APPEAL NO. 94184

This appeal is brought pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act). On January 10, 1994, a contested case hearing (CCH) was held in (city), Texas, with (hearing officer) presiding as hearing officer. The sole issue at the hearing was: what is claimant's correct impairment rating? The hearing officer determined that the claimant had not reached maximum medical improvement (MMI) and therefore her correct impairment rating (IR) cannot be adequately determined. Appellant, (carrier), carrier herein, contended the hearing officer improperly held that the claimant had not reached MMI and thus refused to assess an IR. Carrier requests that we reverse the hearing officer's decision and adopt the IR of the designated doctor. Respondent, claimant herein, did not file a response.

DECISION

The decision and order of the hearing officer are affirmed.

The facts are not in dispute. Claimant was employed by one of carrier's schools, when she sustained a compensable "right knee, neck, upper and low back" (as recited in the designated doctor's report) lifting injury on (date of injury). Claimant sought treatment from (Dr. P) who eventually became her treating doctor. In a Report of Medical Evaluation (TWCC-69) dated August 25, 1992, Dr. P certified MMI on August 25th, with a 37% IR. Although not clear from the record, carrier asserts in its appeal that "[carrier] disputed [Dr. P's] impairment rating." By order dated November 10, 1992, the Texas Workers' Compensation Commission (Commission) ordered claimant to be examined by (Dr. H) for the purpose of: "Designated doctor requested to resolve dispute over: Impairment Rating." Claimant testified, through a translator at the CCH, how Dr. H's examination was conducted and asserted that Dr. H's technicians forced her to bend by actually pushing her into the desired position. Dr. H by TWCC-69 dated "12/18/92" reported "Restricted and painful range of motion of the neck and low back . . . . diffuse knee pain . . . . x-rays and MRI performed do show a herniated nucleus pulposus at lumbar 5-1 [sic, probably should be S-1]." Dr. H stated MMI had not been reached and gave an estimated MMI date of "(date)." Dr. H again examined claimant on February 9, 1993 (the circumstances of how or why claimant returned to Dr. H on that date are not evident in the record). Dr. H completed another TWCC-69, with the narrative stating substantially what he had found in his (month year) TWCC-69, again indicating claimant had not reached MMI, giving a prospective date of (date), (as before) but assessing a seven percent IR. Unlike his previous TWCC-69 in the space for objective or clinical finding of impairment, Dr. H wrote:

> The patient has undergone three attempts at spinal measurements. Each attempt shows significant variation of individual measurements and the tests are not valid according to validity criteria. She is given zero percent disability for loss of range of motion.

Dr. H's February 1993 TWCC-69 was made available to Dr. P for rebuttal. (It is unclear if Dr. P was also shown Dr. H's earlier (month year) TWCC-69). In response, by

report dated December 9, 1993, Dr. P gave detailed computations how he arrived at his IR and stated:

> The bottom line is the patient alleges that [Dr. H's] employees tried to force her to bend beyond her painful limitation which she obviously could not. I had no difficulty obtaining valid figures and found that limited range of motion that was within the patient's capability without producing excess pain was as shown in my figures. I assigned a 20% physical impairment. I then added 7% for the disease portion because of a herniated nucleus pulposus shown on MRI of 06/30/92.

At the CCH the argument and testimony dealt entirely with the accuracy of Dr. P's IR vis-a-vis Dr. H's IR and the fact that Dr. H's report, being the report of a designated doctor, has presumptive weight. Claimant argued that the presumptive weight of the designated doctor's report had been overcome by Dr. P's rebuttal.

The hearing officer found, citing Texas Workers' Compensation Commission Appeal No. 92517, decided November 12, 1992, that claimant had not reached MMI and therefore could not be assessed an IR. The hearing officer's order states that "The Commission is ORDERED to reschedule an appointment with the designated doctor." Carrier appeals, contending the hearing officer erred in refusing to assess an IR.

Initially carrier argues the designated doctor's report has presumptive weight which can only be overcome by the great weight of other medical evidence to the contrary, citing Section 408.125. Carrier also argues that if the great weight of the other medical evidence is to the contrary, the Commission "shall adopt the [IR] of one of the other doctors." (Emphasis in carrier's quotation.) *Citing* "TEX. LABOR CODE ANN. § 408.125 (VERNON SUPP. 1994)." We note the only other IR in the record is Dr. P's 37% IR.

