APPEAL NO. 001563

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 June 14, 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. RP became final under Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 130.5(e) (Rule 130.5(e)). The appellant (claimant) appeals, contending that her treating doctor, Dr. P, had timely disputed Dr. RP's certification of MMI and IR on her behalf. The claimant requests that we reverse the hearing officer's decision and render a decision in her behalf. The respondent (carrier) responds, arguing that Dr. P had already unilaterally disputed Dr. RP's report before the claimant discussed it with Dr. P, therefore, the dispute was not with the claimant's involvement. The carrier urges affirmance.

DECISION

Affirmed.

The background facts are not in dispute. The claimant was employed in some kind of clerical or administrative position by an airline and on _____ (all dates are 1999 unless otherwise noted), sustained a compensable left arm injury when an elevator door closed on her arm. The claimant eventually began treating with Dr. P, her current treating doctor, who in a report of an October 28 visit affirmed an impression of a left elbow occult radial neck fracture, left cubital tunnel syndrome, and left elbow and forearm contusion. The claimant was examined by Dr. RP, and in a report dated November 1, Dr. RP certified MMI on July 9 with a zero percent IR. The parties stipulated that this was the first certification of MMI and IR. In an unappealed finding, the hearing officer found that the claimant received Dr. RP's report on November 13. (A Dispute Resolution Information System note of November 8 indicates the claimant was sent an EES 19 letter that date and the hearing officer apparently assigned a five-day deemed receipt date.) In evidence is a copy of Dr. RP's Report of Medical Evaluation (TWCC-69) dated November 2, with Dr. P's checked disagreement of MMI and IR at the bottom, dated November 19 and signed by Dr. P. That form was filed with the Texas Workers' Compensation Commission (Commission) on November 29.

It is undisputed that the claimant had a follow-up appointment with Dr. P on December 9. Dr. P's progress note of that date makes no mention of Dr. RP's report or a dispute of that report. The claimant testified that she discussed Dr. RP's report with Dr. P and that she said:

> I totally disagree with what [Dr. RP] said. . . .
>
> And when I told [Dr. P] how I felt about what [Dr. RP] said in that letter, [Dr. P] simply told me, he said, well, Jeanette, don't worry about what

[Dr. RP] says. I am your attending physician and we are going to go by his [Dr. P's] finding what he's going to do as far as treating me.

On cross-examination, the claimant testified:

Q. Okay. Thank you. Now, when you discussed the [IR] of [Dr. RP] with [Dr. P], you did that in his office; is that correct?

A. Yes, I did.

Q. Okay. Did you ever instruct [Dr. P] to dispute your [IR] or [MMI] date?

A. No, I didn't.

The claimant, herself, did not timely dispute Dr. RP's first certification and relies on Dr. P's dispute. In evidence is a letter dated June 6, 2000, from Dr. P stating:

A medical evaluation was performed on November 1, 1999 by [Dr. RP]. I disagreed that the patient had reached [MMI] and disagreed with the 0% [IR] that was assigned.

On 11/19/99 I was acting on [the claimant's] behalf as her treating agency when I disagreed with the findings. She was found to have significantly more involvement of her injury than originally assessed. She subsequently required surgery on 1/10/00.

This letter is to affirm that I was acting in [the claimant's] behalf and am continuing to be her treating physician.

The hearing officer, in the discussion portion of his decision, commented:

I find that the evidence established that [Dr. P] was not acting on behalf of the claimant when he indicated his disagreement with [Dr. RP's] assessments. [Dr. P] was acting unilaterally without the involvement of the claimant at the time that he indicated his disagreement. The medical records show that the claimant was not in contact with [Dr. P] prior to him indicating his disagreement on the TWCC-69. In order for a dispute to be effective there must be some involvement of the claimant. In this case, the claimant was not consulted by [Dr. P] prior to his indication of disagreement. I also find that the conversation of December 9, 1999 between the claimant and [Dr. P] was not such from which it could reasonably be inferred that he intended to dispute the [IR] on her behalf, and even if it were, it occurred after he had already indicated his disagreement. A claimant cannot ratify a treating doctor's disagreement, after the fact, and make that disagreement an effective dispute.

Portions of the claimant's appeal deal with information not presented at the CCH but basically confirm that the claimant believed that her doctor/patient relationship provided "that everything [Dr. P] did and sign he was and still is acting [on] my behalf" and that Dr. P's June 2000 letter "clearly states that he at the time he signed the TWCC-69 that he disagreed with [Dr. RP]." (Emphasis added.) Rather clearly Dr. P timely disputed Dr. RP's certification of MMI and IR but the question is whether that action was done on behalf of the claimant or in Dr. P's capacity as the treating doctor as required by Rule 130.3.

Rule 130.5(e) provides that the first IR assigned to an employee is considered final if not disputed within 90 days of when a party receives written notice of it. The Appeals Panel 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.'"

