APPEAL NO. 94049

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 November 18, 1993, a contested case hearing (CCH) was held in (city), Texas, with (hearing officer) presiding. The issues presented for resolution were:

1.Whether or not the treating doctor can rescind his finding of maximum medical improvement [MMI] and impairment rating outside the 90 days set out in Rule 130.5(e);

2.On what date did the Claimant reach [MMI];

3.What is the Claimant's total whole body impairment?

The hearing officer determined that the treating doctor's initial certification of MMI had become final and that claimant had achieved MMI on August 31, 1992, with a 10% impairment rating (IR).

Appellant, claimant herein, contends that the hearing officer erred in determining that the initial MMI and IR "were final because not timely disputed," that the hearing officer "erred in determining that the claimant received notification of the initial rating more than ninety (90) days before he disputed it," and that the hearing officer erred in finding MMI and an IR as he did because there is no medical evidence contrary to the findings of the designated doctor. . . ." Claimant requests that we reverse and render a decision in his favor. Respondent, carrier herein, responds to the points raised in claimant's brief and requests that we affirm the decision of the hearing officer.

DECISION

The decision and order of the hearing officer are affirmed.

Most of the material facts are not in dispute, and the case is submitted principally on an issue involving interpretation of Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 130.5(e) (Rule 130.5(e)). By way of background, the claimant sustained an injury to his lower back on (date of injury), lifting a wet carpet in a residential apartment while in the course and scope of his employment with employer. Initially, claimant saw a chiropractor but was later referred to (Dr. D), an orthopedic surgeon, who became claimant's treating physician in June 1991. It is undisputed that claimant was subsequently diagnosed with L5-S1 disc herniation for which he underwent bilateral laminectomy, foraminotomy and posterior lumbar interbody fusion on February 6, 1992. Dr. D filed a Report of Medical Evaluation (TWCC-69) certifying MMI on "08-31-92" with a 10% whole body IR. Dr. D noted, "[i]n my opinion this patient has 10% permanent physical impairment and loss of physical function to the whole body." Claimant, in both his testimony and in written interrogatories, conceded he received a copy of Dr. D's TWCC-69 and a Payment of Compensation and Notice of Refused/ Disputed Claim (TWCC-21) which indicated a 10% IR, "in September 1992."

Claimant in the interrogatory further stated "[h]owever, I do not read or speak English, so I did not know what it said. I did not learn of the 10% [IR] until the end of March, 1993, when my impairment income benefits [IIBS] ceased." It is undisputed that claimant was represented by a licensed Texas attorney since May 21, 1991. Claimant conceded that he received a number of TWCC-21s, one of which was dated September 2, 1992, that he would give the forms to a neighbor and ask the neighbor to tell him what they said and that "it was very rarely that I spoke to the [meaning his] attorney."

Claimant returned to Dr. D on September 21, 1992, and Dr. D noted claimant "has been having some problems with the back." Dr. D also noted he was going to refer claimant to (Dr. S), who was later identified as a psychiatrist. Dr. D saw claimant again on January 6, 1993, and Dr. D noted claimant continued to have problems with pain in his back and legs and "[t]he medication is not helping. The weather is not helping." Dr. D next saw claimant on January 27, 1993, noted continued problems and "[h]e was suppose [sic] to be MMI somewhere in August and suppose [sic] to be working." Dr. D noted if claimant continues to have problems, a repeat MRI might be necessary. A March 1, 1993, note by Dr. D indicates collapse of the L5-S1 space, with the bone graft and lateral fusion "not taken well." A March 5, 1993, note to carrier from Dr. D indicates "MMI was given to him somewhere of 8-31-92, but since this patient has got a problem he is not working at present." A consultation by (Dr. GV) on March 15, 1993, showed tests and "previous films . . . completely normal." Dr. GV advised conservative treatment. A note by Dr. D dated March 22, 1993, referred to Dr. GV's consultation and indicated Dr. D will keep claimant off work and continue medications.

