APPEAL NO. 93724

This appeal is brought pursuant to the Texas Workers' Compensation Act of 1989, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act). A contested case hearing (CCH) was held on June 2, 1993, with the record closing on July 13, 1993, in (city), Texas, (hearing officer) presiding as hearing officer. The issues at the CCH were whether the respondent (claimant) timely disputed the finding of maximum medical improvement (MMI) on January 17, 1993, and what was the claimant's correct impairment rating (IR). The claimant did not file a timely respons e to the carrier's request for review. We note that this appeal is made by Texas Property and Casualty Insurance Guaranty Association (TPCIGA) on behalf of the impaired carrier, Texas Citrus and Vegetable Insurance Exchange, which is presently in receivership.

DECISION

We affirm in part and reverse and remand in part.

The fact that the claimant suffered a spinal injury in the course and scope of his employment on (date of injury), is not in issue. A CT scan of the lumbar spine disclosed bulging and posterior herniation of L4-5 and L5-S1 discs as well as spinal stenosis and degenerative disc disease. Magnetic resonance imaging (MRI) on January 9, 1992, essentially confirmed these findings. As a result of an examination on January 17, 1992, the claimant's treating physician, (Dr. P) determined by Report of Medical Evaluation (TWCC-69) that the claimant reached MMI on that date (January 17, 1992) with a "total body" impairment rating of 12% and a lumbosacral area impairment rating of 12%. For reasons not clear in the record, Dr. P amended this TWCC-69 to reflect the same MMI, but a change in IR to five percent "total body" and 12% lumbosacral area. Again for reasons not clear, the claimant did not receive a copy of this form until late September or early October, 1992.[1] By notice of September 15, 1992, the carrier terminated temporary income benefits (TIBS) and tendered a lump sum payment of impairment income benefits (IIBS) from which attorney's fees were deducted and paid. By letter of October 2, 1992, the claimant's attorney returned to the carrier its check to the claimant for IIBS and stated:

> This is to confirm that [claimant] is not in agreement with the disability rating and does not wish to receive lump sum settlement at this time. Please resume his weekly benefits until this matter is resolved.

By letter of October 10, 1992, the claimant's attorney returned to the carrier his portion of the proposed lump sum settlement representing attorney's fees and added:

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[1]The carrier's attorney at the CCH conceded that for purposes of timely disputing this TWCC-69, the 90-day period provided in Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 130.5(e) (Rule 130.5(e)) did not begin to run until October 2, 1992. The 90-day period runs from the time that a party desiring to dispute MMI or IR has knowledge of the matter to be disputed, Texas Workers' Compensation Commission Appeal No. 93200, decided April 14, 1993.

. . . this is to inform you that [claimant] is disputing the disability rating as assigned to total body by [Dr. P].

On January 29, 1993, claimant's attorney in a letter to the Texas Workers' Compensation Commission (Commission) again asserted that claimant "was disputing the disability rating assigned by [Dr. P]." He further stated that:

We believe that MMI was not reached as of 1-17-92 as stated on TWCC 69 by [Dr. P], because in the same report he has indicated that he is recommending surgery. . . .

On May 18, 1993, Dr. P "restated" his total body disability rating of 12%, but gave an MMI date of May 18, 1993. Also, on May 18, 1993, the Commission appointed a designated doctor, (Dr. C), to determine an appropriate IR. He determined on June 1, 1993, that the claimant had not reached MMI, but in the narrative portion of the TWCC-69 gave a whole body impairment rating of 15%. On June 17, 1993, the hearing officer re-opened the record and a disability determination officer (DDO) wrote Dr. C to advise him that the claimant reached MMI by operation of law on April 15, 1993,[2] and asked

In light of the fact that you did not know [claimant] had reached [MMI] at the time you assessed the 15% whole body impairment rating . . . does it change your determination that his whole body impairment is 15% . . .

ANSWER: YES Or NO.

If yes please explain on the attached blank form TWCC-69 what the correct impairment rating should be and how you arrive at it under the Guides.

