APPEAL NO. 93529

This appeal is brought pursuant to the Texas Workers' Compensation Act, TEX. REV. CIV. STAT. ANN. art. 8303-1.01 *et seq*. (Vernon Supp. 1993) (1989 Act). On April 6, 1993, a contested case hearing (CCH) was opened in (city) Texas, with (hearing officer) presiding, and the record of the hearing was closed on May 23, 1993. The sole issue at the CCH was whether the respondent (claimant herein) had reached maximum medical improvement (MMI), and if so, when had he done so. The hearing officer, based upon the report of a designated doctor, concluded that the claimant had not reached MMI.

Appellant (carrier herein) files a request for review arguing that the claimant only timely disputed the impairment rating and thus MMI was not timely disputed and had become final prior to the CCH. The carrier also questions the identity of the designated doctor. The claimant responds the determination of MMI is a threshold issue in determining impairment, and therefore once a party requests a designated doctor's opinion as to impairment, it raises the threshold issue of whether or not the claimant has reached MMI. The claimant also requests that we reform a typographical error in the findings of the hearing officer's decision and argues that since the carrier did not raise the identity of the designated doctor as a disputed issue at the CCH, the issue cannot now be raised on appeal.

DECISION

Finding no reversible error in the record and sufficient evidence to support the decision of the hearing officer, we affirm. We reform Finding of Fact No. 6 in the hearing officer's decision to reflect that where the word "impairment" first appears in the finding, the word "improvement" should appear.

The facts of this case are essentially undisputed and are well summarized in the section of the decision of the hearing officer entitled "Statement of the Evidence," which we adopt for purposes of our decision. Briefly, the claimant suffered a compensable right knee injury on (date of injury). Claimant states that he initially saw (Dr. B), a orthopedic surgeon, for his injury and that Dr. B performed arthroscopic surgery on his knee. Claimant testified that he was later referred by the carrier to Dr. S), a W physician, who also operated on his knee. Dr. S certified on a Report of Medical Evaluation (TWCC-69) that the claimant had reached MMI on July 11, 1992, with a 6% whole body impairment. In his attached narrative report also dated July 11, 1992, Dr. S states that in light of his physical condition the claimant might not be able to return to his previous employment, but that Dr. S was releasing the claimant to "some form of work at this time." Dr. S also indicated in the same report while the claimant did not have a return appointment, he may well elect to keep his medical open for some period of time as he had a large degree of problems that were "at this point still unresolved."

The claimant testified that he tried to return to his work after he was released, but was unable to perform his job and was terminated. In September 1992, the claimant saw (Dr. R), a orthopedic surgeon, who stated in a narrative report that he did not believe that

the claimant had "much chance of improving" and probably "will need a total knee or a patellar replacement initially with subsequent total knee performed later on or unilateral knee replacement, but that is something well off into the future." On October 7, 1992, Dr. R injected the claimant's knee and stated that having nothing else to offer him at this time, "I have released him from my care."

The claimant testified that in October 1992, he hired an attorney to represent him in his claim, and a letter from the attorney to the Texas Workers' Compensation Commission (Commission) dated October 7, 1992, was admitted into evidence along with a copy of the certified mail receipt showing receipt by the Commission of the letter on October 8, 1992. The letter stated as follows:

> I represent [claimant] per the Employment Agreement attached hereto. [Claimant] disputes the impairment rating of [Dr. S] under which the carrier appears to be relying. Pursuant to Article 8308.426(g) of the Texas Civil Statutes, [claimant] hereby notifies the Commission that a dispute exists with respect to the impairment rating and requests that [Dr. R] be assigned as the designated doctor to report to the Commission in writing.

On October 19, 1992, the claimant's attorney again wrote to the Commission stating that the carrier and the claimant had been unable to agree on a designated doctor. On November 4, 1992, the Commission sent a letter to all parties designating (Dr. G), a chiropractor, as the Commission selected designated doctor to determine whether or not MMI had been reached, the date reached and percentage of impairment, if any. Dr. G certified on a TWCC-69 that the claimant had not reached MMI.

After the benefit review conference (BRC) in his case, the claimant returned to Dr. B who stated in a report dated March 22, 1993, that the claimant had not reached MMI and stated that he "would not want to make a permanent disability rating until further improvement is seen." There are various indications in the record that the claimant returned to Dr. B as a subsequent Commission selected designated doctor, at the request of the carrier, or by agreement of parties.

