APPEAL NO. 94241

This appeal arises under the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq*. (1989 Act). On October 18, 1993, a contested case hearing was held in (city), Texas, with (hearing officer) presiding as hearing officer. The record was closed on January 31, 1994. The only issue presented for resolution from the benefit review conference (BRC) was: "What is CLAIMANT'S correct impairment rating?" The hearing officer determined that the "issue is not ripe for adjudication" and ordered the Commission to advise the parties that they have 10 days to agree on a designated doctor and failing that, the "Commission shall designate a doctor to determine CLAIMANT'S correct impairment rating and MMI date."

Appellant, carrier herein, contends that the hearing officer erred in failing to consider Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 130.5(e) (Rule 130.5(e)), that claimant's first impairment rating (IR) had become final because it had not been disputed within 90 days, and in the alternative that the hearing officer's determination that the ". . . [IR] originally assigned was not properly calculated is not supported by the evidence." Carrier requests that we reverse the hearing officer's decision and render a decision that the initial impairment rating assessed became final due to the lack of a timely dispute. Claimant did not file a response.

DECISION

The decision and order of the hearing officer are reversed and we remand the decision to the hearing officer for further consideration whether, under Rule 130.5(e), the first impairment rating assigned to claimant was disputed within 90 days and, if not, has that rating become final.

The facts of the case are sketchy, however, it was stipulated that on or about (date of injury), claimant sustained a compensable injury in the course and scope of employment. The medical records indicate claimant was employed by (employer), employer herein, and while moving a pallet of materials, collided with another pallet causing claimant to jerk and injure his lower back. Claimant sought treatment with (Dr. S), who treated him with physical therapy and requested an MRI. Dr. S on an Initial Medical Report (TWCC-61) dated December 17, 1991, diagnosed "acute saceroititis (sacroiliac dysfunction)." (Dr. K) performed the MRI on December 16, 1991, and found "[s]mall central disc herniation protruding in the midline at the L5-S1 level. Degenerative changes at the L5-S1 disc. Hypolordotic curvature." Dr. S then referred claimant to (Dr. W) for neurosurgical consultation. Dr. W became claimant's treating doctor from January 1992, to the date of the CCH (October 18, 1993).

Dr. W, in a narrative report dated December 20, 1991, recounts claimant's history, physical exam, neurological testing and notes his:

IMPRESSION:1)Degenerative disc disease with left lower extremity radicular symptoms.
2)Near normal neurological exam.

RECOMMENDATIONS: The patient does have mechanical findings and probably does have some nerve irritation on the left side. I would be interested in seeing his scans. If he has a small disc herniation, more than likely he can be managed conservatively in view of his good neurological function. If it's a large fragment there might be a surgical consideration here. He was instructed to get his scan and his MRI and bring them by for my review.

In a progress note dated "January 2, 1991 [sic-should be 1992]" Dr. W reviewed claimant's x-rays and MRI, noted a "shuffling in his gain [sic], limping, says he's in agonizing pain all the time . . . yet he's taking no medications." Claimant was advised to return to Dr. S and to have a "psychological assessment." A follow-up progress note of April 3, 1992, indicates no improvement and Dr. W notes: "I do not feel that [claimant] would benefit from surgery but perhaps deserves a second opinion neurosurgically. . . ." A May 18, 1992, progress note indicates claimant was seen by (Dr. P) "who documented his findings and recommended . . . MMPI testing. He did not feel surgery was indicated. . . ." Dr. W recommended a rehabilitation center and noted a return to work "is contraindicated." Follow-up progress notes dated June 17, June 24, July 13, July 29, and August 26, 1992, noted entry into and subsequent discharge from a back work hardening program (termed "unsuccessful") but no appreciable change of condition. The August 26th note indicates that the claimant had been advised to see a psychiatrist but ". . . his lawyer . . . told him not to go see the psychiatrist."

A brief progress note by Dr. W, dated August 31, 1992, states: "Insurance company request a disability rating. I would rate this patient at 10 percent permanent partial neurological disability." An undated Report of Medical Evaluation (TWCC-69) certifies MMI, with the words "whole body" stricken out and handwritten "only neurological" "8-31-94-2 [with] 10% permanent partial." Dr. W's records contain additional progress notes of October 28, 1993, showing claimant's condition "largely neurologically" and "surgery is not indicated for the ruptured disc." A TWCC-61 from another doctor, dated April 13, 1992, gives no new or different information regarding claimant's condition.

Carrier apparently requested an independent medical evaluation (IME) and claimant was examined by (Dr. A) who conducted a thorough evaluation and on a TWCC-69 dated "10-12-92" certified MMI on "10-15-92" with a 10% IR" (in conformity with the `Guides').

Carrier on a Payment of Compensation or Notice of Refused/Disputed Claim (TWCC-21) dated November 9, 1992, advised claimant "[p]er treating doctor MMI reached on 8-31-92 and 10% Impairment Rating given."

