APPEAL NO. 94219

This appeal arises under the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq*. (1989 Act). A contested case hearing was held in (city), Texas, on November 9, 1993, (hearing officer) presiding, to consider the disputed issue unresolved at the Benefit Review Conference, namely, should the finding of maximum medical improvement (MMI) and the impairment rating (IR) of five percent assigned to the respondent (claimant) by his treating doctor on or about January 4, 1993, be considered final for not having been disputed within 90 days as required by Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 130.5(e) (Rule 130.5(e)). The hearing officer's decision states that the following issue "was added because it was actually litigated": "Should the finding of [MMI] and the [IR] of five percent (5%) assigned by [Dr. P and/or treating doctor] on or about January 4, 1993, be considered valid." In its request for review, the appellant (carrier) takes issue with the addition of the IR validity issue asserting that it did not consent to litigating such issue at the hearing, that the evidence of the parties was required on the IR finality issue from the BRC and thus its introduction did not amount to litigation by consent on the validity issue, and that the hearing officer could not decide the validity issue because the designated doctor procedures of the 1989 Act had not been invoked. Beyond the matter of the so-called additional issue, the carrier disagrees with the hearing officer's factual finding that the treating doctor's certification of MMI and assignment of the IR "was not valid because the doctor did not intend for the [IR] to apply to Claimant's whole body," as well as with the legal conclusions that claimant's MMI date and IR cannot be considered final and were not valid. The carrier's position was and continues to be that the January 4, 1993, MMI date and five percent IR assigned to claimant on January 4, 1993, by his treating doctor were not disputed until mid-May 1993, that they thus became final under the 90-day rule (Rule 130.5(e)), and that the hearing officer erred in undoing such finality based on the treating doctor's amended report because there was no compelling medical evidence of significant error or clear misdiagnosis by the treating doctor in his initial report. The respondent (claimant) did not file a response.

DECISION

Affirmed.

According to his testimony and medical records history, claimant, a long haul truck driver, was in (city), Texas, on (date of injury), and while being lifted up on a forklift to reach the tie-down lock on his truck, the forklift driver applied the brakes. Claimant fell onto the truck cab and struck his head, lost his dental bridge and loosened some teeth, and injured his left arm and wrist. Claimant was able to drive back to (city) where he sought treatment at a hospital emergency room on June 29th and was found by his treating doctor, Dr. P, to have a fractured left distal radius which was casted. Dr. P's note of June 29th also stated that claimant said he struck the left side of his head but did not lose consciousness, and that it was "minimally bothersome to him now." A report by (Dr. A) reflecting a visit on July 9, 1992, stated that claimant was "still having a throbbing pain to left side of head," diagnosed a "concussion w/o unconsciousness," and stated a prognosis that "mild concussion may present headaches for 6 mos. to a year after injury." A July 15, 1992, report indicated that

Dr. P had referred claimant to the (the Institute) for recurring headaches and that he was there diagnosed with acute posttraumatic headache, severe paracervical and trapezius muscle spasm, and blurred vision. Dr. P's July 29, 1992, report reflected that claimant had a history of post-injury headaches and was being seen at the Institute. Dr. P referred claimant for therapy on his left arm and on October 2nd reported that claimant still had not been able to resume his regular work and was to be tested for carpal tunnel syndrome (CTS). On October 9, 1992, Dr. P diagnosed post-traumatic left CTS. On October 20, 1992, claimant underwent a left carpal tunnel release and on December 28, 1992, Dr. P examined claimant and reported that he had "good function in his upper extremity" and could return to his regular work "effective 1-4-93." Claimant and his wife testified that upon the conclusion of this examination, as they had done in the past, they listened to Dr. P dictate his notes of the visit and heard him state that claimant had five percent disability. Claimant also said that upon hearing that he had five percent disability, he assumed he would not be receiving further income benefits checks from the carrier.

The Institute records showed that claimant was seen monthly after his initial visit of July 1992. The December 4, 1992, record reflected that claimant's headaches were "better," that he was having fewer of them, that medication was stopping the acute headaches, that he brought no headache journals for review, discontinued medications due to anxiety, did not wish to continue biofeedback, and was anxious to return to work. The Institute records did not indicate whether copies were provided to Dr. P.

Dr. P signed a Report of Medical Evaluation (TWCC-69) certifying that on "01-04-93" claimant reached MMI with a whole body IR of five percent. This form also reflected the "body part/system" as "loss of flexion/extension wrist motion" and the "rating" as "5% whole body."