However, the real point carrier raises is whether the hearing officer can base his decision on MMI when the only issue raised at the Benefit Review Conference (BRC) and the CCH--was "what is the claimant's impairment rating?" Carrier argues:

> Neither claimant nor [carrier] disputed the fact that Claimant had reached [MMI] on August 25, 1992 . . . . Further, Claimant made no complaint at the [CCH] [or the BRC] regarding the date of [MMI]. The only issue presented to the [CCH officer] was that concerning Claimant's [IR].
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> No finding was made by the [CCH officer] that "good cause" existed for not raising the issue at the earlier proceedings. As such, the hearing officer had no jurisdiction or authority to determine that Claimant had not reached [MMI].

The hearing officer clearly based his decision on Appeal No. 92517, *supra*, and the proposition "that an [IR] could not be assessed until [MMI] was reached." Carrier responded that the hearing officer's reliance on Appeal No. 92517, "is misplaced" because

in Appeal No. 92517 both the issue of MMI and IR were before that hearing officer. Carrier argues that is not the instant case because:

> [Dr. P] had already certified, without complaint, objection or dispute, that the Claimant had reached [MMI] on August 25, 1992.

All of which leads back to Dr. P's initial certification of MMI on August 25, 1992, with a 37% IR. Carrier seeks to dispute the 37% IR but wants the August 25th MMI date to be final. The Appeals Panel has squarely addressed this situation a number of times. In Texas Workers' Compensation Commission Appeal No. 93377, decided July 1, 1993, a carrier disputed the treating doctor's IR only and a subsequent designated doctor found a lower IR but a later MMI date, and the Appeals Panel held that where the IR is timely disputed, there is no basis to determine that the underlying certification of MMI has become final. Texas Workers' Compensation Commission Appeal No. 93391, decided July 5, 1993, has a similar factual situation to the instant case and referring to Tex. W. C. Comm'n, 28 TEX. ADMIN. CODE § 130.5 (Rule 130.5) quotes Appeal No. 93377 as follows:

> The pertinent Commission rule, Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 130.5(e) (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. While the rule does not expressly refer to MMI, this panel has held that it would be inconsistent to interpret the rule to bind a claimant or carrier to the percentage of impairment yet allow an "end run" around this finality through the open-ended possibility of an attack on MMI. *See* Texas Workers' Compensation Commission Appeal No. 92670, decided February 1, 1993. Thus a carrier or claimant who disagrees either with the first [IR], or the finding of MMI on which it was based, must make known such dispute within the 90 days required by the rule; a failure to timely dispute one element renders both final, as impairment and MMI have been held to be intertwined for these purposes.
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> This case, of course, involves a situation where the carrier timely disputed impairment only. Applying the same logic by which we determined that in the absence of any timely dispute MMI and impairment either become final together, or not, it appears to us that if the first [IR] has not become final because of timely dispute, it would follow that, under Rule 130.5(e) there is no basis to determine that MMI has become final. As we stated in Texas Workers' Compensation Commission Appeal No. 92693, decided February 8, 1993, in which the failure to timely dispute impairment made that rating final as well as the certification of MMI, "[a]s noted in Appeal No. 92670, *supra*, MMI and [IR] become intertwined in applying the provisions of Rule 130.5."

Similarly the Appeals Panel held, in Texas Workers' Compensation Commission Appeal No. 93410, decided July 8, 1993, applying the reasoning of Appeal Nos. 92670 and 93377, where only the IR was timely disputed, that if the first IR (in this case Dr. P's IR) has

not become final because it was timely disputed, then there is no basis to determine that the underlying certification of MMI has become final. *See also* Texas Workers' Compensation Commission Appeal No. 93529, decided August 2, 1993.

In the present case, just as in Appeal No. 93377, *supra*, the carrier timely disputed impairment only and argues that MMI had become final, or at least is not an issue, because it was not disputed by either party. We find Appeal No. 93377 controlling, and based on the foregoing cited cases, we find that the hearing officer was correct in determining that the issue of MMI was not final, based upon Dr. P's original certification of MMI. That being the case, and noting that the Appeal Panel has long held MMI must be achieved before an IR can be assigned (Appeal No. 92670), the designated doctor has not issued a valid IR, because he believed claimant has not reached MMI. We find no error in the hearing officer's decision referring claimant back to Dr. H for an IR after Dr. H certifies MMI has been reached.

The decision and order of the hearing officer are affirmed.

Thomas A. Knapp
Appeals Judge

CONCUR:

Joe Sebesta
Appeals Judge

Alan C. Ernst
Appeals Judge