APPEAL NO. 93975

This appeal arises under the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq*. (1989 Act) (formerly V.A.C.S., Article 8308-1.01 *et seq*.). On October 6, 1993, a contested case hearing (CCH) was held in (city), Texas, with (hearing officer) presiding as hearing officer. The sole issue agreed upon by the parties to be decided at the CCH was:

Is the assessment of maximum medical improvement given to Mr. H final if it was disputed after 90 days but prior to Appeals Panel Decision 92670 or is Appeals Panel Decision 92670 only to be applied to maximum medical improvement disputes which occur after the decision was entered.

The hearing officer determined that Texas Workers' Compensation Commission Appeal No. 92670, decided February 1, 1993, interprets Texas Workers' Compensation Commission (Commission) Rule 130.5(e) (Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 130.5(e)) and does not create new law. The hearing officer further determined that Appeal No. 92670, *supra*, "applies retrospectively and prospectively to all disputes arising under Texas Workers' Compensation Commission Rule 130.5(e)," that claimant failed to timely dispute either (Dr. M) April 8, 1992, finding of maximum medical improvement (MMI) or his assigned impairment rating (IR) of seven percent and that claimant reached MMI on April 8, 1992, with an IR of seven percent.

Appellant, claimant herein, contends that Appeal No. 92670 created new law which prohibited a dispute of MMI after 90 days, that ". . . there are other people who have protested maximum medical improvement (some successfully) during the past couple of years . . . (and) such a substantial change in prosecution of a claim, to take effect as soon as distributed to the interested parties, should not be applied retroactively . . . ." Respondent, carrier herein, responds that the hearing officer's decision be affirmed.

DECISION

The decision of the hearing officer is affirmed.

The facts of this case are not in dispute, or even at issue, and the case was submitted entirely as a question of law. By way of background the documentary evidence shows that claimant is a 41 year old furniture salesman and mover who injured his back moving furniture for his employer on July 16, 1991. Although claimant has seen a number of doctors in latter 1992 and 1993, it is undisputed that claimant's initial treating doctor was Dr. M. By Report of Medical Evaluation (TWCC-69) and narrative dated April 8, 1992, Dr. M certified MMI on "4/8/92 light duty" with a seven percent whole body IR. A copy of Dr. M's TWCC-69 was mailed to claimant, by Dr. M, on April 8, 1992. Carrier subsequently sent claimant a notice that his income benefits were changing because he had reached MMI with a seven percent IR on May 14, 1992. Although dates of receipt of this correspondence is not clear, the hearing officer found as fact that:

9.Claimant was or should have been first aware of [Dr. M's] April 8, 1992, finding of maximum medical improvement and an impairment rating of 7% no later than May 31, 1992, the end of the month in which Carrier sent notice to Claimant.

This finding has not been appealed and is deemed conclusive. Claimant first disputed Dr. M's April 8, 1992, certification of MMI and seven percent IR on November 11, 1992, which is more than 160 days after claimant was or should have been aware of the ratings. We would note here, again, that Texas Workers' Compensation Commission Appeal No. 92670, was decided February 1, 1993. Claimant does not contest these facts and states he ". . . was vaguely aware of the 90 day time limit on protests, but was more concerned with my treatment and future employment prospects than some rule or law."

Both parties recognize Appeal No. 92670, with the claimant asserting the 90 day limitation, should not be effective until the Appeals Panel had ruled on that provision of the 1989 Act and it was "distributed to the interested parties. . . ."

Rule 130.5(e) states as follows:

(e)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.

Effective Date: January 25, 1991

Appeal No. 92670, *supra*, gave excellent illustrations on why the 1989 Act requires a certain amount of stability which would preclude a party (either claimant or carrier) from reopening a dispute years after everyone believed the issue had been resolved. Portions of Appeal No. 92670 are instructive in this case regarding on why there must be some type of closure to an issue. In discussing Rule 130.5(e) the Appeals Panel in 92670 stated:

This rule affords a method by which the parties may rely that an assessment of impairment and MMI may safely be used to pay applicable benefits, by providing the time limit in which such assessment will be open to dispute. On the other hand, the rule also allows a liberal time frame within which the parties may ask for resolution of a dispute through the designated doctor provisions of the Act. This rule applies with equal force to the carrier and the claimant.

Although the 1989 Act contains no express deadline for raising these disputes, this does not render the rule fatally defective. . . . The Commission has evidently determined the point at which both parties may rely on an MMI and impairment rating to ensure stable payment of benefits. It is not up to the Appeals Panel to second-guess the wisdom of this rule, nor do we have the power to invalidate it. *See* Bullock v. Hewlett-Packard Co., 628 S.W.2d 754 (Tex. 1982); Article 6252-13a, § 12 (Texas Administrative Procedure and Texas Register Act).

We expressly find that Rule 130.5(e) was effective on January 25, 1991, and that the Appeals Panel merely interprets the statute as passed by the legislature and rules promulgated by the Commission. The Appeals Panel does not "make new law," that function belonging strictly to the legislative branch of government. As indicated in Appeal No. 92670, an administrative agency has the authority to promulgate certain rules which implement and enforce a law passed by the legislature. The Commission so promulgated Rule 130.5(e) effective January 25, 1991.

The Appeals Panel is constantly receiving cases of first impression (such as this) where we have not expressly ruled on a particular point or provision of the statute. To carry claimant's argument to its logical conclusion on cases of first impression, there would then still be portions of the 1989 Act and Commission rules which are still not in effect because we have not yet ruled on them. Nor could we divine to whom we should make distribution of these cases of first impression as "interested parties" because we would have no way of knowing who these parties might be. This is clearly and logically not the case.

In summary, we find that claimant's argument is without merit, that Rule 130.5(e) became effective on January 25, 1991, when it was promulgated, that the Appeals Panel does not create new law, but merely interprets existing statutes and rules and that the hearing officer's decision is correct in fact and law. Finding no reversible error, we will not disturb the hearing officer's decision and it is hereby affirmed.

Thomas A. Knapp
Appeals Judge

CONCUR:

Robert W. Potts
Appeals Judge

Susan M. Kelley
Appeals Judge