At the same time the DDO sent this letter to Dr. C, she advised the parties by letter that:

If [Dr. C] answers the first inquiry any way except "no," his response will be submitted to you for comment prior to returning the information to the Hearing Officer. Ultimately, the letter to [Dr. C] and all responses will be attached to the hearing record as Hearing Officer Exhibits.

In his response of July 7, 1993, to this inquiry, Dr. C scratched out the checkmark in block 16 of the original TWCC-69 indicating no MMI and checked the block indicating "yes."

[2]Section 401.011(30)(B) provides that MMI will be presumed 104 weeks from the date on which income benefits begin to accrue.

The words "statutory MMI 4-15-93" and 15 were added to the line on the form at block 16 to reflect a 15% IR. There is no indication in the record or exhibits that the parties were given the opportunity to comment on this submission from Dr. C.

The relevant determinations of the hearing officer are:

## FINDINGS OF FACT

5.[Dr. P] . . . certified that Claimant reached maximum medical improvement on January 17, 1992, with an impairment rating of 5%.

7.Claimant first received notice of [Dr. P's] certification of maximum medical improvement with a 5% impairment rating on September 18, 1992, when he received Carrier's proffer of a lump-sum payment of impairment income benefits based on the 5% impairment rating.

8.Claimant's letter of October 2, 1992, returning Carrier's unsolicited lump-sum payment of impairment income benefits set out his disagreement with [Dr. P's] impairment rating of 5% and requested Carrier to "resume his weekly benefits."

9.Claimant's request to "resume his weekly benefits" was sufficient to give Carrier notice that Claimant also disputed [Dr. P's] certification of maximum medical improvement.

10.Claimant disputed [Dr. P's] certification of maximum medical improvement and impairment rating of 5% within much fewer than 90 days of the date he received notice of [Dr. P's] first report.

13.[Dr. C] certified on July 13, 1993,[3] that Claimant has a whole body impairment rating of 15% following the achievement of statutory maximum medical improvement.

## CONCLUSIONS OF LAW

3.Claimant timely disputed the first impairment rating assigned to him by [Dr. P] on January 17, 1992. . . .

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[3]We note that the date the hearing officer signed his decision, June 19, 1993, is apparently a typographical error.

4.Claimant did not reach maximum medical improvement on January 17, 1992. . . .

6.[Dr. C's] assigned impairment rating of 15% is not against the great weight of the other medical evidence. . . .

7.Claimant's impairment rating is 15%. . . .

On appeal, the carrier asserts that the claimant's letter of October 2, 1992, wherein he requests carrier "to resume his weekly benefits" does not constitute a dispute of MMI, but references only a disagreement "with the disability rating." Texas Workers' Compensation Commission Appeal No. 93377, decided on July 1, 1993. Specifically, under the provisions of Rule 130.5, a first impairment rating is considered final unless disputed within 90 days. In the case under consideration, the claimant by the express terms of his letter of October 2, 1992, clearly contested the impairment rating (which he calls "disability rating"). Thus, this IR did not become final. And, as the Appeals Panel said in No. 93377, *supra,*

. . . it appears to us that if the first impairment rating has not become final because of a timely dispute, it would follow that, under Rule 130.5(e), there is no basis to determine that MMI has become final.

We therefore conclude that the claimant's timely challenge to the IR given by Dr. P on January 17, 1992, included a timely dispute of the MMI. For this reason, carrier's appeal of this issue is found to be without merit.[4]

The carrier also disputes the hearing officer's finding that the claimant reached statutory MMI 104 weeks after his TIBS began to accrue and the propriety of selecting a designated doctor solely because, in its view, the claimant did not timely dispute MMI. In light of our affirmance of the hearing officer's conclusion that MMI was timely disputed, there is no need to address these points raised by the carrier in this appeal.

