APPEAL NO. 93979

On September 30, 1993, a contested case hearing was held in (city), Texas, with the record being closed on October 11, 1993. (hearing officer) presided as the hearing officer. The hearing was held under the provisions of 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*.). The issues at the hearing were: 1) whether the respondent (claimant) sustained injuries to her head, left shoulder, left arm, neck and back on (date of injury), in addition to injuries to her left wrist and thumb; 2) whether the claimant timely disputed (Dr. M) certification of maximum medical improvement (MMI) and impairment rating in accordance with Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 130.5(e) (Rule 130.5(e)); and 3) whether the claimant suffered disability as a result of injuries sustained on (date of injury). The hearing officer determined that: 1) the claimant's compensable injury included injuries to her head, left shoulder, left arm, neck, and back; 2) the claimant did not timely dispute Dr. M's certification of MMI and assignment of a zero percent impairment rating, but that Dr. M's certification of MMI and assignment of impairment rating were invalid and did not become final; and 3) the claimant had disability for certain periods of time. The hearing officer ordered the appellant (carrier) to pay medical and income benefits in accordance with his decision, the 1989 Act, and the rules of the Texas Workers' Compensation Commission (Commission). The carrier asserts that the hearing officer erred in concluding that: 1) Dr. M's certification of MMI and assignment of a zero percent impairment rating are invalid (carrier contends MMI and impairment rating are final); 2) the claimant injured her head; and 3) disability existed from February 13, 1992, through the date of the hearing. The carrier requests that the decision be reversed. The claimant requests that it be affirmed.

DECISION

The determination of the hearing officer regarding the extent of the claimant's compensable injury is affirmed. The determination of the hearing officer that Dr. M's findings on MMI and impairment rating are not final is reversed and a decision is rendered that Dr. M's certification of MMI and assignment of a zero percent impairment rating became final by operation of Rule 130.5(e). We affirm the hearing officer's determination of certain periods of disability to February 17, 1992, but render a decision that the claimant is not entitled to income benefits after she reached MMI on February 18, 1992.

The parties stipulated that the claimant suffered a compensable injury on (date of injury). Extent of the injury, disability, and timely dispute of Dr. M's certification of MMI and assignment of impairment rating were the disputed issues.

The claimant testified that on (date of injury), while working for the employer, (employer)., about 30 cardboard boxes that were stacked against a wall fell on her and struck her head and "whole body" and caused her to fall to the floor on her buttocks or on her back or on her side. The claimant said she did not know what was in the boxes. At one point she indicated that the boxes were actually sheets of cardboard that are made into boxes.

The claimant further testified that the next day she had bruises on her legs, left arm,

hand, back, and under both eyes, and that she had a large knot or swelling on her head as well as pain in her back, neck, and head. She said she went to work the next day and the store manager took her to Dr. M, whom she described as the "company doctor." Dr. M is associated with the (Center A). However, the claimant also testified that she chose to go to Center A and the employer didn't send her there. The claimant said she told Dr. M that her back, neck, and head hurt but that Dr. M looked only at her left hand and treated her for wrist and thumb injuries. She also said that Dr. M took her off work, but then returned her to light duty. She said she went back to work for the employer but could not remember the date. She said that at some point, Dr. M refused to treat her and told her to get treatment for her shoulder, back, and "other stuff" somewhere else. The claimant said that Dr. M referred her to (Dr. S) (a chiropractor) and that Dr. S referred her to (Dr. Z). She said she also saw (Dr. W) and (Dr. H).

The claimant said she thought she last saw Dr. M on February 18, 1992, that Dr. M didn't tell her at that time that she had reached MMI, but that she received Carrier's Exhibit A, which is a letter and a Report of Medical Evaluation (TWCC-69) from Dr. M, about a month after her last visit to Dr. M.

The claimant further testified that she worked for the employer from early Spring 1992 until December 1992 at the same job she was working when she was injured on (date of injury). She said she was suppose to be on light duty work but her employer gave her regular duty work. The claimant said that the reason given by the employer for her termination on December 27, 1992, was that she had a personality conflict with another employee. The claimant said that she thinks she was fired because she told a manager that she was sick and her back was hurting. The claimant filed a discrimination complaint with the Equal Employment Opportunity Commission which the store manager said had been settled for a monetary amount. The claimant said that she went back to Center A on December 28, 1992, the day after she was terminated.

