APPEAL NO. 93987

This appeal arises pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* (formerly V.A.C.S., Article 8308-1.01 *et seq*.). A contested case hearing (CCH) was held on October 10, 1993, in (city), Texas, with (hearing officer) presiding as hearing officer. The sole issue at the CCH was whether or not the first date of maximum medical improvement (MMI) and impairment rating assigned to the appellant (claimant herein) had become final. The hearing officer ruled that the MMI date and impairment rating originally assigned by the claimant's treating doctor in May 1992 had become final. The claimant appeals contending that he had failed to dispute the original finding of his treating doctor because at the time he had no reason to do so and was hampered in doing so by his inability to read or write English. The claimant contends that the hearing officer should have adopted the amended MMI date and impairment rating issued by his treating doctor after additional evaluation and surgery and that this is contemplated by the "Guides to the Evaluation of Permanent Impairment" published by the American Medical Association (AMA Guides). The respondent (carrier herein) replies that in the present case the hearing officer correctly ruled that the claimant failed to justify an exception to Tex W.C. Comm'n 28 TEX. ADMIN. CODE § 130.5 (Rule 130.5) and that therefore the original certification of the claimant's treating doctor as to MMI and impairment had become final.

DECISION

Finding no reversible error in the record and sufficient evidence to support the decision of the hearing officer, we affirm.

The hearing officer discusses the facts in detail in the section of her decision entitled "Statement of the Evidence," and we adopt this discussion for purposes of our decision. Briefly summarizing the facts, the claimant testified at the CCH through an interpreter. It is undisputed that the claimant injured his neck and right shoulder at work on (date of injury). In (month year), (Dr. H), an orthopedic surgeon, became the claimant's treating physician. Dr. H discussed the possibility of surgery but treated the claimant conservatively for some time. Since there was little improvement in claimant's condition, Dr. H referred the claimant to (Dr. D) for a second opinion. Dr. D reported that he believed that there was a component of symptom magnification in the claimant which he felt should be investigated and advised extreme caution as to surgical intervention.

In January 1992, the claimant underwent a psychological examination with (Dr. W), Ph.D. He found that claimant had elevated hypochondria and also advised extreme caution in approaching surgery. The claimant was examined by (Dr. K) at the carrier's request on January 24, 1992. Dr. K expressed the opinion that the claimant would reach MMI on April 10, 1992, with a four percent impairment. Dr. K also commented on the claimant's symptom magnification. Dr. K commented that should objective testing show carpal tunnel syndrome, then the claimant might need carpal tunnel release surgery. Dr. H certified on a Report of Medical Evaluation (TWCC-69) dated May 12, 1992, that the claimant reached MMI on April 10, 1992, with 13% whole body impairment based on cervical

and thoracic range of motion limitations. This MMI date and impairment rating was not disputed by either party and the carrier paid out impairment income benefits (IIBS) pursuant to the rating.

The claimant continued to treat with Dr. H and on March 2, 1993, had surgery to his right shoulder. While the pre-surgical diagnosis was rotator cuff tear, the operative report shows that there "was no evidence of complete rotator cuff tear." On August 9, 1993, Dr. H submitted another TWCC-69 in which he certified that the claimant reached MMI on April 10, 1993, with a 25% impairment rating. This rating is based entirely on range of motion deficits and primarily differs from his earlier rating in that impairment is now given for the right shoulder as well as the cervical and thoracic spine.

Rule 130.5(e) provides:

> 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.

We have interpreted this rule to make the MMI determination final if neither MMI or impairment is disputed, holding that impairment and MMI are intertwined for this purpose. *See* Texas Workers' Compensation Commission Appeal No. 92670, decided February 1, 1992.

At the hearing, the claimant cited Texas Workers' Compensation Commission Appeal No. 93200, decided April 14, 1993, and Texas Workers' Compensation Commission Appeal No. 93119, decided March 29, 1993, for the proposition that a doctor may amend his findings as to MMI and impairment. The hearing officer distinguishes those cases from the present case in that in those cases there was either evidence of a new, previously undiagnosed medical condition or improper or inadequate treatment of an injury. She specifically found that there was neither in the present case. Further, the hearing officer points out that in the present case the original and the amended impairment rating are based on the same criteria--loss of range of motion. The hearing officer also points to the length of time between the original and amended TWCC-69's in the present case as undermining the finality the 1989 Act was intended to foster. Nor is there evidence in the record that the claimant's language or literacy limitations precluded him from timely disputing Dr. H's original rating.

Under the specific facts of this case, we do not find reversible error in the hearing officer's application of Rule 130.5. We agree with the carrier that this case does not justify

an exception to the finality of the first assessed MMI and impairment which goes undisputed under Rule 130.5(e). We, therefore, affirm the decision of the hearing officer.

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Gary L. Kilgore
Appeals Judge

CONCUR:

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Philip F. O'Neill
Appeals Judge

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Lynda H. Nesenholtz
Appeals Judge