Claimant testified that beginning in January 1993 he began to receive checks from the carrier in an amount different from those he had been receiving since his accident and said he became concerned about his entitlement to them so he had his niece call the carrier to inquire. A carrier record reflected that on February 10, 1993, the carrier's adjuster explained impairment income benefits (IIBS) to claimant's niece. Claimant said his niece, in turn, related the information to him and he understood he would receive 15 checks for IIBS. Claimant estimated this conversation to have occurred sometime in February 1993. Claimant also testified to having received a document from the carrier at about the time he received the second IIBS check indicating his IR of five percent. The parties stipulated that after receiving temporary income benefits, claimant received IIBS based on Dr. P's five percent IR. The Appeals Panel has held that the time for disputing an IR under Rule 130.5(e) runs from the time the claimant has actual knowledge of the IR. *See* Texas Workers' Compensation Commission Appeal No. 93423, decided July 12, 1993. Claimant did not take the position that he disputed Dr. P's IR within the 90 day period required by Rule 130.5(e). Rather, claimant's position was that Dr. P's MMI date and IR were invalid in that Dr. P never contemplated such to apply to claimant's headache condition which was being treated by another medical entity, and that Dr. P later amended his TWCC-69 to so reflect.

Claimant testified that in January 1993 he resumed his truck driving work and felt his arm injury was essentially resolved, but that he continued to suffer from headaches which were at times very severe. He said he sought further headache treatment which even included a period of hospital treatment for a few days, and that as of the hearing date he remained under the care of the Institute. According to the Institute records, claimant was not seen after December 4, 1992; however, his wife called on April 26, 1993, seeking an appointment for him for complaints of daily, intense headaches even interfering with his sleep. Claimant explained that because of his truck driving trips, he had difficulty arranging an earlier appointment. Claimant was seen on May 4, 1993, and asked the Institute "to restart headache management" for his daily headaches. The May 18th record indicated that claimant underwent a "trigger point" treatment under anesthetic, a procedure apparently performed at a hospital, that the doctor's assessment was posttraumatic headaches and paracervicular muscle spasms, and that the doctor had tried multiple medications to which claimant developed side effects.

Dr. P's letter of June 1, 1993, to the Texas Workers' Compensation Commission (Commission) stated:

> It has been brought to my attention that the TWCC #69 form that I filled out on [claimant] on 1-4-93 wherein I gave him a 5% whole body disability was incorrect and should have related that patient had a 5% upper extremity disability.
>
> I have been treating [claimant] for a fracture of the left distal radius since 6-29-92.
>
> I apologize for any inconvenience this may have caused your office or my patient.

Accompanying this letter was a copy of Dr. P's TWCC-69 which had typed next to the five percent IR the words "upper extremity." The parties stipulated that Dr. P "amended his report" in this manner. The Appeals Panel has held that "in certain circumstances both a treating doctor and a designated doctor may amend a previous determination of a date of MMI and the assignment of an IR [citations omitted]." Texas Workers' Compensation Commission Appeal No. 94124, decided March 15, 1994.

The Institute's June 22, 1993, record reflected that claimant's present treatment plan was to be continued; a July 15, 1993, record stated that claimant was distressed by lack of income and wanted to be released to return to work but that the doctor was not persuaded that claimant was ready to return to work and wanted a neuropsychological evaluation (performed on August 13, 1993). On September 1, 1993, (Dr. Z) of the Institute stated that while claimant continued under the Institute's care for post-concussion headaches, he has shown dramatic improvement and was that day being released to return to work without restrictions.

In a letter to Dr. P of September 23, 1993, claimant's attorney stated that at the BRC on September 23, 1993, the carrier took the position that Dr. P's IR assigned on January 4,

1993, pertained to claimant's entire injury whereas claimant's position was that it pertained only to his upper extremity and did not purport to state that claimant had reached MMI with respect to his headache condition. Dr. P responded on October 1, 1993, that the claimant's attorney presumed correctly, that as an orthopedic surgeon Dr. P could only determine MMI for claimant's upper extremity problems and not for his headache problems, and that he saw them as entirely separate issues.

We find no merit in the carrier's assertions respecting the hearing officer's having added a second "issue." In our view, though terming it as the addition of another issue, the hearing officer's action was essentially a clarification of the issue framed at the BRC. The hearing officer realized that in order to determine whether the five percent IR that Dr. P assigned and, necessarily, the January 4, 1993, date of MMI certified to, had become "final" under Rule 130.5(e), it would be necessary to consider the "validity" of Dr. P's IR and MMI date. Under the circumstances of this case, the "validity" issue was subsumed in the "finality" issue, the issues were two sides of the same coin, inextricably intertwined, and, in reality, one and the same issue. *See* Texas Workers' Compensation Commission Appeal No. 94213, decided April 5, 1994, where the Appeals Panel considered a somewhat similar situation and indicated that while "the hearing officer should refrain from creating issues not joined by the parties [Texas Workers' Compensation Commission Appeal No. 92071, decided April 9, 1992]," the hearing officer "may correct the issue as stated, or clarify it [Texas Workers' Compensation Commission Appeal No. 93958, decided December 3, 1993.]"