The claimant said that due to pain in her neck, back, and head, she has not been able to work since she was terminated. However, the claimant also testifed that if she had not been terminated she probably would have stopped working because she was ready to quit. She didn't say why she was ready to quit. She also said that she didn't return to her job with the employer because there was no job to return to.

The claimant further testified that sometime in December 1992 she went to a Commission field office, talked to a Commission employee and gave the employee a "little letter" (which was not in evidence), and disputed Dr. M's TWCC-69. The claimant said that after she went to the Commission, the Commission ordered her to see (Dr. P), whom the claimant described as the designated doctor. She said Dr. P told her she was not ready to return to work. As of the date of the hearing, the claimant said her hand, thumb, and left shoulder are "fine" or "alright," but that she still has problems with her upper and lower back and has neck pain and headaches.

(VC) testified that she is presently the employer's personnel manager but that during

1992 she was a customer service manager and had supervisory responsibilities over certain aspects of the claimant's work. VC said she did not see the claimant on (date of injury), the day of the injury. VC said the claimant returned to light duty work on February 17, 1992, and was on regular duty work as of February 19, 1992. She said the claimant was terminated on December 27, 1992, due to a personality conflict with another employee. She said that the claimant was a good worker and that the claimant did her full and regular duties from February 19 to December 27, 1992. She said the claimant never complained to her about not being able to do her work. She said the claimant contested her termination and fought to keep her job. She said that on or about December 28, 1992, a person called her from the (Center B) and told her that the claimant had signed in on December 28th and tried to get someone to give her a statement to the effect that she had had a nervous breakdown, but that the claimant left without seeing a doctor.

A medical report from Center A dated (date), the day after the injury, recites as the history of the injury that a stack of light boxes fell on the claimant and that the claimant twisted her left hand when stopping her fall. The left hand is noted to be painful, swollen, and discolored. A thumb sprain was diagnosed. A January 17, 1992, report from Center A indicates the claimant had a follow-up visit for her thumb sprain. A medical report from Dr. W dated January 20, 1992, indicates that he saw the claimant on (date). He also recites that the claimant stated that she twisted her left hand when a stack of light boxes fell on her at work. Dr. W diagnosed a thumb sprain. A radiology report dated January 24, 1992, states that there is no evidence of fracture or deformity in the left hand or left forearm. A report from Center A dated January 24, 1992, indicates that on that day the claimant complained of left wrist pain which went up her arm and into her back. A January 26th report from Center A states that Dr. M is to review the case.

In a letter dated January 29, 1992, Dr. S stated that she had examined the claimant that day and advised her not to work.

Center A reports dated February 1 and 2, 1992, indicate that the claimant continued to complain of left arm pain. A February 7th report recites arm, shoulder, and back pain.

In a report dated February 12, 1992, Dr. Z said he examined the claimant for complaints of pain in the left thumb, left wrist, left arm, left elbow, left shoulder, cervical spine, dorsal spine, and lumbosacral spine. Dr. Z diagnosed a possible sprain of the left thumb and wrist and a painful left elbow and a painful left shoulder. Dr. Z said he believed the injury to the wrist and thumb were vaguely related to "the elbow and shoulder, but not to the cervical, thoracic and lumbosacral area." In a report dated February 14, 1992, Dr. W noted that the claimant was complaining of pain in the left shoulder.

Carrier's Exhibit A consists of a February 18, 1992, letter and a TWCC-69. In the letter, Drs. M and W wrote (both doctors are associated with Center A; the letter is to Corporate Services, Inc., which entity was not identified in the record):

Due to irreconcilable difference in your employee's approach to her medical care this

> is to advice (sic) you that we will no longer be treating the above named patient [claimant]. Due to the family's abusive behavior to my staff, I am forced to refuse any further treatment of this patient. I will however, give you names of other doctors that this patient can continue to see [the names of four doctors are listed].

The TWCC-69 is undated, contains Dr. M's name, and is signed. Dr. M certified that the claimant reached MMI on February 18, 1992, with a zero percent impairment rating. Dr. M states on the TWCC-69: "We refuse to see patient after 2/18/92 due to abusive language by relatives."

In a report dated February 20, 1992, which shows a date of visit of February 18, 1992, Dr. W stated that the claimant was to follow-up with another physician (he didn't say who) and that she could resume regular duty on February 18, 1992. He continued to diagnose a thumb sprain.

