APPEAL NO. 93915

On July 30, 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. LAB. CODE § 401.001 *et seq*. (1989 Act) (formerly V.A.C.S., Article 8308-1.01 *et seq*.). The issue at the hearing was whether the appellant (carrier) timely disputed the first impairment rating assigned to the respondent (claimant) in accordance with Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 130.5(e) (Rule 130.5(e)). The hearing officer determined that the carrier did not timely dispute the first impairment rating assigned to the claimant by (Dr. K), which was a 20% impairment rating, and concluded that the rating is final. The hearing officer decided that the claimant has a 20% impairment rating and is entitled to impairment income benefits (IIBS) based on that rating. The carrier requests that the hearing officer's decision be reversed contending that Dr. K did not certify maximum medical improvement (MMI) nor an impairment rating. In the alternative, the carrier contends that it did timely dispute Dr. K's rating. The claimant requests that the hearing officer's decision be affirmed.

DECISION

The decision of the hearing officer is reversed and a decision is rendered that Dr. K did not certify MMI. Thus, the 20% impairment rating was not valid and did not become final under Rule 130.5(e).

The claimant injured her back at work on or about (date of injury). Her treating doctor at times relevant to the disputed issue was (Dr. A). (Ms. W) is an adjustor for the carrier and worked on the claimant's claim. On July 24, 1992, the carrier requested the claimant to see Dr. K and on August 6, 1992, the claimant agreed to see Dr. K. On August 24, 1992, the carrier advised the claimant that she had agreed to an "independent medical examination" by Dr. K and that the examination was to be performed on September 8, 1992. Also on August 24, 1992, Ms. W wrote to Dr. K and asked that, following his evaluation of the claimant, he render his opinion on MMI and "permanent disability."

On September 8, 1992, Dr. K wrote a two page letter to Ms. M in which he stated that he examined and evaluated the claimant on September 8, 1992. Dr. K reviewed the claimant's prior diagnostic tests and stated that Dr. A had performed an L4 decompression and discectomy on March 5, 1992. Dr. K further stated that the claimant did not need additional surgery and that she ought to go through a back rehabilitation program as had been outlined by Dr. A. Dr. K concluded his letter by stating: "I think she has had excellent care and just simply needs more time and progressive rehab. (sic) with some work hardening and return to work. Her rating would be the usual rating for post laminectomy, specifically 20% to the whole body." Dr. K did not mention MMI in his letter nor did he make any statement to the effect that further material recovery from or lasting improvement to the claimant's injury could no longer reasonably be anticipated. It was undisputed that Dr. K did not complete a Report of Medical Evaluation (TWCC-69). The claimant said that she did not know about Dr. K's impairment rating until just before the June 1993 benefit review conference when she received a packet of medical reports.

The claimant said she saw Dr. A in October 1992. In an undated TWCC-69, Dr. A certified that the claimant reached MMI on October 12, 1992, with a 10% impairment rating.

Ms. W testified that she received Dr. K's letter of September 8, 1992 (she did not say when she received it), and sent the letter to Dr. A. Ms. W further testified that she did not consider Dr. K's letter of September 8, 1992, to be a certification of MMI because MMI is not mentioned in the letter. She said that all "MEO" (medical examination order) reports are sent to the treating doctor regardless of whether an MEO report certifies MMI and assigns an impairment rating. However, in a letter to Dr. A dated October 15, 1992, Ms. W stated that in his report Dr. K had rendered an opinion that the claimant reached MMI and assessed an impairment rating and asked Dr. A if he agreed with Dr. K's report. In a letter to Ms. W dated October 29, 1992, Dr. A stated that he agreed that the claimant had reached MMI and that she had no more than a 20% impairment rating.

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." The hearing officer concluded that Dr. K's "first impairment rating" was not disputed in a timely manner, pursuant to Rule 130.5(e), and is final. In reaching his conclusion, the hearing officer made several findings of fact including Finding of Fact No. 6 which states:

6.The certification of MMI and impairment by Dr. K fails to meet certain procedural requirements; however, the substance of Dr. K's report constitutes a valid certification of MMI and impairment.

