APPEAL NO. 92693

On November 12, 1992, a contested case hearing was held in (city), Texas, with (hearing officer) presiding as the hearing officer. The case involved a compensable injury of the claimant's shoulder sustained on (date of injury 1), a compensable injury of the claimant's back sustained on (date of injury 2), and a doctor's certification on March 9, 1992, of maximum medical improvement (MMI) with respect to the back injury and assignment of impairment rating for the back injury. The claimant filed separate claims for compensation for each injury and benefit review conferences were held on each claim. The cases were consolidated for the contested case hearing. The issues at the hearing were: (1) does the claimant have to dispute MMI within 90 days of the date of certification; (2) has the claimant's impairment rating been timely disputed; and (3) do impairment income benefits (IIBS) constitute earnings for the purpose of calculating temporary income benefits (TIBS). The hearing officer determined that: (1) The claimant does not have to dispute certification of MMI within 90 days of certification; (2) although there has been no timely dispute of impairment rating, there can be no impairment rating assessed to the claimant's back until MMI has been reached; and (3) IIBS are not wages and shall not be considered as "earnings" in calculating the amount of TIBS due under the Texas Workers' Compensation Act, TEX. REV. CIV. STAT. ANN. art. 8308-4.23(c).

The appellant, carrier herein, disagrees with certain findings of fact and conclusions of law and requests that the hearing officer's decision be reversed and a decision rendered that the claimant reached MMI with respect to the (date of injury 2), back injury on March 9, 1992, with a seven percent impairment rating, that the certification to MMI was not timely disputed by the claimant, that the impairment rating of seven percent was not timely disputed by the claimant, and that in view of the lack of a timely dispute the certification of MMI and impairment rating are final and binding. The carrier further requests that a decision be rendered to the effect that the IIBS owing to the claimant as a result of his back injury be considered as "earnings" with respect to the amount of TIBS the claimant is entitled to receive as a result of his shoulder injury. The respondent, the claimant herein, did not file a response.

DECISION

The decision of the hearing officer that IIBS are not "earnings" for the purpose of calculating TIBS is affirmed. The decision of the hearing officer allowing the claimant to dispute (Dr. M's) certification of MMI for the claimant's back injury of (date of injury 2) is reversed, and a decision is rendered that the certification of MMI and assignment of impairment rating given by (Dr. M) for the claimant's back injury of (date of injury 2) became final by operation of Rule 130.5(e).

On (date of injury 1) and (date of injury 2), the claimant was an employee of (employer), and on those dates the employer had workers' compensation coverage with the carrier. The claimant testified that on (date of injury 1), a box which weighed between 85 and 100 pounds fell on his shoulder at work, and that on (date of injury 2), he hurt his back

when he lifted a box of orange juice at work. The carrier does not dispute that the claimant sustained a compensable injury to his right shoulder on (date of injury 1), and that he sustained a compensable injury to his back on (date of injury 2).

The claimant said that his shoulder and back injuries were treated by his family doctor, (Dr. R), M.D., (the doctor's name is misspelled as "[Dr. O]" in the transcript) for about three months and that (Dr. R) referred him to (Dr. M), M.D., an orthopedic surgeon. He said that (Dr. M) treated him until April 1992 at which time he was referred to (Dr. W) for treatment of his shoulder injury. He said he had arthroscopic surgery on his shoulder in April 1992.

The claimant further testified that (Dr. M) did not talk to him about an impairment rating, but that he did receive a letter from (Dr. M) which the claimant thought had stated "he has met medical improvement or something like that" and in regard to an impairment rating "stated at seven percent." He did not recall when he received the letter. He said the letter did not give him any notice as to what to do if he disagreed with the letter and that he did not contact anyone about the letter. Two benefit review conferences where held on September 15, 1992, one for the back injury and one for the shoulder injury. The claimant said that at one of those conferences the benefit review officer asked him if he contested the seven percent rating and that he said he wanted to contest it. He further testified that the benefit review officer told him he had a right to see a second choice of doctor so he went to (Dr. H), M.D., (the doctor's name is misspelled as "[Dr. J]" in the transcript) in October 1992 for a second opinion. The claimant said that (Dr. W) is still treating him for his shoulder, that he can still feel something pulling in his back and buttocks, and that he could not attend a work hardening program which (Dr. M) referred him to because he did not have a car to get there.

