APPEAL NO. 93199

On January 26, 1993, a contested case hearing was held in (city), Texas, with (hearing officer) presiding as the hearing officer. The hearing was held under the provisions of the Texas Workers' Compensation Act, TEX. REV. CIV. STAT. ANN. art. 8308-1.01 *et seq*. (Vernon Supp. 1993) (1989 Act), and concerned the application of Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 130.5(e). The issue at the hearing was "[c]an an injured employee dispute the first certification of maximum medical improvement (MMI) after 90 days?" The hearing officer found that on January 9, 1992, Dr. P determined that the appellant (claimant herein) had reached MMI (he did not assign an impairment rating; rather he referred the claimant to Dr. K for an impairment rating); that on February 22, 1992, Dr. K determined that the claimant had reached MMI and assigned her an impairment rating of six percent; that the claimant "took exception" to the date of MMI more than 90 days after such status was certified, and that the Appeals Panel has determined in Texas Workers' Compensation Commission Appeal No. 92670, decided February 1, 1993, that certification of MMI must be challenged in 90 days. The hearing officer concluded that the claimant achieved MMI on January 9, 1992.

The claimant disputes the hearing officer's finding that she took exception to the date of MMI over 90 days after such status was reached, contends that Appeal No. 92670 does not apply to her case, and requests that a finding be made that she "protested" her date of MMI within 90 days of the time she received "notification." The claimant further requests that determinations be made that she did not achieve MMI on January 9, 1992, and that she is entitled to temporary income benefits (TIBS) from January 9, 1992, until she returned to full duty work for her employer, on November 28, 1992. The respondent (carrier herein) responds that it agrees with the hearing officer's findings of fact and conclusions of law and requests that her decision be affirmed. However, the carrier adds that the evidence shows that the claimant did not dispute Dr. K's February 22, 1992 certification of MMI and assignment of impairment rating until June 3, 1992.

DECISION

The decision of the hearing officer is reversed and remanded.

The parties stipulated that the claimant sustained a compensable injury to her wrist on (date of injury). She consulted Dr. W., and then began treatment with Dr. P, who diagnosed carpal tunnel syndrome of the right hand and performed a carpal tunnel release and removal of volar ganglion in September 1991. The parties stipulated that Dr. P was the claimant's treating doctor. The parties also stipulated that on January 9, 1992, Dr. P "determined" that the claimant had reached MMI and referred the claimant to Dr. K., who assigned an impairment rating of six percent on February 22, 1992. In a patient note dated January 9, 1992, Dr. P stated that "she [the claimant] has reached her maximum improvement. She will be referred to Dr. K for an impairment rating and will be seen after she sees Dr. K." The claimant testified that Dr. P told her on January 9, 1992 that she had reached "maximum medical," that he could do no more for her, and that he was sending her

to Dr. K "for my impairment rating." There is no indication in the record that Dr. Pena completed or filed a Report of Medical Evaluation (TWCC-69). The claimant further testified that she basically understood that Dr. K was going to assess her condition. The parties stipulated that the claimant saw Dr. K on February 22, 1992.

In an undated TWCC-69, Dr. K certified that the claimant reached MMI on February 22, 1992 with a six percent whole body impairment rating. The parties stipulated that Dr. K's TWCC-69 was filed with the Commission on March 2, 1992. The TWCC-69 does not indicate on its face that a copy was sent to the claimant. Also in evidence was a letter from Dr. K to Dr. P dated "February, 1991 (sic)" in which Dr. K sets out information concerning the claimant's physical examination, assessment, and impairment rating. The Commission and the carrier are shown as having been sent copies of the letter, but not the claimant. The claimant testified that on February 25, 1992 she again saw Dr. P. She said that the carrier's nurse was also present in the office with her and Dr. P and that she heard Dr. P tell the carrier's nurse that he had Dr. K's report, and that "he was in agreement with the six percent, and that he was going to sign it and release me." The claimant said that she did not see Dr. K's report at that time nor did she ask Dr. P for a copy of the report because she did not think it was relevant as all she was trying to get was proper medical care. However, she said that she knew that Dr. P was reviewing Dr. K's report. In a patient note dated February 25, 1992, Dr. P notes the impairment rating assigned by Dr. K and indicates that the claimant is being released to see Dr. W because the claimant lives closer to Dr. W's office. The claimant saw Dr. W on March 2, 1992, and he referred her to Dr. W, whom the claimant saw on May 22, 1992. The parties stipulated that the carrier began paying impairment income benefits on February 23, 1992, and that the claimant received 18 weeks of impairment income benefits in 1992, based upon the six percent impairment rating assigned by Dr. K.

The claimant testified that sometime in May 1992, she went to an attorney to see if the attorney could get the carrier to give her proper medical treatment for the pain she still had in her hand and arm. The attorney wrote a letter to the employer on May 13, 1992, advising the employer that his firm was representing the claimant in her workers' compensation claim. In a letter dated May 20, 1992, an associate attorney in the law firm representing the claimant wrote a letter to the claimant stating that:

> This will confirm our telephone conversation of May 19, 1992, in which you advised that you did not want to contest maximum medical improvement status and impairment rating given you in your Workers' Compensation case.