The next health care provider record which is in evidence is a sign-up sheet for Center B dated December 28, 1992, (the day after the claimant was terminated) which contains the claimant's name and states the reason for the visit as "nervous breakdown." A line is crossed through both the claimant's name and the reason for her visit.

In a narrative report dated February 3, 1993, Dr. H, a neurosurgeon, said she examined the claimant on February 3rd, that the claimant was complaining of pain in the occipital area of her head (this is the first mention of head pain in a medical report), as well as pain in her low back, neck, shoulders, left arm and left wrist. Dr. H's impression was: 1. possible post-concussive syndrome; 2. cervical strain versus cervical disk with a left radiculopathy; and 3. lumbar strain. The report recites a history of injury from an on-the-job injury of (date of injury), when boxes fell on the claimant's head and the claimant landed on the floor. Dr. H stated:

Because the patient did claim to have raccoon eyes and is complaining of pain in the
> occipital area, I would like to go ahead and get an MRI of her head. I think it would be a good idea to rule out any type of head injury. She has some of the sequelae of a post-concussive syndrome. I think some neuropsych testing would be appropriate. It would also test her personality with the MMPI. That would give us some idea of whether she has had a head injury.

In a letter dated February 3, 1993, Dr. H said the claimant was not able to return to work at that time. In a letter dated February 18, 1993, Dr. S said the claimant remained under her care for work-related injuries sustained on (date of injury), and that the claimant is unable to work.

An MRI of the claimant's cervical spine done on February 23, 1993, showed no significant congenital anomalies and no fractures. An MRI of the claimant's brain done on February 23, 1993, was reported as normal "without signs of abnormal enhancement,

hemorrhage, or vascular abnormality." On March 10, 1993, Dr. H wrote that she believed the claimant has post-concussive syndrome.

A benefit review conference (BRC) agreement dated April 8, 1993, states that the disputed issues were: 1) "whether [claimant] has reached MMI and has any impairment;" and 2) "whether the accident on (date of injury) could have caused injuries to [claimant's] head, neck, and back in addition to her left hand." The BRC agreement states the resolution of the issues as "the Commission has designated [Dr. P] to resolve the disputed issues." The agreement is signed by the carrier's representative (an attorney in the law firm representing the carrier) and by the benefit review officer (BRO); however, no signatures are shown in the spaces provided for the claimant's signature and the claimant's representative's signature.

In a letter dated April 19, 1993, the same attorney that signed the BRC agreement wrote to Dr. P stating that a dispute had arisen over whether the claimant's injury of (date of injury), is the cause of her current neck, back, head, and shoulder complaints. The attorney said the carrier did not dispute that the claimant injured her left hand. The attorney then informs Dr. P that the Commission has designated him to address the issues of whether the claimant's neck, shoulder, and head complaints are related to her injury of (date of injury). The attorney added: "The other issues which we are requesting that you address related to maximum medical improvement an (sic) permanent impairment rating . . . ." Dr. P was asked to give his opinions on causal connection, MMI, and impairment rating.

Dr. P examined the claimant and reviewed her x-rays and MRIs on May 4, 1993. He noted that the claimant complained of an "ongoing headache pattern that seems to be present about her entire cranium" as well as pain in her left shoulder, left arm, left hand, neck, and back. His impression was "possible unilateral facet subluxation at the C5-6 level; contusion about the left hand; contusion about the lumbar spine." Dr. P stated that with the normal MRI, there is no evidence of any traumatic injury having occurred about the claimant's head. Dr. P recommended a CAT scan of the neck and an MRI of the lumbar spine. He stated "[a]t this juncture, then, I have not felt the patient has reached a level of [MMI] until the appropriate diagnostic studies can be gleaned." He also said that "[t]he patient is no candidate for returning to work at this juncture." In a TWCC-69 dated May 11, 1993, Dr. P reported that the claimant had not reached MMI and estimated that MMI would be reached on July 1, 1993. In a letter to a Commission disability determination officer dated June 4, 1993, Dr. P said "[h]istorically, the patient was struck about her head on the 13th of January 1992 and fell. I must, therefore, assume the injury of that date is responsible for her complaints of pain about her neck, her back, her shoulder and her head." He further stated that the claimant has demonstrable problems in her neck that may be the result of the accident and that appropriate diagnostic studies are needed to determine if the claimant has reached MMI. He reiterated that he didn't feel that the claimant has reached MMI.