By referral of April 21, 1993, Dr. D apparently referred claimant to (city) Functional Assessment and Restoration Center (center) for "Impairment Rating (per AMA Guides) [and] Functional Capacity Evaluation and if indicated B-200 Evaluation." A letter to claimant from the center, dated April 21, 1993, indicated claimant was scheduled to begin his "Progressive Work Hardening Program." A letter from Dr. D to the carrier, dated May 5, 1993, stated that claimant is back and that Dr. D has, ". . . the [IR] from the [center] which says that he has an [IR] of 24% of the whole body." A copy of the center's six page "Functional Capacity Evaluation," dated May 12, 1993, addressed to Dr. D, makes no reference to a 24% IR or use of the Guides for the Evaluation of Permanent Impairment, third edition, second printing, February 1989, published by the American Medical Association (AMA Guides), but does have a B-200 evaluation "utilizing the Isostation B-200 computerized objective back device." A report from Dr. D, dated June 16, 1993, indicates claimant is very depressed and is being referred to Dr. S, a psychiatrist. A July 14, 1993, report from Dr. D indicates claimant is being treated by Dr. S with the drug Prozac and that claimant "can return to light work."

Dr. D, by letter dated June 23, 1993, to the carrier, stated that there seemed to be a "small problem" regarding claimant's IR. The letter states:

I am changing the previous rating of 10% into MMI of 24%. Unfortunately, when I gave the 10% rating in August 1992 we did not take into consideration the

range of movements and the impairment due to abnormal range of movements and also impairment due to neurological disorders with and without pain.

The impairment rating done by [center] contains three parts: the first part is impairment due to abnormal disorders of the spine which is based on Table 49, page 73, section 2, item E which is 10%. This is the impairment which I have given. But we did not take into consideration impairment due to abnormal range of movement which comes in section 3.3E page 89. This range of movement was documented by them and they have given 15% disability for the same. The impairment due to neurological disorders comes in section 3.1, page 36, Table 42 and page 65, Tables 10 and 11, and page 40, Tables 45 and 69 of the lumbar spine. This comes to about 1% of the lower extremity on this one.

It looks like I have omitted these two: the second and the third one. From what I understand by the Texas Workers' Compensation Commission, the Texas Workers' Compensation Commission Law states that we have to consider these two before we give the full impairment.

Dr. D subsequently filed a TWCC-69 dated July 26, 1993, certifying MMI on April 29, 1993, with 24% IR. For the "attached report" Dr. D states "[s]ee attached report from [center]." No report was attached for the TWCC-69 admitted into evidence and presumably Dr. D was referring to the center's May 12th six page "Functional Capacity Evaluation."

Claimant's attorney, by letter dated May 10, 1993, to carrier, referring to "a medical note dated May 5, 1993," notes the center's "impairment of 24%" and requests that "payments be reinstated to provide for the [IIBS] as well as supplemental income benefits [SIBS]." The parties have considered this letter as disputing Dr. D's August 31, 1992, certification of MMI and 10% IR. Carrier disputed the revised 24% IR by TWCC-21 dated July 9, 1993, raising the issue that the first IR was not disputed within 90 days as stated in Rule 130.5(e). Nonetheless, the Commission, by letter dated July 21, 1993, appointed Dr. P as a Commission-selected designated doctor. Dr. P, by TWCC-69 dated August 9, 1993, assessed a 26% IR and referred to a narrative summary prepared by a medical company dated August 9, 1993, but signed by Dr. P. The narrative assesses 10% for a one-level diskectomy, nine percent for range of motion (ROM) and seven percent whole body for loss of strength, loss of sensation, "totalling . . . to 26% whole body disability." Because the August 9, 1993, TWCC-69 failed to certify an MMI date, Dr. P filed another TWCC-69 dated September 9, 1993, certifying MMI on August 9, 1993, with 26% IR.

The record discloses the carrier issued a TWCC-21 dated September 1, 1992, terminating temporary income benefits (TIBS) because "release to RTW 8-31-92." Another TWCC-21 dated April 2, 1993, showed 30 weeks of IIBS as having been paid with the comment "[Dr. D] gave clmt 10% PPI. We have paid clmt IIBs owed." It is not clear whether each of these TWCC-21s were sent to claimant's attorney but claimant testified he

had received these forms. Another TWCC-21, dated July 9, 1993, disputes Dr. D's revised 24% IR by saying: "Even though TWCC-69 has not been received, we are disputing new impairment rating by treating doctor. The first rating was not disputed within 90 days as MMI reached August 31, 1992 as stated in Rule 130.5(e)."

The hearing officer determined in pertinent part:

FINDINGS OF FACT

7. Claimant and his attorney were sent copies of a letter from the treating doctor, dated August 24, 1992, in which the doctor indicated his intention to certify [MMI] with a 10% [IR].