A TWCC-64 Subsequent Medical Report dated October 23, 1991, showed that (Dr. R) gave notice that the claimant's new treating doctor was (Dr. M). In a medical report dated November 4, 1991, which gave a (date of injury 2) date of injury, (Dr. M) stated that he evaluated the claimant for his low back pain and diagnosed the claimant as having degenerative disc disease, L4-L5, and a herniated nucleus pulposus, L4. He based his diagnosis on a magnetic resonance imaging (MRI) and physical examination. In another report also dated November 4, 1991, which gave a (date of injury 1) date of injury, (Dr. M) stated that he had evaluated the claimant's right shoulder and diagnosed "right rotator cuff tendinitis." (Dr. M) recommended that the claimant undertake a course of physical therapy for both his shoulder and his back. (Dr. M) referred the claimant to (Dr. C), M.D., for an electromyogram. On December 9, 1991, (Dr. C) reported an "abnormal study: left L5 motor nerve root involvement." The claimant had follow-up evaluations with (Dr. M) on December 5, 1991 and January 6, 1992. (Dr. M) noted the poor quality of the claimant's lumbar MRI and recommended a repeat MRI. He also noted that the claimant's EMG and nerve conduction study revealed an L5 nerve root irritation. An MRI of the claimant's lumbar spine done on January 8, 1992 revealed a focal disc protrusion centrally at the L4-5 level. Progress notes indicated that the claimant had some physical therapy in November

and December 1991 and in January 1992. In a report dated January 27, 1992, (Dr. M) reviewed the MRI done January 8th, noted that it revealed a focal disc protrusion centrally at the L4-L5 level, and stated that there is a compression of the neural structure by the disc herniation. He also stated that he had discussed treatment options available to the claimant, including surgical intervention versus continuation of conservative therapy, that the claimant wanted to continue with conservative therapy, and that he was in agreement with that plan.

In a letter to the carrier dated March 9, 1992, showing a date of injury of (date of injury 2), (Dr. M) diagnosed the claimant as having a herniated nucleus pulposus, L4, and stated that he had nothing further to offer the claimant as the claimant refused to attend a pain management program. He further stated that he believed the claimant had reached MMI and that the claimant had an impairment rating of seven percent established by the AMA Guides to Evaluation of Permanent Impairment in regard to the claimant's low back. In a signed but undated TWCC-69 Report of Medical Evaluation, showing a date of injury of September 15, 1992, (Dr. M) certified that the claimant had reached MMI on March 9, 1992, assigned him a whole body impairment rating of seven percent, made the same statements as in his letter of March 9, 1992, and listed the body part/system as "herniated nucleus pulposus, L4." In a letter to the carrier dated April 17, 1992, (Dr. M) stated that the claimant "was given a maximum medical improvement and a disability rating on March 9, 1992" and that "[h]e has been released from care in this office as we have nothing further to offer him." The BRC report for the claimant's (date of injury 2) injury to his lower back indicated that the claimant had been paid 24 weeks of TIBS and 21 weeks of IIBS for that injury. Since the period for entitlement to IIBS is computed at the rate of three weeks for each percentage point of impairment, the 21 weeks of IIBS paid to the claimant to the date of the BRC corresponds to (Dr. M's) seven percent impairment rating.

In a signed but undated TWCC-69 Report of Medical Evaluation, (Dr. H) certified that, with respect to the claimant's injury of September 15, 1992, the claimant reached MMI on October 28, 1992 and assigned him a whole body impairment rating of 23 percent. The findings set forth in the report pertain to the claimant's lumbar spine.

At the hearing the parties were in agreement that the claimant had sustained two separate injuries, one to his back and one to his right shoulder, in two separate accidents at work. They also appear to agree that (Dr. M's) certification of MMI and assigned impairment rating were for the claimant's back injury, and that (Dr. W) was treating the claimant for the shoulder injury. In regard to the first two issues at the hearing concerning MMI certification and impairment rating, it was the claimant's position that (Dr. M's) certification of MMI and assigned impairment rating were not final because the claimant had not been given any notice that he had to dispute those findings within 90 days. It was also the claimant's position that there is no Commission rule which directs that an MMI certification has to be disputed in 90 days. The claimant urged that the Commission base the date of MMI and impairment rating for his back injury on (Dr. H's) report. The claimant did not assert that he had in fact disputed either MMI or impairment rating as found by (Dr.

