APPEAL NO. 92670

This appeal arises under the Texas Workers' Compensation Act of 1989 (1989 Act), TEX. REV. CIV. STAT. ANN. arts. 8308-1.01 through 11.10 (Vernon Supp. 1992). On November 18, 1992, a contested case hearing was held in (city), Texas, with (hearing officer) presiding, to determine if the claimant could dispute her doctor's assessment that she had reached maximum medical improvement (MMI) with a 9% impairment rating, effective February 25, 1992. The claimant sustained an undisputed carpal tunnel injury to her right hand on _____, and the carrier's position was that she had not timely disputed the MMI finding and impairment rating. The hearing officer held that because there had been no forms or reports submitted which indicated that claimant had reached MMI or sustained impairment for her injury of _____, that she had not exceeded her time limit and could still dispute her doctor's report.

The carrier has appealed, pointing out that the report filed by the claimant's doctor clearly assesses impairment to the injured right extremity, regardless of the typographical error used for the date of injury, and that the claimant, who was paid most of her impairment income benefits before she disputed her doctor's report, has not made a timely request within 90 days of receiving the report. The claimant did not file a response.

DECISION

We reverse the hearing officer's decision that the 90 day time period did not begin to run and that the claimant may thus dispute the rating, and render a decision that the claimant may not dispute the MMI certification and impairment rating rendered by her doctor because it became final by operation of Tex. W.C. Comm'n, 28 Tex. ADMIN. CODE § 130.5(e) (Rule 130.5).

The hearing was very short, and both parties submitted most of their case in the form of exhibits. The only issues reported from the benefit review conference were whether the claimant could now dispute the certification of MMI or the 9% impairment rating that a doctor, acting on her behalf, had rendered. There were no issues before the hearing officer regarding the merits of that report.

The claimant stated that she had received a (prior date of injury) injury to her left hand and wrist (carpal tunnel). She had been treated for that earlier injury by (Dr. C). On _____, in the course and scope of employment for (employer), she sustained an injury to her right wrist. She said that she was initially treated by the company doctors, (Dr. B) and (Dr. S), and was diagnosed with a right hand sprain on (date). This report indicates an anticipated MMI date of September 23, 1991. However, she continued to be treated for three more months by Dr. B and Dr. S for an acute strain to the right hand and wrist. A subsequent medical report (Form TWCC-64) filed by Dr. B or Dr. S, and dated November 14, 1991, indicates that claimant continued to experience pain and was referred to Dr. C for orthopedic evaluation. Dr. B also apparently ordered EMG testing to be performed by (Dr. CV).

The test report from Dr. CV indicates that he found indications that "would make one suspicious of an early, mild median nerve carpal tunnel syndrome. I would suggest clinical correlation. All other parameters of the right median nerve motor and sensory study were within normal limits." This test report involved testing of the right extremity only, and not the left.

The claimant first saw Dr. C on December 11, 1991. The record reflects that she continued to seek treatment from Dr. C up to her final examination with him on February 25, 1992. She stated that she changed doctors to (Dr. N), but the record indicates that Dr. N primarily has treated claimant for her left hand condition.

It is clear from reading his reports that Dr. C re-examined her left wrist. It is equally clear that he noted that she had a new condition involving her right wrist, and he began to treat it and run tests. His treatment and review of tests culminated in his report that determined that the claimant had reached MMI effective February 25, 1992, and he assessed a 9% whole body impairment rating (derived from 15% assigned to the right extremity only).

Although the first document of the report is a TWCC-64 report form, Dr. C attached two pages which ask, and answer, all questions from the TWCC-69 form that are not printed on the TWCC-64. The TWCC-64 specifically incorporates these addenda. The date of injury filled in on this form is (prior date of injury). However, the narrative unequivocally attributed impairment to the right upper extremity. The narrative described Dr. C's earlier treatment of claimant's left hand and arm, and noted that she had, by his examination on December 11, 1991, developed tenosynovitis of the right wrist with carpal tunnel syndrome of the right hand. He noted that he determined that she did not need surgery. Dr. C's opinion indicated it is also based upon his review of EMG tests. On November 6, 1992, Dr. C filled out a TWCC-69 form that contains the same information, including the (prior) injury date.