The claimant said that she did not recall having the phone call referred to in the letter, but would not say that she never received the letter from her attorney. She further testified that she could not recall telling her attorney that she had been seen by Dr. K or that he had done a report on her.

The parties stipulated that the claimant first saw Dr. W on May 22, 1992. On that date, Dr. W wrote that she had evaluated the claimant for persistent pain in her right wrist, diagnosed "status post carpal tunnel repair with secondary myofascial pain and possible reflex sympathetic dystrophy," and recommended physical therapy. The claimant testified that Dr. W told her that she had not reached MMI.

The parties stipulated that the claimant "initiated dispute resolution on some date occurring on or before June 15, 1992." In a letter dated June 3, 1992, the associate attorney at the law firm representing the claimant wrote to the Commission as follows:

> Please accept this as [the claimant's] "Notice of Dispute" regarding the medical evaluation by Dr. K (sic) that [the claimant] had reached maximum medical improvement on or about February 25, 1992. This notice is given pursuant to Rule 130.6 of the TWCC "New Law" Adopted Rules and is based on the medical assessment of Dr. Linda Wilson of Victoria, Texas, after a medical examination on or about June 29, 1992 (sic).

In a letter dated June 18, 1992, Dr. W wrote that the claimant had improved somewhat but still had pain, and wanted her to be evaluated at the Hospital. The claimant testified that the carrier would not approve her going to Hospital but did approve treatment at the University of Texas Health Science Center where she has been treated by several doctors, including Dr. T, for pain management. The parties stipulated that Dr. T is the claimant's second treating doctor and that the claimant first consulted her on August 25, 1992. The claimant said that Dr. T also told her that she had not reached MMI. The claimant further stated that her medical condition has improved with the treatments provided by Drs. W and T.

The Commission sent the claimant a letter dated June 23, 1992, which stated: "The Commission is in receipt of a report of medical evaluation from Dr. K dated 2-22-92 stating you have reached maximum medical improvement with 6% whole body impairment." Attached to the letter is Dr. K's TWCC-69. The claimant testified that she received the Commission letter on June 23, 1992, and that was the first time she saw Dr. K's report.

On July 16, 1992, the claimant's attorney wrote her stating that the Commission had denied a request for a benefit review conference (BRC) and a request for a designated doctor "due to the lapse in 90 days." The attorney said that there was nothing further that could be done for the claimant and that the attorney would be releasing the claimant's case within the next 10 days and returning her file to her. However, a BRC was held on October 10, 1992 to resolve the issue of whether an injured employee can dispute the first certification of MMI after 90 days. The claimant testified that she first received word that her attorney was withdrawing in early summer, but she didn't know the exact date. She

said neither her attorney, nor anyone else, told her about impairment ratings or MMI until the ombudsman explained her rights to her on an unspecified date.

In a letter to the claimant dated October 8, 1992, Dr. W stated that she did not think the claimant achieved MMI and that the claimant was only now beginning to get treatment for her reflex sympathetic dystrophy. In a letter to the Commission dated October 8, 1992, Dr. T stated that the claimant has not reached MMI, that the claimant was to undergo extensive physical therapy and intravenous regional blocks to help decrease the joint pain as well as the superimposing reflex sympathetic dystrophy.

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." "Impairment" means any 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). "Maximum medical improvement" means the earlier of: (A) the point after which further material recovery from or lasting improvement to an injury can no longer reasonably be anticipated, based on reasonable medical probability; or (B) the expiration of 104 weeks from the date income benefits begin to accrue. Article 8308-1.03(32). Article 8308-4.26(d) provides, in part, that after the employee has been certified by a doctor as having reached MMI, the certifying doctor shall evaluate the condition of the employee and assign an impairment rating, and that the certifying doctor shall issue a written report to the Commission, the employee, and the insurance carrier certifying that MMI has been reached, stating the impairment rating, and providing other information required by the Commission. Rule 130.1(a) requires a doctor who determines during the course of treatment that an employee has reached MMI to complete and file the medical evaluation report required by that rule. Rule 130.1 sets forth the definition of "certification" and the requirements for the certification of MMI by a doctor who is required to certify or who determines during the course of treatment whether an employee has reached MMI. We observed in a prior decision that the attainment of MMI will not, in every case, mean that the injured worker is completely free of pain. Texas Workers' Compensation Commission Appeal No. 92394, decided September 17, 1992. We also noted in Appeal No. 92394 that the threshold issue of the existence of MMI cannot be neatly severed from the assessment of an impairment rating, and that the issues of MMI and impairment are somewhat inextricably tied together.