M) within 90 days of the certification and assignment or within 90 days of his receipt of the copy of (Dr. M's) letter advising him of his findings. The carrier's position was that (Dr. M's) certification of MMI and assignment of impairment rating were final under Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE Sec. 130.5(e) because the claimant had not disputed those findings within 90 days.

In addition to finding that the claimant sustained a compensable injury to his right shoulder on (date of injury 1), and a compensable injury to his back on (date of injury 2), the hearing officer made the following findings of fact, conclusions of law, and decision and order:

Findings of Fact

No. 6. Claimant continues to receive treatment for his shoulder injury, for which MMI has not been reached.

No. 7. Although there can be no impairment rating assessed if MMI has not been reached, the two are separate and distinct issues and a party may dispute one without disputing the other.

No. 8. There are no specific time limits in the Act during which a party must dispute a certification of MMI, although the dispute should be made within a reasonable time.

No. 9. Claimant's treating doctor certified that he had reached MMI for his back injury on March 9, 1992, with a 7% whole body impairment rating.

No. 10. Claimant did not dispute the certification of MMI for his back within 90 days of certification; however, claimant did dispute this certification within a reasonable amount of time.

No. 11. If MMI has not been reached, an assessment of impairment rating may not be made.

Conclusions of Law

No. 2. Claimant does not have to dispute certification of MMI within 90 days of certification and may do so at this time.

No. 3. Although there has been no timely dispute of impairment rating, there can be no impairment rating assessed to claimant's back until MMI has been reached.

No. 4. Impairment income benefits are not wages as defined by Article 8308-1.03(47),

and shall not be considered as "earnings" in calculating the amount of TIBS due under Article 8308-4.23(c).

Decision and Order

Claimant does not have to dispute a certification of MMI within 90 days of certification. Claimant voiced his dispute regarding MMI to his back in a reasonable amount of time. There can be no assessment of impairment rating without a certification of MMI. Should claimant begin receiving IIBS for one of his injuries while still receiving TIBS for the other, those TIBS shall not be adjusted to reflect the IIBS as post-injury earnings.

Rule 130.5(e) provides that "[t]he first impairment rating assigned to an employee is considered final if the rating is not disputed within 90 days after the rating is assigned."

The claimant did not appeal the decision of the hearing officer. The carrier contends in its appeal that the hearing officer erred in making Findings of Fact Nos. 7, 8, and 10, except that the carrier does not appeal that portion of Finding of Fact No. 10 wherein the hearing officer finds that the claimant did not dispute the certification of MMI for his back injury within 90 days of certification. The carrier further contends that the hearing officer erred in making Conclusions of Law Nos. 2 and 3, except that the carrier does not appeal that portion of Conclusion of Law No. 3 wherein the hearing officer concludes that there has been no timely dispute of impairment rating. Essentially, the carrier urges that by implication Rule 130.5(e) requires that MMI be disputed within 90 days of certification, and in the alternative urges that if an impairment rating becomes final under Rule 130.5(e) for lack of a timely dispute, the underlying certification of MMI must also become final because there can be no assessment of impairment rating without the claimant having reached MMI.

We first observe that, notwithstanding the language in Rule 130.5(e), the 90 day time period in which to dispute the first impairment rating assigned to an employee does not necessarily run from the date the rating is actually assigned by the doctor. *See* Texas Workers' Compensation Commission Appeal No. 92542, decided November 30, 1992, where the Appeals Panel stated in a discussion of Rule 130.5(e) that whether a claimant had actually disputed an impairment rating under the rule would be a fact-specific determination in each case and that "we would 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 was rendered." However, in the present case the claimant did not contend that he had disputed (Dr. M's) certification of MMI or impairment rating within 90 days of the assignment of the impairment rating or within 90 days of when he became aware of the assignment, and the claimant has not appealed the hearing officer's finding that the claimant did not dispute the certification of MMI for his back injury within 90 days of certification or the hearing officer's conclusion that there had been no timely dispute of the impairment rating. Consequently, for purposes of this appeal we must consider correct the hearing officer's determination that there was no timely dispute of (Dr. M's) impairment rating.

