APPEAL NO. 002117

Following a contested case hearing held on August 3, 2000, pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act), the hearing officer, resolved the disputed issue by determining that the first certification of maximum medical improvement (MMI) and impairment rating (IR) did not become final under Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 130.5(e) (Rule 130.5(e)). The appellant (carrier) files a request for review arguing that the dispute of the IR by the respondent's (claimant) treating doctor was insufficient to constitute a dispute pursuant to Rule 130.5(e). The claimant responds that the dispute by the treating doctor was sufficient.

DECISION

Finding sufficient evidence to support the decision of the hearing officer and no reversible error in the record, we affirm the decision and order of the hearing officer.

Most of the essential facts of the case are undisputed. It was not disputed that the claimant sustained a compensable injury on _____, and that the claimant's treating doctor was Dr. G. It is also undisputed that the carrier referred the claimant to Dr. O, for a required medical examination. Dr. O certified on a Report of Medical Evaluation (TWCC-69) that the claimant attained MMI on July 21, 1999, with a nine percent IR. The claimant received copies of Dr. O's certification on August 13, 1999, and on August 26, 1999. The claimant and Dr. G both testified that the claimant and Dr. G discussed Dr. O's certification on August 30, 1999, and that the claimant asked Dr. G to dispute the certification on her behalf. On August 30, 1999, Dr. G signed the TWCC-69 checking "I disagree" on the form and sent it to both the carrier and to the Texas Workers' Compensation Commission (Commission). The carrier acknowledged receiving the TWCC-69, showing Dr. G's disagreement, by facsimile transmission on August 30, 1999.

The carrier argues that we should reverse the hearing officer because the claimant failed to establish an agency relationship with her treating doctor that would allow her treating doctor to dispute Dr. O's certification, relying on Texas Workers' Compensation Commission Appeal No. 981088, decided July 8, 1998. The claimant argues that in many subsequent decisions the Appeals Panel has rejected the view that the claimant must establish legal agency to allow a treating doctor to dispute a certification by another doctor for purposes of Rule 130.5(e).

The beginning point for analysis is the language of Rule 130.5(e) itself, which provides as follows:

> (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, unless based on compelling medical evidence the certification is invalid because of:

(1) a significant error on the part of the certifying doctor in applying the appropriate AMA Guides [Guides to the Evaluation of Permanent Impairment, third edition, second printing, dated February 1989, published by the American Medical Association] and/or calculating the [IR];

(2) a clear mis-diagnosis or a previously undiagnosed medical condition; or

(3) prior improper or inadequate treatment of the injury which would render the certification of MMI or [IR] invalid.

We note that the rule states that the first certification of MMI and IR is final if the certification "is not disputed within 90 days" without any reference as to who may or may not do the disputing. We held long ago that a treating doctor may dispute the first certification for a claimant, but there be a showing of some involvement by the claimant in the dispute. The underlying rationale for requiring such involvement was to prevent a certification to be disputed against the wishes of the claimant. The majority opinion in Appeal No. 981088, *supra*, appeared to extend the requirement of claimant involvement to include proof of a full-blown agency relationship. However, in Texas Workers' Compensation Commission Appeal No. 990046, decided February 25, 1999, we rejected such a requirement. We have followed our decision in Appeal No. 990046 in a number of cases since. *See* Texas Workers' Compensation Commission Appeal No. 990790, decided May 19, 1999; Texas Workers' Compensation Commission Appeal No. 990969, decided June 21, 1999; and Texas Workers' Compensation Commission Appeal No. 000652, decided May 10, 2000. In the present case, we find no error in the hearing officer's determination that the first certification of MMI and IR did not become final because it was timely disputed by Dr. G on behalf of the claimant.

The decision and order of the hearing officer are affirmed.

Gary L. Kilgore
Appeals Judge

CONCUR IN THE RESULT:

Robert E. Lang
Appeals Panel
Manager/Judge

DISSENTING OPINION:

I respectfully dissent.

Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 130.3(a) and (b) (Rule 130.3(a) and (b)) provides that if a doctor other than the treating doctor or designated doctor certifies that the claimant has reached maximum medical improvement (MMI), that doctor shall file a copy of the report with the treating doctor and that the treating doctor shall indicate agreement or disagreement with the certification of MMI and impairment rating (IR). The Report of Medical Evaluation (TWCC-69) contains instructions and has places to mark to assist in complying with the provisions of Rule 130.3(a) and (b). The TWCC-69 states:

> A doctor, other than the treating doctor or designated doctor, who certifies [MMI] must send this Report of Medical Evaluation (TWCC-69) to the treating doctor no later than 7 days after the examination. The treating doctor, in turn, must send this Report of Medical Evaluation to the commission [Texas Workers' Compensation Commission] field office handling the employee's claim within 7 days. This will serve as the treating doctor's [emphasis added] agreement or disagreement with certification of [MMI] and/or with the assigned [IR].

The TWCC-69 has places for the treating doctor to mark agreement or disagreement with the certification of MMI and the assigned IR and to date and sign the TWCC-69.

Rule 130.5(e) provides that the first certification of MMI and IR is final if that certification is not disputed within 90 days after the written notification is sent by the Commission to the parties. A claimant and his treating doctor may not agree with an IR assigned, but, because the IR assigned is one that meets one of the criteria for entitlement to supplemental income benefits, the claimant may decide not to dispute the assigned IR. In my opinion, if all that is done is that the treating doctor has indicated his disagreement on the TWCC-69 as required by Rule 130.3(b), there has not been a dispute of the first certification of MMI and IR under the provisions of Rule 130.5(e). The treating doctor's having indicated his disagreement on the TWCC-69 does not indicate that the claimant has disputed the first certification of MMI and IR. There is not a dispute under the provisions of Rule 130.5(e).

The Commission uses the TWCC-69 to assist doctors in complying with Rule 130.3(a) and (b). It appears that using a form that provides the written notice to the parties in Rule 130.5(e); that contains instructions; and that has places to check stating “Dispute the Certification of MMI,” “Dispute the IR Assigned,” and “Request a Designated Doctor Be

Appointed" would make it easier for parties to dispute first certification of MMI and IR and could reduce litigation concerning Rule 130.5(e).

Tommy W. Lueders
Appeals Judge