An MRI of the claimant's lumbar spine was done on June 7, 1993. It revealed a minimal disc bulge at L4-5 and some dehydration, internal derangement, and minimal disc

bulge at L5-S1. Either a CAT scan or an MRI of the claimant's cervical spine was done on June 8, 1993. It revealed mild instability at the C5-6 level which was non-specific and "likely secondary to ligamentous laxity, which may be secondary to early intervertebral disc and facetal degenerative change or post-traumatic change."

A second BRC was held on June 22, 1993, to determine the issues of the extent of the claimant's injury, whether the claimant timely disputed Dr. M's certification of MMI and assignment of impairment rating, and disability.

The hearing officer found that as a result of being hit on the head and falling to the floor, the claimant injured her head, neck, back, left shoulder, left arm, left wrist, and left thumb, and the hearing officer concluded that the claimant's compensable injury included injuries to her head, left shoulder, left arm, neck and back. The carrier contends on appeal that the hearing officer erred in concluding that the claimant's injuries extended to and included her head inasmuch as "this is contradicted by the medical records and the circumstances of her return to work." The hearing officer is the judge of the weight and credibility to be given to the evidence. Section 410.165(a). The medical records do not mention complaints of a head problem from the claimant's (date of injury), accident until February 3, 1993, after she had been terminated from employment. However, in Texas Employers' Insurance Association v. Thorn, 611 S.W.2d 140 (Tex. Civ. App.-Waco 1980, no writ), the court stated:

> Under our worker's compensation law, the immediate effects of the original injury are not solely determinative of the nature and extent of the compensable injury. "The full consequences of the original injury, together with the effects of its treatment, upon the general health and body of the workman are to be considered." [citation omitted].

In the instant case, the claimant said she had a knot or swelling on her head the day after the accident, that she reported head pain to her health care providers prior to returning to work (although such is not reflected in the medical records), and that she continues to suffer from severe headaches. Dr. H believes the claimant has post-concussive syndrome as a result of her accident, and Dr. P states that, given the history of the accident, he assumes the claimant's complaints of head pain are related to the accident. That the evidence may give rise to equally supportable inferences is not a sound basis for disturbing a fact finder's determinations. Salazar v. Hill, 551 S.W.2d 518 (Tex. Civ. App.-Corpus Christi 1977, writ ref'd n.r.e.). We do not overturn a hearing officer's finding unless the evidence on which it is based is so weak or against the great weight and preponderance of the evidence as to be clearly wrong and manifestly unjust. Cain v. Bain, 709 S.W.2d 175 (Tex. 1986). Having reviewed the record we conclude that, although different inferences might have been reached in regard to whether the claimant injured her head on (date of injury), the hearing officer's finding that the claimant did injure her head is supported by sufficient evidence and is not so against the great weight and preponderance of the evidence as to be clearly wrong and manifestly unjust.

The carrier also asserts on appeal that the hearing officer erred in concluding that Dr. M's certification of MMI and assignment of a zero percent impairment rating are invalid because his findings are final by operation of Rule 130.5(e).

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."

The hearing officer made the following findings of fact and conclusions of law with respect to the 90-day dispute issue:

FINDINGS OF FACT

7.Dr. M certified claimant reached MMI on February 18, 1992, with a 0% rating.

8.In making that certification Dr. M did not indicate he considered the injuries to claimant's head and neck.

9.Dr. M did not examine claimant on or after February 18, 1992.

10.In the certification, Dr. M did not state the injuries covered nor give any explanation of the certification.

14.Claimant received notice of Dr. M's certification of MMI and impairment rating no later than March 31, 1992, and did not dispute that certification before December 1, 1992.

CONCLUSIONS OF LAW

3.Claimant did not timely dispute Dr. M's certification of MMI and impairment rating.

4.Dr. M's certification of MMI and impairment rating was invalid and it did not become final.

The finding that Dr. M did not examine the claimant is simply not supported by the evidence. The claimant testified that Dr. M examined her, albeit for her hand injury, and she testified that she thought she last saw Dr. M on February 18, 1992. The claimant never asserted at the hearing that Dr. M failed to examine her before certifying MMI and assigning an impairment rating, although she did testify that Dr. M did not treat her for injuries other than to her hand.

