission Appeal No. 990864, decided June 9, 1999, also failed to follow the precedent of Appeal No. 981088, *supra*, as have a number of other decisions. I can only conclude that the decision in Appeal No. 981088 is no longer of precedential value.

Philip F. O'Neill
Appeals Judge