APPEAL NO. 93111
FILED MARCH 25, 1993

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. 1993). On January 15, 1993, a contested case hearing was held. She (hearing officer) determined that respondent school district (carrier herein) had timely disputed appellant's (claimant hereafter) first impairment rating so that a dispute as to impairment now exists. Claimant appeals saying that she has new evidence that the carrier received notice earlier than the date found, and claimant argues that the 90 days for disputing should run from the time the "rating is assigned. . .and not when carrier is notified." The response was untimely and will not be considered.

DECISION

We do not find merit in the appeal. The decision is supported by sufficient evidence of record and is affirmed.

Claimant testified that she worked for the carrier for four years; she fell and dislocated her elbow in the school cafeteria on (date of injury). She was treated by Dr. C, who stated on a TWCC form 69 that she reached maximum medical improvement (MMI) on June 3, 1992 with an impairment rating of 30%. The carrier disputed the amount of the impairment on October 5, 1992. There was no indication that any impairment rating was given to claimant prior to the 30% that accompanied Dr. C's report of June 3, 1992.

The only issue at the hearing was whether the carrier timely disputed the first impairment rating issued by the treating doctor. The disputed issue form, generated at the benefit review conference, indicates that both parties considered the question in terms of the 90 day rule found in Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 130.5(e) (Rule 130.5(e)). The evidence presented at the hearing was directed at this issue in the context of the 90 day limit for disputing the impairment rating. Some argument was made in closing by claimant as to a five day rule under Rule 130.5, but even claimant directed all aspects of the appeal to the 90 day rule. Nevertheless, no finding is directed specifically at the question of 90 days while one finding addressed the seven day rule in Rule 130.2(b)(2), which provides the time in which a treating doctor shall send his report to the Commission and parties, and another finding says the carrier met the standard set by Rule 130.5(b) which provides that within five days of receiving the report (emphasis added), the carrier must begin payment or file its dispute. Findings of Fact Nos. 6 and 7, which state that Dr. C's TWCC-69 specifying 30% impairment was not received by the carrier until September 29, 1992, are sufficient to imply a finding that the carrier disputed the impairment rating within 90 days of having received notice thereof. Rule 130.5(e) says only: "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." (emphasis added) The conclusion of law that states the carrier timely disputed the first impairment rating can be

viewed as implying a finding that the 90 days did not begin to run until the party attempting to meet its terms had received notice of the rating in question. Such an implied finding is consistent with Texas Workers' Compensation Commission (Commission) Appeal No. 92693, dated February 8, 1993, which said "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."

The hearing officer properly declared at the opening of the hearing that the burden of proof was on the carrier in this case since it was attempting to meet the conditions for timely disputing an impairment rating under Rule 130.5. The hearing officer, however, responded to repeated objections to the introduction of evidence based on failure to exchange (*see* Rule 142.13) by summarily admitting the evidence without determining whether good cause existed, and "noting" the objection--in two instances leaving the party offering the evidence to state, after the ruling, that it had mailed copies to the claimant. Claimant did not appeal this question so it will not be addressed any further, but we by no means endorse such handling of objections based on untimely exchange and note we have written repeatedly on the subject.

At the hearing, Ms. B testified that she worked for the carrier as its workers' compensation claims processor. She stated that Dr. C's TWCC form 69, apparently signed on June 3, 1992, was received by the carrier on September 29, 1992, as shown by the carrier's date stamp thereon. She added that the September 29th stamp is the only date stamp from the carrier on the document although there is also one from the Commission indicating July 1, 1992. She stated that the normal business practice where she works is to stamp the document the day it was received. The carrier received notice of the impairment rating on a Tuesday and disputed that rating the following Monday.

Claimant asserts in her appeal that she learned on January 28, 1993 that the carrier paid for the report of Dr. C on July 17, 1992 (presumably the report in regard to the determination of MMI and impairment rating of 30%). To determine whether evidence offered for the first time on appeal requires that the case be remanded for further consideration, we consider whether it came to appellant's knowledge after the hearing, whether it is cumulative, whether it was through lack of diligence that it was not offered at the hearing, and whether it is so material that it would probably produce a different result. *See* Black v. Willis, 758 S.W.2d 809 (Tex. App.-Dallas 1988, no writ). In this instance the answers to the first two parts of the question appear to be in claimant's favor. There is no indication, however, that the claimant could not have secured the same material from Dr. C earlier had she asked for it. In addition, there is no indication that it was so material that it would probably have changed the outcome.

The new evidence presented asserts that a bill was paid on July 17, 1992. That may or may not indicate that a copy of the report was with the bill. There is no indication

that the bill itself indicated that an impairment rating of 30% was made. In addition, if there is a showing that carrier had some knowledge of an impairment rating on July 17, 1992, the carrier still had 90 days thereafter to dispute the rating. Carrier was found to have disputed the rating on October 5, 1992, which is within 90 days of July 17th. The new evidence does not require a remand and will not be considered on appeal. *See* Texas Workers' Compensation Commission Appeal No. 92400, dated September 18, 1992.

The claimant also asserts that the time period for disputing starts to run "90 days after the rating is assigned. . ., not when carrier is notified." The Appeals Panel has never taken this position. Without evidence of notice or knowledge concerning the impairment rating in question, in regard to the party asserting compliance with the 90 day rule, the Appeals Panel has not held that the 90 day period began simply by the preparation by a doctor of a TWCC form 69. *See* Appeal No. 92693, *supra*.

The decision and order that the impairment rating in question has been timely disputed, that a dispute exists, and that a designated doctor should be appointed is supported by sufficient evidence of record and is affirmed.

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Joe Sebesta
Appeals Judge

CONCUR:

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Philip F. O'Neill
Appeals Judge

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Thomas A. Knapp
Appeals Judge