8. Claimant did not dispute the finding of [MMI] nor the [IR] until on or about May 10, 1993, over 90 days after he had notice of it.

9. Claimant's treating doctor submitted a second TWCC-69 on July 26, 1993, certifying [MMI] to be April 29, 1993, and assessing a 24% [IR]. This does not accurately reflect a correct application of the [AMA Guides].

10. The Commission designated [Dr. P] to determine an [IR]. [Dr. P] certified a [MMI] date of August 9, 1993, and a 26% [IR].

11. The designation of a doctor by the Commission was a nullity. The initial certification had become final.

12. Carrier consistently raised the issue of the 90 day Rule and nothing in its conduct is sufficient to trigger the doctrine of estoppel.

CONCLUSIONS OF LAW

2. The treating doctor's initial certification of [MMI] of August 31, 1992, and assessment of a 10% [IR] became final.

3. Claimant achieved [MMI] on August 31, 1992, with a 10% [IR].

Claimant appealed contending that the "hearing officer erred in determining that the initial MMI and [IR] were final because not timely disputed because there was no evidence that the treating doctor's amended findings were not correctly rendered." Claimant supports this contention by arguing the treating doctor's initial certification and rating were "invalid" and therefore Rule 130.5(e) does not apply. Claimant alleges the initial report was invalid because the treating doctor clearly did not consider ROM and neurological deficit in the initial rating and that this constitutes "significant error" citing Texas Workers' Compensation Commission Appeal No. 93489, decided July 29, 1993. Claimant argues that "all that is required is that the initial determination be invalid because of significant error

. . . and that the wide disparity between 10% and 24% is indicative of significant error." We disagree. Rule 130.5(e) provides that: "[t]he first [IR] assigned to an employee is considered final if the rating is not disputed within 90 days after the rating is assigned." We have held that if the IR becomes final, so does the underlying finding of MMI. Texas Workers' Compensation Commission Appeal No. 92670, decided February 1, 1993. We have also held that the time for disputing the IR runs from the time the claimant has actual knowledge of the IR. Texas Workers' Compensation Commission Appeal No. 93423, decided July 12, 1993. In the instant case, it is unrefuted that both claimant and his attorney were sent copies of Dr. D's letter of August 24, 1992, and the TWCC-69 certifying MMI on August 31, 1992, with a 10% IR. Claimant concedes in his appeal that he "did receive a copy of the TWCC-69 and Payment of Compensation and Notice of a Refused/Disputed Claim (Commission Form TWCC-21) some time in September, 1992." This rating was not disputed until May 10, 1993, when claimant's attorney wrote carrier requesting additional IIBS (based on a 24% IR) and SIBS.

Claimant argues that Rule 130.5(e) does not apply because the initial MMI and IR were invalid, citing Appeal No. 93489, *supra*, and Texas Workers' Compensation Commission Appeal No. 93259, decided May 17, 1993. In Appeal No. 93259, the Appeals Panel reversed a hearing officer's decision that an IR had become final pursuant to Rule 130.5(e) because there had been a prospective date of MMI and consequently without a proper MMI there can be no valid IR and "[i]t follows that there was nothing to become final at the expiration of the 90 days and there was nothing for the claimant to dispute." That situation is clearly distinguishable from the instant case and the Appeals Panel did not hold that an error in an IR somehow invalidates the entire rating and MMI certification. We would further note that Dr. D's certification of MMI and the IR was not invalid on its face, and it was only some eight months later that Dr. D admitted he had not considered ROM and neurological deficit in preparing the IR. In Appeal No. 93489, *supra*, a hearing officer denied further TIBS holding that the MMI was final since it was not disputed within 90 days under Rule 130.5(e). The Appeals Panel in that case pointed out that Rule 130.5(e) is not absolute by saying:

> While giving a strict application to the provisions of Rule 130.5 and recognizing that the application of time limits can, by their very nature, appear to be harsh in a given case, there is a sound basis, as apparently determined by the Commission, to require some definitive finality in resolving claims. Nevertheless, the application of Rule 130.5 is not absolute and Appeal No. 92670 does not so hold. For example, if an MMI certification or [IR] were determined, based on compelling medical or other evidence, to be invalid because of some significant error or because of a clear misdiagnosis, then a situation could result where the passage of 90 days would not be dispositive. However, the particular circumstances must be evaluated in such a situation. We do not find that to be the case here. Rather, we find there is sufficient evidence to support the hearing officer's decision.