It is not clear when claimant disputed the IR although a DRIS (Dispute Resolution Information System) note indicates that on July 12, 1993, claimant went to the Texas Workers' Compensation Commission's (Commission) field office ". . . to discuss claim. IIBS [impairment income benefits] has been paid in full. Clmt req. BRC as he feels IR too low. Did not know about 90 days to dispute, but does state he advised S and J[JA] at St. P--that he felt this was too low." Carrier's "claim history" admitted into evidence indicates no

dispute of Dr. W's IR was made. An entry made by or for JA dated "11/09/92" states "RECD IME DR MRI REPORT, [Dr. A] AGREED W/[Dr. W] TWCC-69 . . . CLMT HAS UNTIL 12/1/92 TO DISPUTE IMP RATING."

A BRC was conducted on September 7, 1993, with the unresolved issue being "What is the correct impairment rating?" Claimant's position was recorded as being that he has not reached MMI so no valid IR can be made. Carrier's position was "[c]laimant did not dispute within 90 days the treating doctor's 10% impairment rating."

At the CCH the unresolved issue was announced and agreed to by the parties as stated in the first paragraph of this decision and as listed at the BRC. Claimant testified as to the doctors he had seen, his symptoms, and the checks he received from the carrier. No reference was made to Rule 130.5(e) by either party. Carrier's cross-examination of the claimant emphasized that Dr. W had assessed a 10% IR in August of 1992 and that claimant was aware of the IR. Carrier also elicited that claimant had seen Dr. A at the request of the carrier and had received Dr. A's written report assessing a 10% IR. In response to questions by the hearing officer claimant confirmed he had received Dr. W's report assessing a 10% IR which had been mailed to his house and received (the date is inaudible) August 1992. Claimant testified he feels he had not reached MMI because he still has pain and can't lift. After claimant had testified the hearing officer asked claimant's attorney if he had any documentary evidence or exhibits to offer and claimant's attorney stated he had misplaced claimant's medical file and asked for 10 days to look for claimant's file. Carrier offered its exhibits and represented they included all the medical reports (even some carrier had not intended to offer). After carrier's exhibits were admitted without objection, the hearing officer announced the record would be left open for 10 days to allow claimant's attorney to look for the missing file/records, and then adjourned the hearing after advising the parties of their appeal rights. Within moments, the proceeding was on the record again and carrier "referred" the hearing officer to Texas Workers' Compensation Commission Appeal No. 93330, decided June 10, 1993, that carrier believed "relevant to the issue that is in dispute today." No closing argument was requested or made by either party.

By letter dated October 19, 1993, the hearing officer advised the parties that he had written Dr. W "to clarify some matters pertaining to the issue on this case" and he would allow the parties to respond. The hearing officer wrote Dr. W asking about: (1) the "only neurological" comment on the TWCC-69; (2) comment on objective laboratory or clinical findings where Dr. W had put "none ordered;" (3) if Dr. W used the "Evaluation of Permanent Impairment, third edition, second printing, dated February 1989, published by the American Medical Association (The Guides);" and (4) if Dr. W had considered claimant's herniated disc in assessing the IR. In response, Dr. W made cryptic marginal notes stating "correct" to (1), "Copy of Report Enclosed" to (2), "Whole body rating is 4%" to (3), and "yes" to (4), signing the annotated copy. The enclosed report was Dr. K's MRI study of December 16, 1991. The hearing officer by letter dated November 29, 1993, again advised the parties he was keeping the record open to ask Dr. W some additional questions, and by letter of the same date wrote Dr. W pointing out a herniated disc of the lumbar spine "is worth 7% impairment" and generally educating the doctor on use of the AMA Guides. Dr. W

responded by letter dated December 6, 1993, stating that he is "not familiar . . . [with] this AMA Guideline book . . . [and] the only book I have is the AMA Evaluation . . . published in 1985." The hearing officer made the response available to the parties. By letter dated January 12, 1993 (sic, obviously 1994), Dr. W submitted "an addendum to my letter dated December 6, 1993, . . . rating (claimant) at 11 percent neurological with the AMA Guides to Evaluation of Permanent Impairment, third edition, published in 1989." A TWCC-69 is attached certifying MMI on "1-12-94" with an 11% IR. Also attached was another TWCC-69 correcting the MMI certification from "1-12-94," in hand writing, to "8-31-92 corrected."

The hearing officer determined in pertinent part:

FINDINGS OF FACT

5.On August 31, 1992 [Dr. W], CLAIMANT'S treating doctor, believed that CLAIMANT had reached MMI and assessed a 10% impairment rating based on neurological evaluations only.

6.The AMA Guides require that all objective evidence be taken into consideration when assessing an impairment rating.

7.[Dr. W] did not take into consideration CLAIMANT'S December 16, 1991 MRI study which showed a herniated disc.

8.CLAIMANT was examined by [Dr. A] for an independent medical examination on October 12, 1992 and estimated CLAIMANT'S MMI date.

9.The examinations performed by [Dr. W] and [Dr. A] did not properly and adequately determine CLAIMANT'S correct impairment rating or MMI date.