We also find to be without merit the carrier's position concerning the particular factual finding and two legal conclusions challenged. The evidence sufficiently supports the finding that Dr. P's certification of MMI and assignment of the five percent IR on January 4, 1993, were not "valid" because Dr. P "did not intend for the [IR] to apply to claimant's whole body." We are troubled by the hearing officer's using the term "valid" in this case insofar as such term could be read to mean void as distinguished from merely flawed; and we observe that Dr. P's certification of MMI and assignment of an IR cannot be said to be invalid insofar as they relate to the body part/system (upper extremity) intended to be covered. Dr. P, had he so intended, could have certified an MMI date and assigned an IR covering the entirety of claimant's injuries notwithstanding that he was not personally treating all of the injuries. Dr. P, however, amended his report to correct a misperception that the MMI date and IR he determined applied to the entirety of claimant's injuries rather than just to the injury Dr. P was treating. That having been said, we view the finding as sufficiently supporting the challenged conclusions that Dr. P's IR and MMI date were not "valid" and cannot be considered to have become final.

Rule 130.5(e) provides that the first IR assigned is considered final if the rating is not disputed within 90 days after being assigned. Though the Rule speaks specifically to the IR, the Appeals Panel has held that the rule also applies to the determination of MMI as well since once an IR is assigned, both MMI and the IR become final if neither is disputed within the 90 day period. *See* Texas Workers' Compensation Commission Appeal No. 93377, decided July 1, 1993; and Texas Workers' Compensation Commission Appeal No. 92670,

decided February 1, 1993. Further, in Appeal No. 92670, *supra*, the Appeals Panel agreed "with the principle that an assignment of impairment for an injury other than the compensable injury would not start the 90-day deadline . . . . "

The case we consider stands in contrast with the facts in Texas Workers' Compensation Commission Appeal No. 92693, decided February 8, 1993, which involved separate back and shoulder injuries and a dispute over the MMI and IR certified for only the back injury. In that case, the claimant injured his shoulder on September 4, 1992, and his back on September 15, 1992, in two separate accidents at work. Initially, the same doctor treated both injuries but eventually referred claimant to another doctor for continued treatment of his shoulder. The doctor treating his back later certified the claimant to have reached MMI with respect to his back injury and assigned an IR for that injury. The hearing officer found that the claimant continued to receive treatment for his shoulder injury for which MMI had not been reached and that finding was not appealed.

In Texas Workers' Compensation Commission Appeal No. 93489, decided July 29, 1993, the employee underwent surgery on her injured knee by her treating doctor who subsequently certified she had reached MMI and assigned her an IR. The employee said she was unaware of the 90 day rule. Approximately four months later and still having pain, the employee changed treating doctors and the new treating doctor performed another surgical procedure some five months later. The employee said the second operation dramatically improved her knee, and the new treating doctor felt that the employee had not yet reached MMI. The hearing officer determined that the first MMI date became final under Rule 130.5(e). The Appeals Panel did not find compelling medical or other evidence to invalidate the MMI, did find that the failure to dispute the MMI or IR within 90 days resulted in the MMI date becoming final as determined by the hearing officer, and stated the following:

> While giving a strict application to the provisions of Rule 130.5(e) 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(e) is not absolute and Appeal No. 92670 does not so hold. For example, if an MMI certification or impairment rating 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.

Compare Texas Workers' Compensation Commission Appeal No. 94049, decided February 18, 1994, where the treating doctor amended claimant's IR from 10% to 24% and said that when he assigned the 10% IR for spinal injury, he had failed to consider impairment

for loss of ROM and for neurological deficit. The hearing officer found the initial 10% IR to have become final under Rule 130.5(e). The Appeals Panel affirmed saying Appeal No. 93489 was not read "as carving out broad new general categories of exceptions under Rule 130.5(e)." *And see* Texas Workers' Compensation Commission Appeal No. 94011, decided February 16, 1994, and its summary of other decisions concerning the finality of an IR under Rule 130.5(e) and changed circumstances.

In the case at hand, we are satisfied there is compelling evidence of the treating doctor's having erred in certifying to claimant's having reached MMI and in assigning a whole body IR because, as found, Dr. P had only claimant's upper extremity injury in mind. Dr. P had referred claimant to the Institute for treatment of his posttraumatic headache condition which resulted from the same accident, and there was no indication in the medical records that Dr. P was following the course of that treatment or even considered claimant's status relative to his headache condition when he determined the date of MMI and claimant's IR. When the matter was called to his attention, Dr. P readily acknowledged such to be the case.

We do not find the challenged factual finding and legal conclusions to be so against the great weight and preponderance of the evidence as to be manifestly unjust. Pool v. Ford Motor Co., 715 S.W.2d 629, 635 (Tex. 1986); In re King's Estate, 244 S.W.2d 660 (Tex. 1951).

The decision and order of the hearing officer are affirmed.

Philip F. O'Neill
Appeals Judge

CONCUR:

Stark O. Sanders, Jr.
Chief Appeals Judge

Gary L. Kilgore
Appeals Judge