Dr. M issued and signed a TWCC-69 form, which is the Commission prescribed form for certifying MMI and assigning an impairment rating. In the TWCC-69 he certified that the claimant reached MMI on February 18, 1992, and he assigned a zero percent impairment rating. MMI means 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(30). In the instant case, the claimant testified that various parts of her body, in addition to her hand, hurt immediately after the injury and continued to hurt while she was being treated by Dr. M. Despite her knowledge of the pain she had in parts of her body other than her hand, and her testimony that Dr. M treated only her hand, she gave no explanation for her failure to dispute Dr. M's certification of MMI and assignment of impairment rating for nine months after she had actual knowledge of Dr. M's findings. Dr. M did not fail to certify MMI nor did he give a conditional certification of MMI; instead, he used the Commission prescribed form to certify MMI and assign an impairment rating. Basically, the claimant seeks to attack the underlying basis for the certification of MMI and assignment of impairment rating long after the 90-day period for disputing the first impairment rating expired. In Texas Workers' Compensation Commission Appeal No. 92670, decided February 1, 1993, we stated in regard to Rule 130.5(e):

> 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.
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> 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) [now Section 408.123(a)]. 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.
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> Therefore, the 90 day deadline of Rule 130.5 operated to finalize the 9% impairment rating in this case. It may be that both the claimant and the carrier could have asserted valid disputes that might have resulted in the 9% rating being set aside, had either timely filed a dispute. If the carrier belatedly determined, for example, that 9% was a high rating for a mild unilateral carpal tunnel, and had medical evidence in its favor, it would nevertheless be precluded by the same rule from disputing the first, and in this case, final impairment rating. 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 no exceptions in the rule.

In the present case, as in Appeal No. 92670, *supra*, the claimant may have had valid reasons to dispute Dr. M's certification of MMI and assignment of a zero percent impairment rating; however, she failed to raise those disputes until nine months after she had actual knowledge of the certification of MMI and assignment of the impairment rating. Consequently, having failed to dispute the findings within 90 days, under the holding in Appeal No. 92670, the zero percent impairment rating and the underlying MMI certification became final under operation of Rule 130.5(e). We emphasize that this is not a case where the doctor who first assigns an impairment rating wholly fails to certify MMI or gives a conditional certification of MMI; on the face of the TWCC-69, Dr. M both certifies MMI and assigns an impairment rating of zero percent. Disputes as to the validity of the certification of MMI and assignment of the impairment rating should have been brought forward within 90 days of when the claimant had actual knowledge of those findings. No issue was presented at the hearing or on appeal to the effect that the carrier may have in some fashion waived its right to assert the 90-day provision by failing to assert that provision until after it was aware of the findings of the designated doctor and thus we do not address such matter in this decision.

In regard to disability, the carrier contends on appeal that the hearing officer erred in concluding that the claimant had disability from February 13, 1992, through the date of the hearing because she worked at her regular job from February 19, 1992, until she was terminated for cause on December 27, 1992. The undisputed evidence is that the claimant worked at her regular job from February 19, 1992, to the date she was terminated on December 27, 1992. There is no evidence that she was paid less than her preinjury wages during this period. Thus, the evidence is insufficient to support a finding of disability for the period of time the claimant was working her regular job. The question of disability after termination was a factual matter to be determined by the hearing officer and termination for cause does not necessarily preclude a finding of disability thereafter. While it may be that Finding of Fact No. 13, and Conclusion of Law No. 5, both of which state, among other things, that the claimant had disability from February 13, 1992, through the date of the hearing contain typographical errors, that is, February 13, 1992 should have read February 13, 1993 (which would be more consistent with the hearing officer's order which recites, in part, disability from February 17, 1993, through the date of the hearing), the claimant, in any event, would not be eligible for temporary income benefits (TIBS) after she reached MMI on February 18, 1992, because in order to be entitled to TIBS the claimant must have disability and not have attained MMI. Section 408.101(a). Thus the question of disability after MMI was reached on February 18, 1992, is rendered moot. As it is essentially undisputed that the claimant had disability for other periods of time found by the hearing officer, to wit: January 17 through 19, 1992; one day between January 19 and 26, 1992; and January 26, 1992, through February 17, 1992, the finding of those periods of disability will not be disturbed on appeal.

The hearing officer's determination on the extent of the claimant's compensable injury

is affirmed. We render a decision that the claimant reached MMI on February 18, 1992, with a zero percent impairment rating and that the claimant is not entitled to income benefits after reaching MMI.

Robert W. Potts
Appeals Judge

CONCUR:

Philip F. O'Neill
Appeals Judge

Gary L. Kilgore
Appeals Judge