APPEAL NO. 92542

A contested case hearing was held on September 2, 1992, in (city), Texas, (hearing officer) presiding. The two issues before the hearing officer were the following: 1. Did the claimant dispute (Dr. R's) finding of maximum medical improvement in accordance with the provisions of the Texas Workers' Compensation Act, TEX. REV. CIV. STAT. ANN. arts. 8308-1.01 *et seq*. (Vernon Supp. 1992) (1989 Act); 2. Did the claimant dispute (Dr. R's) impairment rating, in accordance with the provisions of the Act. The hearing officer held that the claimant disputed the doctor's findings pursuant to the requirements of Commission Rule 130.5(e), and accordingly ordered the carrier to pay impairment income benefits to the claimant as and when they accrue.

A request for appeal was filed by (self-insured), a self insured governmental entity which will be referred to herein as "carrier." In essence, the carrier maintains that the provisions of Rule 130.5(e) apply to the claimant, and that claimant's dissatisfaction expressed prior to the certifying doctor's certification of maximum medical improvement and impairment does not constitute a dispute of the doctor's findings. No response was filed by the claimant.

DECISION

We reverse and remand the decision and order of the hearing officer.

It is not disputed that claimant suffered a compensable knee injury on (date of injury). Claimant, as sole witness, testified that in February 1992 his treating doctor, (Dr. H), sent him to (Dr. R) for a second opinion regarding his condition. Claimant said he did not know anything about the examination also being for the purpose of obtaining an impairment rating: although a February 7, 1992 letter from Dr. H reflects that he intended the referral to be for both purposes, his actual referral letter to Dr. R only asks for a second opinion. When he saw Dr. R on February 6, 1992, claimant said Dr. R asked how he was, grabbed his knee and twisted it, and told him it was time to get on with his life and go back to work. The entire examination, claimant said, lasted about three minutes. Claimant never saw Dr. R again. The same day, claimant said he called (JB), carrier's representative who claimant said he talked to on a regular basis. He complained that Dr. R had acted unprofessionally, and did not give him a complete exam. He said JB responded, "Let's get an impairment rating done and get this thing on the road" and advised him to contact his treating doctor. At that point claimant said he still did not understand what an impairment rating was, nor that Dr. R was going to issue one. The record shows, however, that Dr. R on February 6th completed a Form TWCC-69 (Report of Medical Evaluation) with accompanying narrative, which certified maximum medical improvement (MMI) as of that date and assigned an impairment rating of 5%. There was no evidence that this form was sent to the claimant.

The same day (February 6th) claimant returned to Dr. H and complained about the examination procedures used by Dr. R (the February 7th letter from Dr. H reflects claimant's dissatisfaction with (Dr. R). Dr. H then referred claimant to (Dr. C), who examined claimant on February 28, 1992 and completed a Form TWCC-69 stating that MMI had been reached

on that date and assigning an impairment rating of 15%. Claimant called JB after that examination and said he was comfortable with the way Dr. C examined him.

On February 25, 1992, the carrier filed a Form TWCC-21 (Payment of Compensation or Notice of Refused/Disputed Claim) which stated as follows: "Claimant received 5% from referring (sic) doctor. Started IIB payment and requesting treating doctor concurrence." The claimant testified that he never received this notice. On March 13th Dr. H responded to the carrier as follows: "Since my specialty is in pain management and not in impairment/disability rating, I must agree with [Dr. R's] assessment of this case."

Claimant testified that he first realized Dr. R had assigned him an impairment rating about four months after Dr. R's examination, when he received a notice from carrier indicating that his benefits had ended. He called JB, who told him he had been "paid off," based on a 5% impairment rating. The record reflects that on May 20th, carrier filed a second TWCC-21 stating that it had paid claimant impairment income benefits for 15 weeks, based upon the impairment rating from Dr. R.

Because of the dispute between the parties, the benefit review officer apparently appointed a designated doctor after the benefit review conference on August 5th. This doctor, (Dr. W), filed a TWCC-69 certifying MMI had been reached on July 21, 1992 and assigning an impairment rating of 15%. On August 18th, the carrier disputed Dr. W's impairment rating, based on Rule 130.5(e). (Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 130.5(e)).

The rule in question provides in pertinent part as follows:

(e)The first impairment rating assigned to an employee is considered final if the rating is not disputed within 90 days after the rating is assigned.

At the hearing claimant stated that it is arguable that Rule 130.5 applies only to carriers and not to claimants. Notwithstanding that argument, the claimant contended that his oral statements to his treating doctor and to carrier's representative were adequate to show that he wanted to see another doctor, and that he took every step that could have been expected of a claimant. Carrier argued at hearing, and maintains on appeal, that subsection (e) is binding upon claimant.

We agree that the plain language of Rule 130.5, entitled "Impairment Rating Disputes," indicates that subsection (e), (which is the only subsection of the rule that is not expressly limited to a carrier), applies to both claimants and carriers. The preamble to the published version of the adopted rule supports that this was the intent of the Commission in drafting the rule (". . .[Rule 130.5] provides that an impairment rating is final if not disputed by either party within 90 days after the rating is assigned," 16 Tex. Reg. 177 (January 11, 1991)).

With regard to the form a claimant's dispute must take, we observe that subsections (a) through (d) set out with specificity the steps a carrier must take to dispute an impairment rating; no such requirements are specified for a claimant. From this we would infer that whether a claimant had actually disputed an impairment rating under the rule would be a fact-specific determination in each case.

The carrier disagrees with the hearing officer's finding that claimant timely disputed Dr. R's finding of MMI and his impairment rating, arguing that the steps taken by claimant--contacting JB and Dr. H--could not effectively serve to dispute a finding of MMI and an impairment rating that claimant had not at that point received. We agree that it would require some stretch of the imagination to find that claimant could dispute a doctor's report before he was aware that it had been rendered. Therefore, we reverse the hearing officer's findings and conclusions that claimant had so timely disputed. However, the facts of this case raise an issue of whether Rule 130.5(e) can be read to impose a time limit on disputing an impairment rating of which a claimant has no knowledge. Reading this rule in context with other Commission rules on MMI and impairment rating, we observe that Rule 130.1(h) contemplates that a doctor who certifies MMI and assigns an impairment rating shall send a copy of his or her report to the Commission, the carrier, and the claimant. The record indicates that was not done in this case. In addition, there is evidence in the record that claimant was not aware, through any other means, that Dr. R had assigned an impairment rating until his benefits ran out, more than 90 days after Dr. R filed his TWCC-69.

For the foregoing reasons, the decision and order of the hearing officer are reversed and remanded for further consideration and development of evidence, if deemed necessary by the hearing officer, consistent with this opinion. Pending resolution on remand, a final decision has not been made in this case.

____
Lynda H. Nesenholtz
Appeals Judge

CONCUR:

____
Stark O. Sanders, Jr.
Chief Appeals Judge

____
Thomas A. Knapp
Appeals Judge