The carrier states in its request for review that the primary issue in its appeal is: "Does a dispute of impairment rating necessarily constitute a dispute of [MMI]?" The carrier cites our decisions in Texas Workers' Compensation Commission Appeal No. 92561, decided December 4, 1992, and in Texas Workers' Compensation Commission Appeal No. 92627, decided January 7, 1993, for the proposition that we have reserved this question, but argues that under the 1989 Act as well as the logic of our decision in Texas Workers' Compensation Commission Appeal No. 92670, decided February 1, 1993, that we should hold that MMI is final where the claimant failed to dispute MMI within 90 days, even though impairment was disputed. The claimant reads our decision in Appeal No. 92670, *supra*,

differently and argues that language from Texas Workers' Compensation Commission Appeal No. 92394, decided September 17, 1992, would imply the opposite result. It is unnecessary to attempt to guess the law on this issue from looking at the language of somewhat related decisions which are not entirely on point, as we have recently squarely decided this issue.

In Texas Workers' Compensation Commission Appeal No. 93377, decided July 1, 1993, we held that where the impairment rating is timely disputed, there is no basis to determine that the underlying certification of MMI has become final. *See also* Texas Workers' Compensation Commission Appeal No. 93391, decided July 5, 1993. As we stated in Appeal No. 93377, *supra*:

> The pertinent Commission rule, Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE §130.5(e) (Rule 130.5(e)) provides that 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. While the rule does not expressly refer to MMI, this panel has held that it would be inconsistent to interpret the rule to bind a claimant or carrier to the percentage of impairment yet allow an "end run" around this finality through the open-ended possibility of an attack on MMI. *See* Texas Workers' Compensation Commission Appeal No. 92670, decided February 1, 1993. Thus a carrier or claimant who disagrees either with the first impairment rating, or the finding of MMI on which it was based, must make known such dispute within the 90 days required by the rule; a failure to timely dispute one element renders both final, as impairment and MMI have been held to be intertwined for these purposes.
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> This case, of course, involves a situation where the carrier timely disputed impairment only. Applying the same logic by which we determined in the absence of any timely dispute MMI and impairment either become final together, or not, it appears to us that if the first impairment rating has not become final because of timely dispute, it would follow that, under Rule 130.5(e), there is no basis to determine that MMI has become final. As we stated in Texas Workers' Compensation Commission Appeal No. 92693, decided February 8, 1993, in which the failure to timely dispute impairment made that rating final as well as the certification of MMI "[a]s noted in Appeal No. 92670, *supra*, MMI and impairment rating become intertwined in applying the provisions of Rule 130.5.

The only distinction between the present case and Appeal No. 93377, *supra*, is that in the present case the claimant disputed impairment and in Appeal No. 93377, *supra*, the carrier did so. We find this to a distinction without a difference and find Appeal No. 93377, *supra*, controlling in the present case and, consequently, we hold that the hearing officer

was correct in finding that the issue of MMI was not final based upon the original certification.

Nor do we find that the hearing officer erred in finding that MMI has not been reached. The carrier asserts that we are presented with the underlying issue of the identity of the designated doctor. The carrier submits that the record shows that the parties agreed that Dr. G was not an appropriate designated doctor and requested "the Commission's designation of a new designated doctor, Dr. B." We do not find the record so clear on this point. In fact from the record before us it is not possible for us to determine whether or not Dr. B actually became a designated doctor and, if so, whether it was through selection by the Commission or the parties.

Should the status of Dr. B as a designated doctor make any difference in the present case, we would remand for further development of the record on this point. We do not find this necessary in the present case because it is clear that Dr. G was originally properly selected by the Commission as a designated doctor entitling his finding in regard to MMI presumptive weight under Article 8308-4.25(b) (1989 Act). Since Dr. B agrees with Dr. G that the claimant has not reached MMI, the question as to whether Dr. B has superseded Dr. G as the designated doctor is irrelevant in our determination to uphold the decision of the hearing officer's decision that the claimant has not reached MMI.

We do find it would clarify the decision of the hearing officer to correct the typographical error in the decision, and we therefore reform Finding of Fact No. 6 in the hearing officer's decision to reflect that where the word "impairment" first appears in the finding, the word "improvement" should appear. *See* Texas Workers' Compensation Commission Appeal No. 92686 decided February 3, 1993.

The decision of the hearing officer, as reformed, is affirmed.

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Gary L. Kilgore
Appeals Judge

CONCUR:

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Joe Sebesta
Appeals Judge

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Robert W. Potts
Appeals Judge