In Texas Workers' Compensation Commission Appeal No. 92670, decided February 1, 1993, the Appeals Panel reversed a hearing officer's decision and rendered a decision that the employee may not dispute MMI certification and impairment rating rendered by her doctor because it became final by operation of Rule 130.5(e). In doing so the Appeals Panel stated that:

> This rule [Rule 130.5(e)] affords a method by which 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.
>
> * * * *
>
> We may, however, interpret agency rules to the facts at hand. Rule 130.5(e) 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.

In the present case, the claimant sustained two separate compensable injuries in two separate accidents at work. (Dr. M) was the first doctor to certify that the claimant had reached MMI with respect to his back injury and assign an impairment rating with respect to that injury. Neither party contended at the hearing or on appeal that the certification of MMI and assignment of impairment rating was for any injury other than the claimant's back injury sustained on (date of injury 2). In fact, the carrier states in its appeal that there is no contention that the claimant has reached MMI with regard to the injuries sustained to his shoulder on (date of injury 1). The contention made by the carrier is that the claimant received a proper certification of MMI by (Dr. M) on March 9, 1992, with a seven percent impairment rating with respect to the back injury sustained on (date of injury 2), and that the claimant did not timely dispute the certification of MMI or the impairment rating assigned by (Dr. M) with respect to the back injury sustained on (date of injury 2). Considering that no party has challenged the hearing officer's determination that the impairment rating assigned by (Dr. M) was not timely disputed, along with our decision in Appeal No. 92670 interpreting Rule 130.5(e), we hold that, with respect to the back injury sustained on (date of injury 2), the claimant reached MMI on March 9, 1992, and has a seven percent impairment rating for

that injury as certified and assigned by (Dr. M) on March 9, 1992, because the claimant failed to timely dispute the impairment rating under Rule 130.5(e) thereby making the impairment rating and underlying certification of MMI final.

We point out that we agree with that portion of Finding of Fact No. 7 which states that there can be no impairment rating assessed if MMI has not been reached. However, in this case, the failure of the claimant to timely dispute the impairment rating for his back injury made that rating final as well as the certification of MMI for the back injury. We also do not necessarily disagree with that portion of Finding of Fact No. 7 that states that "the two [MMI and impairment rating] are separate and distinct issues and a party may dispute one without disputing the other." However, we stated in Texas Workers' Compensation Commission Appeal No. 92366, decided September 10, 1992, that the two matters "may become somewhat inextricably intertwined." As noted in Appeal No. 92670, *supra*, MMI and impairment rating become intertwined in applying the provisions of Rule 130.5(e).

We also observe that the hearing officer is correct in stating in Finding of Fact No. 8 that there are no specific time limits in the 1989 Act during which a party must dispute a certification of MMI, and in Appeal No. 92670 we recognized that fact. However, we also recognized that the Commission has the authority to make rules to implement and enforce the 1989 Act. Rule 130.5(e), as interpreted in Appeal No. 92670, *supra*, makes the certification of MMI final when the first impairment rating assigned to the employee becomes final for failure to dispute the rating within the time period provided in that rule. Thus, in the circumstances presented in this case, we disagree with that portion of Finding of Fact No. 8 which states that the dispute [MMI] should be made by the claimant within a reasonable amount of time, because the certification of MMI underlying the first impairment rating assigned will become final if the rating is not disputed within 90 days. What we have stated as to Findings of Fact Nos. 7 and 8 also applies to Conclusions of Law Nos. 2 and 3.

Lastly, the carrier contends that if, as we have determined, (Dr. M's) certification and assignment of impairment rating are final, then there will be a period of time during which the claimant would qualify both for IIBS for the (date of injury 2), back injury and TIBS with respect to the injury to his shoulder sustained on (date of injury 1). The carrier notes that under Article 8308-4.23(c), TIBS "are payable at the rate of 70 percent of the difference between the employee's average weekly wage and the employee's weekly earnings after the injury," that the term "wages" is defined in Article 8308-1.03(48) ("wages" includes every form of remuneration payable for a given period to an employee for personal services), that the term "earnings" is not defined in the 1989 Act, and that the legislature used the term "earnings" instead of "wages" in Article 8308-4.23(c) in describing "weekly earnings after the injury." The carrier concedes that had the term "wages" been used instead of "earnings," IIBS would not factor into the computation of TIBS under Article 8308-4.23(c) in the present case. The carrier points out that "earnings" is defined in the Webster's Dictionary as (1) something (as wages) earned, (2) the balance of revenue after deduction of costs and expenses, and that "earn" is defined as (1) to receive as return for effort and especially for work done or services rendered or (2) to come to be duly worthy of or entitled or suited to.

