APPEAL NO. 94222

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 on January 10, 1994, in (city), Texas, to determine the issues of claimant's correct impairment rating (IR) and maximum medical improvement (MMI) date. At the carrier's request, the hearing officer found good cause to add the issue of whether the claimant was bound by the MMI date and IR assigned by the IME (independent medical examination) doctor because not disputed within 90 days.

The hearing officer, (hearing officer), held that the report of the IME doctor was not received in a timely manner by claimant or his representative, that the claimant contested that doctor's report within a reasonable period of time which was within 90 days of its receipt, and that the report of the designated doctor, which found MMI on July 30, 1993, with an 11% IR, should be given presumptive weight.

In its appeal the carrier seeks this panel's reversal of the hearing officer's decision because, it argues, the claimant did not dispute the initial assessment of MMI and impairment within 90 days, although it was acknowledged that claimant received that doctor's report. The carrier also argues that the great weight of the other medical evidence is contrary to the report of the designated doctor. The claimant did not file a response.

DECISION

We reverse the decision and order of the hearing officer and render a new decision that the claimant's first IR was not timely disputed and hence became final pursuant to Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 130.5(e) (Rule 130.5(e)).

That the claimant suffered an injury on (date of injury), in the course and scope of his employment with (employer) was not in dispute. Claimant, whose injury was to his left wrist, was treated by Dr. B and later by (Dr. W). At the carrier's request the claimant was examined by (Dr. C) on December 22, 1992. On that date, Dr. C wrote carrier's adjuster a letter which stated claimant had reached MMI as of December 21, 1992, with an eight percent whole body impairment based upon 15% for his hand and wrist. On December 28th, Dr. C completed a Report of Medical Evaluation (Form TWCC-69) which gave the same MMI date and IR; while it does not specifically reference the December 22nd letter, carrier's attorney averred that the carrier received both documents together. The December 22nd letter shows that copies were sent to claimant's attorney and to Dr. W.

Although the claimant did not testify, his attorney took the witness stand and stated that while "we" (presumably he and the claimant) received Dr. C's December 22nd report on December 24th, "we" did not see the TWCC-69 until after it was referenced in Dr. W's later report (on March 31, 1993, Dr. W wrote that he agreed with Dr. C's assessment of MMI and IR, and on April 1st he completed a TWCC-69 to that effect). On May 19th claimant's attorney wrote the Texas Workers' Compensation Commission (Commission) disputing Dr. W's impairment rating and seeking the appointment of a designated doctor. The

designated doctor, (Dr. O), found the claimant to have reached MMI on July 30, 1993, the day he examined him, with an 11% IR.

Claimant's argument at the hearing was that although he received Dr. C's report on December 24th, two days after it was prepared, he never received the TWCC-69 until sometime after Dr. W's April 1993 report made reference to it. Moreover, he argued, Rule 130.3 requires that a doctor who certifies MMI must complete a medical evaluation report pursuant to Rule 130.1, which says that all reports shall be on a form prescribed by the Commission. The carrier argued that it believed the TWCC-69 and the report were sent together (as it received them together); that even if the TWCC-69 were not sent to claimant's counsel, it believed the form was sent to the claimant, whose name and address appeared on the form; and that substantial compliance with Rules 130.1 and 130.3 is required, and Dr. C's narrative contained all elements and information required by Commission rule.

The hearing officer held that Dr. C's report was not received in a timely manner by claimant or claimant's representative; that claimant contested Dr. C's report within a reasonable period of time which was within 90 days of its receipt; and that the designated doctor's report, which found MMI on July 30, 1993 with an 11% IR, is entitled to presumptive weight.

Rule 130.5(e) provides that the first IR assigned to an employee is considered final if the rating is not disputed within 90 days after the rating is assigned. The Appeals Panel has held that the 90 days begins to run when the claimant becomes aware of the rating, not necessarily the date on which it is "assigned" by the doctor. Texas Workers' Compensation Commission Appeal No. 92693, decided February 8, 1993. The evidence in this case unequivocally shows the claimant and his attorney received Dr. C's narrative, which contained the eight percent IR, on December 24, 1992, and thus were presumably aware of such IR on that date. The remaining question is whether the claimant was nevertheless relieved of the obligation to dispute this IR because of Dr. C's failure, if such is the case, to transmit to him the TWCC-69. (There does not appear to be a contention that Dr. C's report was not in substantial compliance with Rule 130.1; indeed, the bulk of the information required by a TWCC-69 was contained in Dr. C's narrative and not in the form itself.)

In a somewhat similar case, Texas Workers' Compensation Commission Appeal No. 92670, decided February 1, 1993, the Appeals Panel held that the fact that the doctor used a Subsequent Medical Report (Form TWCC-64) rather than a TWCC-69 did not excuse compliance with Rule 130.5(e), where the facts showed the doctor attached a narrative which, together with the TWCC-64, incorporated all the information required on the TWCC-69. In another case more directly on point, Texas Workers' Compensation Commission Appeal No. 93330, decided June 10, 1993, the claimant and her attorney received a Form TWCC-21 and other reports indicating that her doctor had given an MMI date and assigned an IR. The Appeals Panel in that case rejected the claimant's argument that, notwithstanding the other evidence of notification, the 90 day period began to run from actual receipt of the TWCC-69.

Our review of the evidence shows that Dr. C's was the first IR assigned to claimant, who did not dispute it within 90 days of when he became aware of such IR being assigned. Based on this evidence, we reverse the hearing officer's decision and order, and render a new decision and order that the claimant reached MMI on December 21, 1992, with an eight percent IR, as found by Dr. C.

Lynda H. Nesenholtz
Appeals Judge

CONCUR:

Stark O. Sanders, Jr.
Chief Appeals Judge

Alan C. Ernst
Appeals Judge