On appeal the carrier contends, as it did at the hearing, that Dr. K kid not certify MMI and that without a certification of MMI an impairment rating cannot be assigned and be made final. Section 401.011(30) defines MMI as the earlier of: (a) the earliest date after which, based on reasonable medical probability, further material recovery from or lasting improvement to an injury can no longer reasonably be anticipated; or (b) the expiration of 104 weeks from the date on which income benefits begin to accrue. Section 401.011(24) defines impairment as any anatomic or functional abnormality or loss existing after MMI that results from a compensable injury and is reasonably presumed to be permanent. Section 408.123(a) states in pertinent part that, after an 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. Section 408.123(b) states in pertinent part that a certifying doctor shall issue a written report certifying that MMI has been reached and stating the employee's impairment rating. Rule 130.3(a) provides that a doctor, other than a treating doctor, who certifies MMI shall complete a medical evaluation report under Rule 130.1 and send a copy of the report to the treating doctor, if the certifying doctor is not a designated doctor. Rule 130.1(c) provides, among other things, that the report of medical evaluation must contain a statement that the employee has reached, or an estimate of when the employee will reach, MMI. Under Rule 130.1(b) certification of MMI means the formal assertion of medical facts or expert opinion by a doctor supporting or relating to whether an employee has or has not reached MMI. Dr. K's letter of September 8th does not contain a statement that the claimant has reached MMI and does not assert medical facts or expert

opinion supporting or relating to MMI.

Rule 130.5(e) applies to the first impairment rating assigned to the employee. Texas Workers' Compensation Commission Appeal No. 93570, decided August 24, 1993. Although Rule 130.5(e) refers to the date the impairment rating is assigned, we have held that the 90 day time period runs from the time a party has actual knowledge of the impairment rating. Texas Workers' Compensation Commission Appeal No. 93423, decided July 12, 1993. We have held that "an impairment rating cannot be assigned, and made final, absent a certification of MMI." Texas Workers' Compensation Commission Appeal No. 92670, decided February 1, 1993. We have also held that without a certification of MMI, there is no MMI nor valid impairment rating to dispute under Rule 130.5(e). Texas Workers' Compensation Commission Appeal No. 93551, decided August 19, 1993. The requirements for certification of MMI and assignment of an impairment rating are generally contained in Rule 130.1 and the Commission prescribed form for certifying MMI and assigning an impairment rating is form TWCC-69. Texas Workers' Compensation Commission Appeal No. 92384, decided September 14, 1992. We have held that where a doctor does not complete a TWCC-69 but his report on MMI and impairment rating otherwise meets the statutory and rule requirements for certification of MMI and assignment of an impairment rating, the report may be accepted. Texas Workers' Compensation Commission Appeal No. 92126, decided May 7, 1992. *See also* Texas Workers' Compensation Commission Appeal No. 92384, decided September 14, 1992. In Appeal No. 93551, *supra*, the injured employee's treating doctor was the first doctor to assign an impairment rating but did so without certifying MMI. In that decision we held:

> Since Dr. F [treating doctor] did not certify that the claimant reached MMI, he could not give a valid assignment of impairment rating for as we have seen, under Article 8308-4.26(d) [now Section 408.123(a)] and Rule 130.2, it is only after certification of MMI that an impairment rating is assigned. *See also* Appeal No. 92670, *supra*. [decided February 1, 1993]. Consequently, the provisions of Rule 130.5(e) never came into play in this case since without a certification of MMI, there was no valid assignment of impairment rating for Rule 130.5(e) to attach to.

In the instant case, as in Appeal No. 93551, the doctor who assigned the first impairment rating, Dr. K, did not certify MMI. Finding of Fact No. 6 is simply not supported by sufficient evidence and is against the great weight and preponderance of the evidence. Consequently, Dr. K did not give a valid assignment of impairment rating and the legal effect was that there was nothing to dispute under the provisions of Rule 130.5(e). In regard to the carrier's letter to Dr. A of October 15, 1992, wherein it was indicated that Dr. K had in his letter rendered an opinion that the claimant had reached MMI, the content of Dr. K's letter shows the carrier's statement to be incorrect for Dr. K did not render an opinion on MMI. Were we to attempt to hold the carrier to its previous inconsistent statement without regard to the statutory and rule provisions relating to MMI and impairment rating, we would be hard pressed to not do likewise in a case where a claimant mistakenly makes a previous inconsistent statement with respect to whether a doctor certified MMI when in fact the doctor

had not done so thereby prematurely, and in contravention of applicable statutory and rule provisions, ending entitlement to temporary income benefits (TIBS) and possibly impacting entitlement to other income benefits. This we are not willing to do. Our holding in this case makes it unnecessary to address the carrier's alternate contention on appeal that it timely disputed Dr. K's impairment rating.

The decision of the hearing officer is reversed and a decision is rendered that Dr. K's impairment rating did not become final under the provisions of Rule 130.5(e).

Robert W. Potts
Appeals Judge

CONCUR:

Stark O. Sanders, Jr.
Chief Appeals Judge

Joe Sebesta
Appeals Judge