The carrier urges that under these definitions, weekly income benefits should qualify as "earnings," because this is clearly a benefit provided to the employee by the employer in return for the services the employee rendered to the employer during his tenure of employment. The carrier reasons that had the employee not worked for the employer, he would not have been provided with workers' compensation benefits, and that as such, these benefits should be considered as earnings and applied into the equation for the determination of the claimant's TIBS rate. The carrier states that any other finding would result in unjust enrichment to the claimant and that the legislature did not intend for a claimant to profit through the receipt of workers' compensation benefits. The claimant's position at the hearing was that IIBS for his back injury should not reduce any TIBS he might receive for his shoulder injury.

We disagree with the carrier's contention that IIBS constitute "earnings" for the purpose of calculating an injured employee's "weekly earnings after the injury" under Article 8308-4.23(c). Pursuant to Article 8308-4.26(a), all awards of IIBs must be based on an impairment rating using the impairment guidelines referred to in Article 8308-4.24. An "impairment rating" means the percentage of permanent impairment of the whole body resulting from a compensable injury. Article 8308-1.03(25). "Impairment" means an anatomic or functional abnormality or loss existing after MMI that results from a compensable injury and is reasonably presumed to be permanent. Article 8308-1.03(24). Pursuant to Tex. W.C. Comm'n, TEX. ADMIN. CODE Sec. 129.1 the following definition applies for the purpose of calculating TIBS:

> "Weekly earnings after the injury" means the weekly amount of all pecuniary and non-pecuniary remuneration paid or provided to the employee as wages, as that term is defined in the Act, Sec. 1.03(47), beginning on the day after the injury and continuing throughout the temporary income benefit period. Weekly earnings after the injury excludes the fair market value of non-pecuniary wages throughout the period that an employer continues to provide them after an injury, whether or not the employee is working.

Pursuant to Article 8308-1.03(47), "wages" includes every form of remuneration payable for a given period of time to an employee for personal services. The term includes the market value of board, lodging, laundry, fuel, and other advantage that can be estimated in money which the employee receives from the employer as part of the employee's remuneration.

Thus, the Commission in promulgating Rule 129.1 has determined that "weekly earnings after the injury" as used in Article 8308-4.23(c) for the calculation of TIBS means "wages" as defined in Article 8308-1.03(47), and the legislature defined "wages" to mean remuneration payable for personal services. We have previously determined that payments made by an employer for workers' compensation insurance coverage are not included within the definition of "wages" in Article 8308-1.03(47). *See* Texas Workers' Compensation Commission Appeal No. 91059, decided December 6, 1991. In our opinion, IIBS are compensation for an employee's permanent impairment existing after MMI that

results from a compensable injury, and are not remuneration for personal services. The claimant is being compensated not for the personal services rendered to the employer but instead for the permanent impairment he sustained as a result of his injury in the course and scope of his employment. While it is true that if the employer did not have workers' compensation coverage the claimant would not be entitled to IIBS, it is equally true that if the employer did not have such coverage the employee would not be bound by the exclusive remedy provision of the workers' compensation law and would be free to sue the employer in a common-law negligence action and the employer would not have the benefit of certain common-law defenses. Professor Larson calls the exclusive remedy provision of the workers' compensation law "part of the *quid pro quo* in which the sacrifices and gains of employees and employers are to some extent put in balance, for, while the employer assumes a new liability without fault, he is relieved of the prospect of large damage verdicts." Larson, Workmen's Compensation Law, Vol. 2A, Sec. 65.11 (Matthew Bender 1992).

The hearing officer's decision that, for the purpose of calculating the rate of TIBS for the claimant's shoulder injury of (date of injury 1), the IIBS the claimant received for his back injury of (date of injury 2), are not post-injury earnings is affirmed. The hearing officer's decision that the claimant may dispute (Dr. M's) certification of MMI for his back injury is reversed, and a decision is rendered that the certification of MMI and assignment of impairment rating given by (Dr. M) for the claimant's back injury of (date of injury 2), are final by operation of Rule 130.5(e).

Robert W. Potts
Appeals Judge

CONCUR:

Lynda H. Nesenholtz
Appeals Judge

Thomas A. Knapp
Appeals Judge