In this case, the hearing officer found, and is supported by the evidence, that Dr. P disputed Dr. RP's certification of MMI and IR on November 19, filed with the Commission on November 29, without speaking with, or the involvement of, the claimant and did so in his capacity as the treating doctor. 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.

The hearing officer said that Dr. P acted "unilaterally without the involvement of the claimant at the time that he indicated his disagreement." There is virtually no evidence or argument to the contrary.

We do, however, disagree with the hearing officer's generalized statement that a "claimant cannot ratify a treating doctor's disagreement after the fact, and make that disagreement an effective dispute." While we may agree there are differences of opinion on ratification we would point to Texas Workers' Compensation Commission Appeal No. 981266, decided July 22, 1998, a case where we affirmed the hearing officer's decision of a timely dispute based on ratification. However, that case is clearly distinguished from the instant case. In Appeal No. 981266, the facts were that the claimant spoke with the treating doctor within 90 days of receiving the first certification (as was the case here), that the treating doctor had earlier told the claimant he would dispute the RME doctor's report and that when the treating doctor subsequently saw the claimant he told the claimant he "had written workers comp" disputing the first IR, when in fact, he had only checked the boxes in block 21 and forwarded the TWCC-69 to the Commission. Consequently, in Appeal No. 981266, not only did the claimant specifically ask for the doctor's assistance in disputing the first certification but we also have a situation of detrimental reliance where the claimant, in that case, relied on the doctor's representation that he had in fact disputed for the claimant by "writing workers comp." We hold, in this case, that the hearing officer's statement that the December 9 office visit and conversation between the claimant and Dr. P "was not such from which it could reasonably be inferred that he intended to dispute the [IR] on her behalf" is supported by the evidence and testimony. We disagree that there can never be an after-the-fact ratification if done within 90 days of receipt of the first written certification. However, our review of the testimony and evidence does not lead us to conclude that there was such a ratification as was present in Appeal No. 981266. In fact, the claimant agrees that she never instructed or requested Dr. P to dispute in her behalf but just assumed that he would do whatever was in her best interest based on their doctor/patient relationship. We hold that to be insufficient involvement by the claimant, in order to impute Dr. P's dispute to the claimant after the fact.

Accordingly, we affirm the hearing officer's decision and order for the reasons stated.

Thomas A. Knapp
Appeals Judge

CONCUR:

Kathleen C. Decker
Appeals Judge

DISSENTING OPINION:

I dissent. When the issue of whether or not a dispute of impairment rating (IR) by a treating doctor operated to prevent an IR from becoming final pursuant to Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 130.5(e) (Rule 130.5(e)) first arose, it was my belief that such a dispute would operate to do so. This was based on the fact that Rule 130.5(e) does not provide who is to dispute an IR but provides that the first certification does becomes final "if the rating is not disputed within 90 days after the rating is assigned." It seemed to me that if the Commissioners in promulgating Rule 130.5(e) had intended that a dispute of the first certification could only be done by the parties, it would have been very easy to have worded Rule 130.5(e) to have said just that. It seemed logical to me that the Commissioners may not have wanted to limit a dispute of the first certification to the parties because a doctor would seem to be in a better position than a lay person to determine whether or not an IR was accurate and complied with the protocols of the Guides to the Evaluation of Permanent Impairment, third edition, second printing, dated February 1989, published by the American Medical Association. So it seemed to me that interpreting Rule 130.5(e) to mean that a treating doctor could dispute an IR for purposes of Rule 130.5(e) was consistent with both the wording and the purpose of the rule. It appeared that the purpose of the rule was to bring finality to an IR which was unquestionably accurate. If a doctor felt this was not the case, then the designated doctor process would be invoked to allow an accurate rating to be given.

It was argued to me that allowing a treating doctor to dispute an IR without any involvement from the claimant could result in a treating doctor disputing an IR that the claimant did not want to have disputed but that the claimant desired to become final. In spite of the fact that no such case had been before the Appeals Panel, I finally agreed to the doctrine that there should be some claimant involvement to preclude this situation from arising. However, this doctrine of claimant "involvement" has in my view been overread time and time again leading to absurd results of which the present case is only the latest example. In the present case the zero percent IR certification of the carrier's doctor was sent to both the claimant and her treating doctor.[1] The treating doctor disputed the carrier's doctor zero percent IR certification. The claimant discussed the carrier's doctor certification with her treating doctor well within 90 days of her receipt of the certification and was told that he had taken care of it. The claimant was satisfied that her treating doctor was handling the matter for her and therefore did not take further action herself. To say that under these circumstances there has been no claimant involvement in the dispute of the zero percent rating of the carrier's doctor is to enter the realm of absurdity, and I decline to join my colleagues in their travels to that realm.

[1]It seems to me that if it was not envisioned that the treating doctor can dispute an IR certification it could be argued that a tremendous amount of resources are being wasted in seeking in every case the opinion of the treating doctor concerning an IR certification.

I would reverse the decision of the hearing officer and render a decision that the first certification of IR has not become final pursuant to Rule 130.5(e).

Gary L. Kilgore
Appeals Judge