* * * *

> We pause to observe here that MMI does not mean there will not be a need for some further or future medical treatment and that the need for additional or future medical treatment does not mean that MMI was not reached at the time it was certified. Likewise, we have held that pain is not, in and of itself, an indication that MMI has not been reached and that a person assessed with a permanent impairment may continue to experience some pain as a result of an injury. [citation omitted.]
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> In the case at hand, there is no compelling evidence of a new, previously undiagnosed, medical condition or prior improper or inadequate treatment of the claimant's injury which would render the certification of MMI invalid.

We do not read Appeal No. 93489 as carving out broad new general categories of exceptions to Rule 130.5(e). Rather, we view that case as saying there may, under some circumstances, be such egregious medical conditions as to compel a finding that the passage of 90 days under Rule 130.5(e) would not be dispositive. The fact that Dr. D made an error in computation of his original IR does not arise to such an occasion. Claimant and claimant's attorney were aware of Dr. D's IR, and that it was the first IR. Claimant and claimant's attorney received the TWCC-21s from the carrier beginning IIBs, Claimant went back to Dr. D in September of 1992 with back complaints and claimant's attorney was sent a copy of Dr. D's note regarding the September 21, 1992, visit. As the Appeals Panel stated in Texas Workers' Compensation Commission Appeal No. 92670, decided February 1, 1993:

> [Rule 130.5(3)(e)] 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.

To logically extend claimant's argument in the instant case, anytime one of the parties, in a future case, could show an error in the first IR assigned to an employee, Rule 130.5(e) could be rendered inapplicable and theoretically the IR would be subject to dispute years later. Clearly Rule 130.5(e) was intended to provide closure if the IR is not disputed within 90 days, subject perhaps to some undefined egregious medical circumstance. In the instant case claimant and claimant's attorney had adequate time to review Dr. D's report; they were aware that claimant had gone back to the doctor and they could have determined that Dr. D had perhaps not considered all the impairment elements he should have in arriving at his IR. It is precisely for this reason that the parties are given 90 days pursuant to Rule 130.5(e) to consider whether they wish to dispute that rating as either being too high or too low. We see no basis upon which to disturb the hearing officer's determination that Dr. D's initial

certification of MMI and IR had not been disputed within 90 days and had therefore become final.

A recent Appeals Panel decision touching on the issues raised in the instant case and surveying other Appeals Panel decisions on this subject, is Texas Workers' Compensation Commission Appeal No. 94011, decided February 16, 1994. The decision in this case is intended to be consistent with Appeal No. 94011.

Claimant in his second point argues that he "did not have actual knowledge of the initial IR more than ninety days before disputing it." Claimant urges consideration of his limited understanding of the English language and his limited education. Appeal No. 93423, *supra*, does stand for the proposition that the time for disputing the [IR] runs from the time the claimant has actual knowledge of the rating. Appeal No. 93242 cited Texas Workers' Compensation Commission Appeal No. 92542, decided November 30, 1992, which explained the rationale behind this proposition as being "that it would require some stretch of the imagination to find that claimant could dispute a doctor's report before he was aware that it was rendered. Consequently it is when the claimant has actual knowledge of the . . . rating that becomes the more critical matter, rather than when it was rendered." We are unwilling to further graft onto that decision that not only must claimant have actual knowledge of the rating, but there must also be proof that the claimant understood the rating and its ramifications. Nothing in Rule 130.5(e) would lead one to such a conclusion. Further, in this case, claimant was represented by counsel and the hearing officer found, as fact, that claimant and his attorney were sent copies of Dr. D's August 24, 1992, letter assessing a 10% IR. Claimant's counsel was also sent a copy of all of Dr. D's progress notes (at least all that are in the record) including Dr. D's progress note of September 21, 1992. We agree with carrier's response that claimant, not having a good command of the English language, should have discussed the meaning of Dr. D's reports, the TWCC-21s and his IR with his attorney, nor would it have been untoward for the claimant's attorney to have made inquiry of the claimant's status, on his own initiative, after receiving Dr. D's certification of MMI and IR. We find no merit in claimant's contention on this point.