The claimant said that she did not receive this report within seven days of his examination, but she admitted that she had received it. She did not recall the date. The copy she put into evidence appears to be date-stamped on March 11, 1992. Dr. C's report indicated that he sent copies to the claimant and the carrier. The evidence indicates that the carrier sent her a notice of termination of temporary income benefits (TIBs), and initiation of payment of impairment income benefits (IIBs), accompanied by a copy of the report. The notice sent by the carrier stated that it figured payment of IIBs based upon a 9% impairment rating and an MMI date of 2/25/92. This notice was sent out March 12, 1992. The carrier began payment of 27 weeks worth of IIBs effective February 25, 1992.

On July 31, 1992, the claimant completed a notice of dispute of Dr. C's report. This notice is date-stamped August 19, 1992 by the Commission field office handling the claim. At the hearing, the claimant did not deny that she had disputed the claim in excess of 90

days, nor was an explanation furnished. She stated that her reason for disputing Dr. C's report was that it was not filed with the Commission within seven days, as required by Rule 130.1(h). Her second reason was that she felt Dr. C had confused her _____ injury with her (prior) injury, because Dr. C used the wrong date on his report. She did not present any medical information indicating that Dr. C's evaluation was wrong.

It has become clear that many claimants do not understand how they can reach "maximum medical improvement" when they still continue to hurt and suffer from an injury. "Maximum medical improvement" appears to mean complete recovery to the ordinary person. But that is not what it means for purposes of workers' compensation benefits. That term means, under Article 8308-1.03(32)(A) of the 1989 Act, the point at which further material recovery or lasting improvement can no longer be reasonably anticipated, according to reasonable medical probability. When the doctor finds MMI and assesses an impairment, he agrees, in effect, that the injured worker is likely to continue to have effects, and quite possibility pain, from the injury. However, he has determined, based upon his medical judgment, that there will likely be no further substantial recovery from the injury.

There are many aspects of the 1989 Act that depend upon the date that MMI is reached and the percentage of impairment. Article 8308-4.33(c) provides that settlements as to impairment cannot be reached before an injured employee reaches MMI. Article 8308-4.321, which provides for acceleration of impairment income benefits, indicates that the duration of benefits must be reduced to offset accelerated payments. The right of a claimant to receive supplemental income benefits is determined in part by the percentage, and duration, of impairment. Article 8308-4.28(b). A carrier is required to start payment of IIBs within five days of receiving a certifying doctor's report, when it does not dispute it. Article 8308-4.26(e); Rule 130.8. A carrier that refuses to pay impairment income benefits within five days of receipt of a report of a doctor certifying MMI and impairment runs the risk of an administrative penalty. Article 8308-4.26(e); 5.22(b). All of these provisions require that some stability be accorded to MMI assessments and impairment ratings that are not "disputed".

The Texas Workers' Compensation Commission, in Rule 130.5(e) which was effective January 24, 1991, stated:

> 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.

This rule affords a method by which the parties may rely that an assessment of impairment and MMI may safely be used to pay applicable benefits, by providing the time limit in which such assessment will be open to dispute. On the other hand, the rule also allows a liberal time frame within which the parties may ask for resolution of a dispute through the designated doctor provisions of the Act. This rule applies with equal force to the carrier and the claimant.

Although the 1989 Act contains no express deadline for raising these disputes, this does not render the rule fatally defective. The Commission has the general grant of authority to make rules to implement and enforce the Act. Article 8308-2.09(a). The Commission has evidently determined the point at which both parties may rely on an MMI and impairment rating to ensure stable payment of benefits. It is not up to the Appeals Panel to second-guess the wisdom of this rule, nor do we have the power to invalidate it. *See* Bullock v. Hewlett-Packard Co., 628 S.W.2d 754 (Tex. 1982); Article 6252-13a, § 12 (Texas Administrative Procedure and Texas Register Act).

