APPEAL NO. 94233

This appeal arises under the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq*. (1989 Act). A contested case hearing (CCH) was held in (city), Texas, on October 4, 1993, (hearing officer) presiding as hearing officer. She determined that (Dr. JT) determination of maximum medical improvement (MMI) effective January 15, 1992, became final at the end of 90 days from the date claimant received his report by operation of Tex. W. C. Comm'n, 28 TEX. ADMIN. CODE § 130.5(e) (Rule 103.5(e)). The appellant (claimant) asserts error in the hearing officer's determination that claimant reached MMI by operation of Rule 130.5(e), in failing to dispute the doctor's certification within 90 days of notice or knowledge of the certification. The respondent (carrier) initially maintains that claimant's appeal is untimely. In the alternative, carrier asserts that there is sufficient evidence to support the decision of the hearing officer and that she correctly applied Rule 130.5(e) in this case.

DECISION

Finding that the appeal was timely filed and further finding no error in the hearing officer's conclusions of law and sufficient evidence to support her factual findings, the decision and order are affirmed.

It is undisputed that claimant suffered a compensable back injury on (date of injury), in the course and scope of her employment with (employer). Following her injury, claimant sought treatment from her family physician, (Dr. L). After initial treatment with Dr. L, claimant self-referred to (Dr. K). After one consultation, Dr. K referred claimant to (Dr. C) at the Texas Institute for Rehabilitation and Research. Apparently, claimant was going to have to wait several months to schedule an appointment with Dr. C; thus, the referral was changed to (Dr. NT) at the Texas Back Institute. Claimant's treatment with Dr. NT continued from on or about November 6, 1991 to April 1, 1992, when Dr. NT issued a TWCC-69 report, certifying that claimant had reached MMI on April 1, 1992, with an impairment rating of zero percent. In January 1992, claimant was examined by (Dr. JT), a doctor chosen by the carrier. On January 15, 1992, Dr. JT issued a TWCC-69 report certifying that claimant reached MMI as of the date of the report (January 15, 1992), with an impairment rating of zero percent. It is undisputed that Dr. JT's certification and assignment were the first certification of MMI and assignment of impairment assessed to claimant.

On June 4, 1992, claimant filed a form entitled "Employee's Request for Third or Subsequent Treating Doctor" with the Texas Workers' Compensation Commission (Commission), stating "Limitations still exist. Cannot perform work tasks, pain keeps me from being able to do much at all. I have not recovered." That request apparently resulted in the scheduling of a Benefit Review Conference (BRC) on November 18, 1992. At the BRC, the request for a third treating doctor was approved and claimant was referred to (Dr. C). Dr. C disagreed with Dr. JT's certification of MMI. The claimant was then evaluated by (Dr. E), the Commission-selected designated doctor, on March 29, 1993. Dr. E completed an Initial Medical Report (TWCC-61), in which he opined that claimant had not

reached MMI, stating that he would leave the determination of MMI to claimant's treating doctor, Dr. C.

The hearing officer found that claimant did not dispute Dr. JT's January 15, 1992, certification of MMI or impairment rating (IR) until the November, 18, 1992, BRC. Thus, as will be more fully discussed below, the challenge came too late to avoid the operation of Rule 130.5(e).

We first address the timeliness argument raised in the carrier's response. Carrier notes that the decision and order of the hearing officer are dated November 16, 1993. Carrier asserts that, assuming the decision was mailed on the day it was decided, under Rule 102.5(h) of the Commission, we can deem that claimant received the decision no later than November 21, 1993, five days after it was mailed. Thus, according to the carrier, pursuant to Rule 143.3(c) of the Commission, the appeal herein would be timely only if it were mailed on or before the 15th day after receipt of the hearing officer's decision and received by the Commission and the opposing party not later than the 20th day after receipt of the decision. Thus, carrier alleges that claimant had until December 6, 1993, to file her Request for Review. Carrier's argument is not persuasive under the circumstances presented here. The Commission files reveal that the hearing officer's decision was not transmitted by the Commission to the parties until February 2, 1994. Thus, under the normal operation of Rule 143.3(c), claimant's request was to be filed by February 22, 1994.

Claimant's Request for Review was filed February 24, 1994. Thus, at first blush, it appears that the appeal may be untimely. However, the record reveals that the Commission inadvertently used the incorrect mailing address for both the claimant and her attorney in sending out the hearing officer's decision. The record further reveals that in a Request for Rescheduling of Contested Case Hearing dated August 8, 1993, claimant's attorney apprised the Commission of its use of an incorrect address in sending out the order scheduling the CCH and provided the correct address for both the claimant and himself. It should also be noted that about a year earlier, claimant had advised the Commission of her correct address, apparently to no avail. Claimant states in her brief that she received the hearing officer's decision on February 22, 1994. Because it is the date of receipt which triggers the running of Rule 143.3(c), we find that the appeal was timely filed. Claimant filed her Request for Review on February 24, 1994, just two days after she received the hearing officer's decision; thus, it was filed well within the time limits of Rule 143.3(c). Our decision is only reinforced by the fact that the hearing officer's decision was mailed to claimant at the incorrect address, despite her two previous attempts to change her address with the Commission. Because we find that the appeal was timely filed, we will proceed to a determination of the appeal on its merits. *See* Texas Workers' Compensation Commission Appeal No. 92090, decided April 24, 1992. (Where the hearing officer's decision was mailed to the claimant and thereafter returned to the Commission requiring remailing, the period of time for filing the appeal was extended.)