Finally, claimant argues that the designated doctor's opinion regarding MMI and impairment is designed to resolve those issues and should be given presumptive weight, citing Articles 8308-4.25(b) and 4.26(g) (since codified as Sections 408.122(b) and 408.125(e)). That is normally the situation; however, in the instant case, a designated doctor's opinion was obviated when the hearing officer found Rule 130.5(e) to be applicable. When Dr. D's revised IR became known and when claimant, by letter of May 10, 1993, asserted a new IR, the carrier, by TWCC-21, dated July 9, 1993, disputed the new IR and clearly asserted "[t]he first rating was not disputed within 90 days . . . as stated in Rule 130.5(e)." Because a designated doctor's opinion became unnecessary by the application of Rule 130.5(e), we agree with the hearing officer's determination that the opinion of the designated doctor was of no effect, and should not be considered.

In that the above is dispositive of the appeal, we need not address whether Dr. D and/or the center did or did not properly apply the AMA Guides to the Evaluation of

Permanent Impairment, third edition, second printing dated February 1989, as mandated by Section 408.124(b).

In summary, we cannot conclude that the hearing officer, who is the judge of the weight and credibility of the evidence pursuant to Section 410.165(a), was compelled, under the evidence presented, to find that Dr. D's initial certification of MMI and IR was a "significant error," as discussed in Appeal No. 93489, *supra*. Having reviewed the record, we find no reversible error and sufficient evidence to support the hearing officer's factual determinations. In considering all the evidence in the record, we find that the decision of the hearing officer is not so against the great weight and preponderance of the evidence as to be manifestly wrong and unjust. In re King's Estate, 244 S.W.2d 660 (Tex. 1951).

The decision and order of the hearing officer are affirmed.

Thomas A. Knapp
Appeals Judge

CONCUR:

Joe Sebesta
Appeals Judge

CONCURRING OPINION:

While I concur in the result reached by the majority, I am troubled by the issue in this case. The treating doctor assigned to claimant the first IR, namely, 10% for a surgically treated disc lesion with residual symptoms. The surgical treatment apparently included some type of bone graft and fixation. The treating doctor, some 10 months after assigning the first IR, frankly conceded that he did not consider impairment due to abnormal ROM and neurological deficits, in addition to impairment due to the specific spinal disorder, when he assigned the 10% IR. The AMA Guides provide for consideration of all three elements in determining an IR for a spinal injury. After becoming aware that he should have considered the ROM and neurological deficit elements of impairment, pursuant to the AMA Guides, the treating doctor then increased claimant's IR to 24% and a designated doctor determined claimant's IR to be 26%. It would seem possible, if not probable, that surgery involving a spinal internal fixation procedure could result in some permanent abnormal ROM, and that an IR which did not consider the element of abnormal ROM would be questionable.

The 1989 Act in Section 408.124 requires that an award of IIBS be made on an IR

which is determined using the AMA Guides and which requires the Commission to use the AMA Guides for determining the existence and degree of an employee's impairment. Even if claimant's IIBS were not paid on the basis of an award of the Commission, Rule 130.1(e) provides that if a doctor certifies that an employee has an impairment the doctor shall assign an IR based on the injury and further provides that "[a]ll certifications of impairment shall be made in compliance with the rating criteria contained in the [AMA Guides]." Rule 130.5(e) provides, without any stated exception, that the first IR assigned is considered final if not disputed within 90 days. It seems to me that if the first IR assigned is invalid on its face, it ought not to become final, and that it is arguable whether any patently invalid IR can ever become final. In the circumstances of this case, it is difficult to read Rule 130.5(e) in harmony with Section 408.124 and Rule 130.1(e). The strict application of Rule 130.5(e) involved in this case could appear to force the award or payment of an impairment benefit which was, concededly, not based on the AMA Guides and which, therefore, does not comport with the mandates of Section 408.124 and Rule 130.1(e). In Appeal No. 93489, *supra*, the Appeals Panel recognized that the application of Rule 130.5(e) is "not absolute" and observed that if an IR were determined, "based on compelling medical or other evidence, to be invalid because of some significant error or because of a clear misdiagnosis, then a situation could result where the passage of 90 days would not be dispositive." However, because I am not convinced from the evidence of record that claimant's surgery must inevitably have resulted in permanent abnormal ROM impairment, I am not prepared to say that the initial 10% IR was invalid as a matter of law and could not have become final notwithstanding claimant's failure to dispute it within 90 days.

Philip F. O'Neill
Appeals Judge