We may, however, interpret agency rules to the facts at hand. Rule 130.5 does not expressly refer to MMI. But an impairment rating cannot be assigned, and made final, absent a certification of MMI. *See* Article 8308-4.26 (d). It would be inconsistent to interpret the rule to bind a claimant or carrier to the percentage of impairment, but allow an "end run" around this finality through an open-ended possibility of attack on the MMI. Such an interpretation would read the rule out of existence. Therefore, in this case, the impairment rating and MMI certification are intertwined, and either became final together, or not. *See* Texas Workers' Compensation Commission Appeal No. 92561, decided December 4, 1992.

The evidence here indicates that the report was mailed by the carrier to the claimant on March 12, 1992. It was the first impairment rating assigned to the claimant. Whether the 90 day time limit were held to run from the date Dr. C assigned his rating, or from the date claimant received notice of the impairment rating, it was exceeded here. The uncontroverted evidence indicates that the report was mailed at least by March 12, 1992. Even if she did not receive it until the end of the month, her dispute was filed at least another month after 90 days had expired.

Of course, the claimant did not assert that she filed her dispute within 90 days, and the statement of her position in the benefit review conference report is that she was unaware of the 90 day rule. (Left unanswered is why, if the claimant thought that the 9% impairment rating was for her old injury, and not the new injury, she would continue to accept IIBs for over 20 weeks without protest). Both reasons given by the claimant for disputing the report were present from the beginning of the 90 day time period, so, even if there were a good cause exception to Rule 130.5(e), it would not be present here.

The hearing officer appears to recognize that Rule 130.5(e) potentially applies to this case, because she finds the time limit did not begin to run because no impairment has been assessed for the _____ injury. We agree with the principal that an assignment of impairment for an injury other than the compensable injury would not start the 90-day deadline within which either the claimant or insurance carrier could dispute the rating. However, those are not the facts here.

The hearing officer was clearly in error when she indicated that there was not proper compliance with Rule 130.1 insofar as the TWCC-69 was not used. Dr. C used a TWCC-64 and then, in his addenda, wrote out the questions from the TWCC-69 that the 64 does not contain, and answered them. The November 1992 TWCC-69 report is simply the same information on a different form.

Further, it is crystal clear that the injury that Dr. C evaluated for impairment was the _____ injury. There isn't any indication that Dr. C was confused or rendered impairment based upon earlier injury to the left extremity. His narrative makes clear that the right extremity injury was a "new" condition he observed in December 1991. In this context, the earlier date listed in the identifying information part of the form can be inferred to have been taken from similar identifying information on his medical records relating to the claimant, who he began treating in 1989 for her earlier injury. The conclusion that Dr. C's report is insufficient to certify MMI and impairment for the _____ injury, or that it does not meet the requirements of Rule 130.1 because of the wrong injury date, is plainly wrong under the facts of this case.

Therefore, the 90 day deadline of Rule 130.5 operated to finalize the 9% impairment rating in this case. It may be that both the claimant and the carrier could have asserted valid disputes that might have resulted in the 9% rating being set aside, had either timely filed a dispute. If the carrier belatedly determined, for example, that 9% was a high rating for a mild unilateral carpal tunnel, and had medical evidence in its favor, it would nevertheless be precluded by the same rule from disputing the first, and in this case, final impairment rating. The Commission has determined that 90 days is a sufficient time frame for raising questions about the accuracy of a certification or impairment rating, and there are no exceptions in the rule.

During the hearing, the claimant raised the question of why she should comply with the rule if the doctor did not obey the seven day rule under Rule 130.1(h). The difference is that, as we have pointed out in previous decisions, the Act provides that the result of not filing a doctor's report on time is that an administrative penalty, under Article 8308-10.03(c)(3), can be imposed. The penalty provided for does not include that the doctor's opinion be disallowed as a professional opinion or certification of MMI. *See* Texas Workers' Compensation Commission Appeals Panel Decision No. 92132, decided May 18, 1992. By contrast, the stated consequence of not disputing an impairment rating in 90 days is that it becomes final.

For these reasons, the hearing officer's determination that the claimant may still dispute Dr. C's report is reversed, and a decision rendered that, by operation of Rule 130.5(e), the impairment rating and underlying certification of MMI became final.

Susan M. Kelley
Appeals Judge

CONCUR:

Stark O. Sanders, Jr.
Chief Appeals Judge

Joe Sebesta
Appeals Judge