The carrier also objects to the hearing officer's conclusion that the claimant's IR is 15% as determined by the designated doctor. Carrier contends that it was denied due process in that it never had an opportunity to review and rebut the documentation provided to the hearing officer upon his reopening of the record on June 17, 1993, and on which he based this finding and because, in any event, Dr. C's conclusions on his "corrected" TWCC-

[4]Carrier also appeals the hearing officer's factual finding that the claimant's request to "resume his weekly benefits" constituted notice of a dispute of Dr. P's selection of MMI. As an appeals body, we will overturn a hearing officer's finding of fact only if it is so contrary to the overwhelming weight of the evidence as to be clearly wrong and unjust. Cain v. Bain, 709 S.W.2d 175, 176 (Tex. 1986). We have examined the evidence and find it sufficient to support this finding of the hearing officer.

69 were contrary to the great weight of the medical evidence.[5]

After the CCH closed, the hearing officer on his own initiative re-opened the record to receive a clarification from Dr. P not only about an inherent contradiction in the TWCC-69 (i.e., a determination of an impairment rating and an express statement that MMI had not been reached), but also about whether the fact that the claimant reached statutory MMI (a point hotly contested) would have any effect on Dr. P's impairment rating. We have in the past commented on the "unique position" of the designated doctor as an agent, not of the parties, but of the Commission and about the critical role of the designated doctor in resolving disputes about both MMI and IR. *See* Texas Workers' Compensation Commission Appeal No. 93410, decided July 8, 1993. Also in the past, hearing officers have re-opened CCH records to resolve ambiguities in the report of a designated doctor. *See* Texas Workers' Compensation Commission Appeal No. 93380, decided June 29, 1993, and Texas Workers' Compensation Commission Appeal No. 93001, decided February 19, 1993. In these cases, we have emphasized the importance of allowing the parties the opportunity to review new information received from the designated doctor and respond to it. This is especially so when the designated doctor's additional information is material and could affect the decision and there is no lack of diligence on the part of any party challenging on appeal the new information. Appeal No. 93001, *supra*. In the case now under consideration, both parties on final argument made much of Dr. P's clear indication that as of the date of his report MMI had not been reached. At the hearing, the carrier specifically challenged Dr. P's impairment rating as against the great weight of the other medical evidence. Dr. P's further comment, on both his original and amended TWCC-69, that surgery was needed and MMI not yet attained suggests that he was not aware of the definition of MMI under the 1989 Act by which it exists 104 weeks after income benefits accrue. Moreover, the parties were told they would have the opportunity to respond. Under these circumstances, we believe the hearing officer erred by not allowing the parties an opportunity to comment at least in writing on the evidence. As the impairment rating itself was not changed, and the carrier could have presented evidence relating to that rating at the CCH, we see no need to reconvene the hearing itself. The carrier may, as part of its response, specify how it believes the American Medical Association Guides to the Evaluation of Permanent Impairment, Third Edition (including the combined value charts), were not properly used.

For the above reasons, we affirm the finding of the hearing officer that the claimant did timely contest his first MMI determination of January 17, 1992, but we reverse and remand for the development of appropriate evidence and reconsideration of the effect of

[5]Carrier also on appeal objects to the admission of Claimant's Exhibit No. 1 (Dr. C's initial TWCC-69) on the basis that it was received only at the CCH and, as a result, carrier "was unable to adequately prepare for and rebut this evidence." However, at the CCH, carrier did not object to the admissibility of this evidence. For this reason, carrier's objection will not be considered on appeal.

Hearing Officer's Exhibit No. 7 on the determination of MMI and IR as appropriate. Since reversal and remand necessitate the issuance of a new decision and order by the hearing officer, a party, including claimant, 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 Texas Workers' Compensation Commission's division of hearings pursuant to Section 6.41. *See* Texas Workers' Compensation Commission Appeal No. 92642, decided January 20, 1993.

Susan M. Kelley
Appeals Judge

CONCUR:

Robert W. Potts
Appeals Judge

Lynda H. Nesenholtz
Appeals Judge