In Appeal No. 92670, *supra*, the Appeals Panel stated the following in regard to the application of Rule 130.5(e) to the treating doctor's certification of MMI and assignment of impairment rating:

> 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 Appeals Panel also stated in Appeal No. 92670 that 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 not exceptions in this rule. However, in holding that the certification and impairment rating became final under the provisions of Rule 130.5(e), the Appeals Panel noted that, whether the 90 day time limit were held to run from the date the doctor assigned his rating, or from the date the employee received notice of the impairment rating, it was exceeded in that case. In Texas Workers' Compensation Commission Appeal No. 93046, decided March 5, 1993, the Appeals Panel held that a carrier's TWCC-21 which disputed the method of certification of MMI was a timely dispute of MMI and impairment rating under the provision of Rule 130.5(e).

In the instant case, the carrier urged at the hearing, as it does in its response, that the claimant did not dispute Dr. K's February 22, 1992 certification of MMI until June 3, 1992, which was more than 90 days after Dr. K certified MMI and assigned and impairment rating, and, therefore, Dr. K's certification of MMI and impairment rating of six percent are final under Rule 130.5(e). The carrier did not assert at the hearing, and does not assert in its response (although it states that it agrees with the hearing officer's findings, conclusions, and decision) that the 90 day period ran from the time that Dr. P "determined" MMI without assessing an impairment rating. The claimant urged at the hearing, as she does in her request for review, that she did not know about Dr. K's certification of MMI and assignment of impairment rating until June 23, 1992, when she received the June 23rd letter from the Commission informing her of his report. The claimant states in her appeal that she protested her date of MMI within 90 days of the time she was notified by Claimant's Exhibit 1 (the June 23rd letter from the Commission).

The claimant disputes the following findings of fact and conclusion of law:

**FINDING OF FACTS**

No. 11. The claimant took exception to the date of MMI over 90 days after such status was certified.

No. 12.The Commission's Appeals Panel had determined in Appeal No. 92670 that certification of maximum medical improvement must be challenged in 90 days.

The hearing officer concluded that the preponderance of the evidence establishes that the claimant achieved MMI on January 9, 1992 (the date the parties stipulated that Dr. Pena determined the claimant had reached MMI).

It is readily apparent from the hearing officer's conclusion of law that the hearing officer determined that the 90 day period provided for in Rule 130.5(e) ran from the date Dr. P determined that the claimant reached MMI. This we find to be a misapplication of law because Dr. P did not assign the claimant an impairment rating. Rule 130.5(e) applies to the first impairment rating assigned to the employee. *See* Appeal No. 92670, *supra*, where the Appeals Panel agreed with the principal that an assignment of impairment for an injury other than the compensable injury would not start the 90-day time period provided for in Rule 130.5(e). We also note that, notwithstanding the parties' stipulation that Dr. P"determined" that the claimant reached MMI on January 9, 1992, there is no indication that he "certified" that the claimant reached MMI or completed and filed the report of medical evaluation as required by the above cited provisions of the 1989 Act and Commission rules. *See* Texas Workers' Compensation Commission Appeal No. 92127, decided May 15, 1992. The hearing officer should have applied Rule 130.5(e) to Dr. K's certification of MMI and impairment rating of February 22, 1992, as Dr. K's assessment of impairment rating was the first impairment rating assigned to the claimant. Consequently, we reverse and remand the case to the hearing officer for further consideration and development of evidence, as appropriate, on the application of Rule 130.5(e) to the first impairment rating assigned to the claimant. In doing so, we observe that the Appeals Panel has previously held that the 90-day time period does not necessarily run from the date the impairment rating is actually assigned by the doctor. *See* Texas Workers' Compensation Commission Appeal No. 93089, decided March 18, 1993; Texas Workers' Compensation Commission Appeal No. 92542, decided November 30, 1992. Appeal No. 93089, *supra*, involved a situation where the 90-day time period ran from the time the employee received actual notice of the certification and impairment rating.

We note the claimant's concern about continued medical treatment in the event MMI is reached. We advise the parties that pursuant to Article 8308-4.61(a), an injured employee is entitled to all health care reasonably required by the nature of the compensable injury as and when needed. The Appeals Panel has stated that medical benefits have not necessarily ceased just because MMI has been reached, and that medical benefits did not have to cure or promote added recovery of an injury; they may also relieve the effects of the injury. *See* Texas Workers' Compensation Commission Appeal No. 92164, decided June 5, 1992.

The decision of the hearing officer is reversed and the case is remanded for further consideration and development of evidence, as deemed necessary and appropriate by the hearing officer, not inconsistent with this opinion.

A final decision has not been made in this case. However, since reversal and remand necessitate the issuance of a new decision and order by the hearing officer, a party who wishes to appeal from such new decision must file a request for review not later than 15 days after the date on which such new decision is received from the Commission's division of hearings, pursuant to Article 8308-6.41. *See* Texas Workers' Compensation Commission Appeal No. 92642, decided January 20, 1993.

Robert W. Potts
Appeals Judge

CONCUR:

Lynda H. Nesenholtz
Appeals Judge

Thomas A. Knapp
Appeals Judge