APPEAL NO. 002452

Following a contested case hearing held on September 19, 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 certification of maximum medical improvement (MMI) and impairment rating (IR) assigned by Dr. W did not become final under Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 103.5(e) (Rule 130.5(e)). The appellant/cross-respondent (carrier) appealed the hearing officer's determination, asserting that the first IR had become final under Rule 130.5(e) because the treating doctor, Dr. A, did not send the Report of Medical Evaluation (TWCC-69) indicating that he did not agree with Dr. W's certification of MMI and 0% IR to the Texas Workers' Compensation Commission (Commission) within 7 days as required by Rule 130.3(b)(2) and that the claimant's involvement in the dispute of the IR by Dr. A was not communicated to the carrier or the Commission within 90 days of the date the claimant received written notice of the IR. The respondent/cross-appellant (claimant) responded to the carrier's appeal by asserting that the hearing officer's decision was correct and should be affirmed and appealed the hearing officer's admission of the carrier's exhibits, asserting that the hearing officer did not make a finding that good cause existed to admit the documents and further asserting that the hearing officer abused his discretion in allowing the documents into evidence over the claimant's objection that the documents had not been timely exchanged.

DECISION

Affirmed.

The claimant sustained a compensable injury on _____, and his treating doctor for that injury was Dr. A. On October 14, 1999, the claimant was examined by Dr. W, a carrier-selected doctor. On October 29, 1999, Dr. W executed a TWCC-69 wherein he certified that the claimant had reached MMI on October 14, 1999, with a 0% IR. Dr. W mailed copies of his TWCC-69 and an accompanying report to the claimant and Dr. A.

On November 3, 1999, claimant went to Dr. A for a previously scheduled appointment. The claimant testified that he took a copy of Dr. W's report with him. While there, the claimant talked to Dr. A about having Dr. A dispute Dr. W's assignment of an IR. The claimant's testimony was corroborated by a July 21, 2000, letter by Dr. A which stated:

> On November 3, 1999, I met with [the claimant] and discussed at length the IME by [Dr. W]. We both concurred that we did not agree with his results as he was still very symptomatic at that time and we both felt that he was a surgical candidate.
>
> We also agreed that I would respond in disagreement with the above doctor's certification of MMI and with his assigned IR.

On November 3, 1999, Dr. A checked the boxes on the TWCC-69 which stated that he disagreed with Dr. W's certification of MMI and that he disagreed with Dr. W's assigned IR. Dr. A signed the form and sent it to the carrier. The carrier received the completed TWCC-69 on November 8, 1999. Additionally, on November 29, 1999, Dr. A sent a letter to the carrier which set forth definitions of MMI and stated that Dr. A believed that the claimant was a surgical candidate and that another doctor, Dr. R, agreed. Dr. A then stated that he disagreed "with Dr. W's certification of MMI on 10-14-99."

Based upon the foregoing, the hearing officer found that the IR by Dr. W was the first IR for the compensable injury, and that the claimant was involved in Dr. A's notification to the carrier of the disagreement of the certification of MMI and IR. The hearing officer concluded that the first IR had not become final under Rule 130.5(e) because it had been disputed within 90 days of the date the claimant received written notice of it.

The carrier asserts that Dr. A's disagreement with Dr. W's TWCC-69 did not effectively dispute the IR within 90 days because Dr. A did not send the completed TWCC-69 to the Commission within 7 days as required by Rule 130.3(b)(2) and because neither the carrier nor the Commission were given notice that Dr. A was acting on behalf of the claimant within 90 days of the date the claimant received written notice of the IR. We do not agree with either proposition.

Rule 130.3 requires a treating doctor to advise the employee, the employee's representative (if any), and the Commission of his agreement or disagreement with another doctor's certification of MMI and assignment of an IR within 7 days of the date the treating doctor receives the other doctor's report. There is no reference to Rule 130.5 in Rule 130.3, nor is any reference between the two inferred by the language of either rule.

The version of Rule 130.5(e) applicable to this matter and the effect of a treating doctor's disagreement with the first certification of MMI and assignment of an IR was discussed by the Appeals Panel in Texas Workers' Compensation Commission Appeal No. 001546, decided August 18, 2000. The Appeals Panel stated:

> 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.

The carrier's assertion, that Texas Workers' Compensation Commission Appeal No. 981088, decided July 8, 1998, holding that there must be some indication within the 90-day dispute period that the treating doctor is acting on behalf of the claimant, is controlling in this case and vitiates the treating doctor's dispute on behalf of the claimant herein, was addressed in a concurring opinion in Appeal No. 001546, *supra*, which noted:

> [Appeal No. 981088] 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 [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.

It is noted in passing that the Appeals Judge authoring the above concurrence was the author judge of Appeal No. 981088. The holding set forth in Appeal No. 001546, *supra*, is a correct statement of the law and the carrier's contention that the failure of the claimant or his treating doctor to give notice that the treating doctor's disagreement was on behalf of the claimant within the 90-day dispute time limit results in the first IR becoming final is without merit.

The 1989 Act provides that the hearing officer is the sole judge of the weight and credibility of the evidence. Section 410.165(a). Where there are conflicts in the evidence, the hearing officer resolves the conflicts and determines what facts the evidence has established. As an appeals body, we will not substitute our judgment for that of the hearing officer when the determination is not so against the overwhelming weight of the evidence

as to be clearly wrong and unjust. Cain v. Bain, 709 S.W.2d 175, 176 (Tex. 1986); Texas Workers' Compensation Commission Appeal No. 950456, decided May 9, 1995.

With reference to the claimant's appeal of the hearing officer's admission of two of the carrier's exhibits into evidence over the claimant's objection, we note that the first of the two exhibits, the adjuster's notes, served to confirm the proposition set forth by the claimant that the carrier had notice that Dr. A disagreed with Dr. W's assessment of MMI and IR on November 8, 1999. The other document, the copy of the green card showing that the claimant received a copy of Dr. W's TWCC-69 on December 2, 1999, is superfluous in light of the claimant's testimony that he had a copy of the TWCC-69 when he saw Dr. A on November 3, 1999. In this matter, even if the hearing officer's refusal to exclude the two documents was error, it was harmless error.

The decision and order of the hearing officer are affirmed.

Kenneth A. Huchton
Appeals Judge

CONCUR:

Elaine M. Chaney
Appeals Judge

Thomas A. Knapp
Appeals Judge