The only issue on appeal is whether Dr. JT's certification of MMI as of January 15, 1992, became final pursuant to Rule 130.5(e), because claimant failed to timely dispute it. 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.

At the CCH, claimant's attorney admitted that claimant had not challenged Dr. JT's assigned impairment rating of zero percent within the 90-day period prescribed in Rule 130.5(e), acknowledging that he was precluded from doing so under the rule; however, he argued that nothing prevented a challenge to MMI after the passage of 90 days. It is well-settled however, that where an impairment rating becomes final through the operation of Rule 130.5(e), the underlying certified MMI also becomes final. In Texas Workers' Compensation Appeal No. 92670, decided February 1, 1993, the Appeals Panel stated:

> This rule 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.
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> Although the 1989 Act contains no express deadline for raising these disputes, this does not render the rule fatally defective. The Commission has the general grant of authority to make rules to implement and enforce the Act. Article 8308-2.09(a). The Commission has evidently determined the point at which both parties may rely on an MMI and impairment rating to ensure stable payment of benefits. It is not up to the Appeals Panel to second-guess the wisdom of this rule, nor do we have the power to invalidate it. *See* Bullock v. Hewlett-Packard Co., 628 S.W.2d 754 (Tex. 1982); Article 6252-13a, § 12 (Texas Administrative Procedure and Texas Register Act).
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> We may, however, interpret agency rules to the facts at hand. Rule 130.5 does not expressly refer to MMI. But an impairment rating cannot be assigned, and made final, absent a certification of MMI. *See* Article 8308-4.26(d). It would be inconsistent to interpret the rule to bind a claimant or carrier to the percentage of impairment, but allow an "end run" around this finality through an open-ended possibility of attack on the MMI. Such an interpretation would read the rule out of existence. Therefore, in this case, the impairment rating and MMI certification are intertwined, and either became final together, or not. *See* Texas Workers' Compensation Appeal No. 92561, decided December 4, 1992.

See also Texas Workers' Compensation Commission Appeal No. 93377, decided July 1, 1993 ("[A] carrier or claimant who disagrees either with the first impairment rating, or the

finding of MMI on which it is 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.") and Texas Workers' Compensation Commission Appeal No. 92693, decided February 8, 1993 (Claimant's failure to timely dispute the impairment rating under Rule 130.5(e) renders the impairment rating and underlying certification of MMI final.). Where, as here, a party does not dispute the first certification of MMI and assignment of an impairment rating within the 90-day time frame established in Rule 130.5(e), both become final by operation of the rule. Therefore, the hearing officer correctly determined that Dr. JT's assessment of MMI and IR became final because of claimant's failure to voice her dispute therewith within 90 days of the date she was notified of or had knowledge of Dr. JT's certification. *See* Texas Workers' Compensation Commission Appeal No. 93320, decided June 1, 1993 (It is the date party is notified or has knowledge of IR, which triggers the running of the 90-day period.).

In Texas Workers' Compensation Commission Appeal No. 93489, decided July 29, 1993, the Appeals Panel noted that:

the application of Rule 130.5 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 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.

In her appeal, claimant appears to assert that Dr. JT's MMI should not be dispositive under the operation of Rule 130.5(e) because it was rendered by a doctor chosen by the carrier. We note that there is nothing in the plain language of Rule 130.5(e) which would excuse a party from the operation of the rule in the case where MMI and IR were first assessed by a doctor chosen by the opposing party. Similarly, although Appeal No. 93489 acknowledges that there may be instances where the passage of 90 days would not be dispositive, in order to come within the possible exception noted therein, a party is required to assert significant error or clear misdiagnosis. An assertion of bias in the certification of MMI because the certifying doctor was chosen by the carrier falls far short of the type of showing required to raise a challenge to the validity of the finality of the MMI under the operation of Rule 130.5(e). We find no basis for disregarding finality merely because it was the carrier's doctor who first certified MMI and agree that claimant's failure to dispute MMI within the time required in Rule 130.5(e) resulted in it becoming final and no longer subject to challenge.

Finally, claimant asserts in her request for review that the carrier improperly suspended temporary income benefit (TIBS) payments solely on the basis of Dr. JT's certification of MMI. It is undisputed that the only issue raised at the CCH was whether the claimant had reached MMI, and if so, on what date. Because the issue concerning the carrier's suspension of TIBS was not raised below, and we have held that new issues may not be raised on appeal, we will not further address this matter in this decision. *See* Texas Workers' Compensation Commission Appeal No. 91057, decided December 2, 1991.

For the foregoing reasons, the decision and order of the hearing officer are affirmed.

Stark O. Sanders, Jr.
Chief Appeals Judge

CONCUR:

Philip F. O'Neill
Appeals Judge

Alan C. Ernst
Appeals Judge