10.The Commission shall designated a doctor to determine CLAIMANT'S correct impairment rating and MMI date.

11.The issue is not ripe for adjudication.

The hearing officer made no reference in his determinations or his discussion to Rule 130.5(e) and if he considered Appeal No. 93330, cited by carrier, he made no reference to it.

Carrier appealed, specifically referencing Findings of Fact 7, 9, 10, 11 and the Conclusions of Law based on those findings of fact. Carrier's primary contention is that Dr. W's first impairment rating became final because it was not timely disputed in accordance with Rule 130.5(e). Carrier, in the alternative, contends that the hearing officer's determination that the 10% IR originally assigned was not properly calculated, is not supported by the evidence because "much of the evidence recited by the hearing officer in support of this finding involved his letters to [Dr. W] following the conclusion of the hearing

and [Dr.W's] responses." On this point, we would note that the hearing officer, as the trier, has the duty to resolve inconsistencies and conflicts in the evidence (Garza v. Commercial Insurance Co. of Newark, New Jersey, 508 S.W.2d 701 (Tex. Civ. App.-Amarillo 1974, no writ)) and that this is equally true regarding medical evidence. Texas Employers Insurance Association v. Campos, 666 S.W.2d 286 (Tex. App.-Houston [14th Dist.] 1984, no writ)). It further appears to us, from the record, that the hearing officer kept the parties apprised of his correspondence with Dr. W and that the parties offered no objection or comment to that correspondence.

On the other hand, the hearing officer in Finding of Fact No. 8 apparently determined that Dr. A had given a prospective date of MMI as of October 15, 1992, by report dated October 12, 1992. That fact was not discussed and the parties were not given an opportunity to comment regarding the prospective (the hearing officer refers to it as an "estimated") MMI date. In Texas Workers' Compensation Commission Appeal No. 93837, decided October 29, 1993, the Appeals Panel cautioned against utilizing a summary type procedure where complete documentation is not included in the file. In another case the Appeals Panel reversed and remanded where the hearing officer invalidated a designated doctor's IR on his own initiative and without allowing or soliciting any comment from the parties. *See also*, Texas Workers' Compensation Commission Appeal No. 93045, decided March 3, 1993. Although those cases may be distinguished from the present case involving Dr. A's report, we caution against the use of a summary procedure without allowing the parties an opportunity to comment on what the hearing officer obviously believed was a critical piece of evidence.

However, it is on the hearing officer's lack of comment, determinations or as far as we can determine, lack of consideration that the first IR may have become final due to a lack of timely dispute in accordance with Rule 130.5(e), that we reverse and remand. Although Rule 130.5(e) was not referenced as such, carrier was clearly referring to the provisions of that rule when its position at the BRC was recorded as being "[c]laimant did not dispute within 90 days the treating doctor's 10% [IR]." At the CCH, carrier in its cross-examination of the claimant, made clear that it considered Rule 130.5(e) a key point in emphasizing, on the record, that claimant had received the treating doctor's [Dr. W] first impairment rating at approximately the time it was assigned (the end of August 1992) and did not dispute this IR until July 12, 1993. Further, in the absence of any oral argument, carrier referred the hearing officer to Appeal No. 93330, which was a case where the treating doctor's first IR had become final because it had not been timely disputed. If the hearing officer considered this case, he did not so indicate in his decision or on the record. In the remand, the hearing officer may wish to consider additional argument and/or written briefs on the issue and may wish to consider the following Appeals Panel decisions (and others not listed) which may have a bearing on the issue. Texas Workers' Compensation Commission Appeal No. 92670, decided February 1, 1993, which held that there are no exceptions to Rule 130.5(e); Texas Workers' Compensation Commission Appeal No. 93489, decided July 29, 1993, which held 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.

In Texas Workers' Compensation Commission Appeal No. 94011, decided February 16, 1994, the Appeals Panel affirmed a hearing officer's decision that the first IR had become final under Rule 130.5(e) even though the treating doctor attempted to rescind the first IR. In Texas Workers' Compensation Commission Appeal No. 94049, decided February 18, 1994, the Appeals Panel affirmed a hearing officer's decision that the first IR had become final under Rule 130.5(e) even though the treating doctor subsequently stated he had not used range of motion (ROM) measurements or neurological deficit in calculating the first IR. In that case, the Appeals Panel said it did not read Appeal No. 93489 as carving out broad new categories of exceptions under Rule 130.5(e) and would limit exceptions to "egregious medical conditions." However, there was a concurring opinion to Appeal No. 94049. In Texas Workers' Compensation Commission Appeal No. 94219, decided April 7, 1994, the Appeals Panel affirmed a hearing officer's determination that because the treating doctor only rated a left arm injury and did not include a head injury, the first IR had not become final under Rule 130.5(e). Other cases the parties and hearing officer may wish to consider are Texas Workers' Compensation Commission Appeal No. 931115, decided January 20, 1994, and Texas Workers' Compensation Commission Appeal No. 93501, decided August 2, 1993.

The hearing officer's decision is hereby reversed and we remand the case to the hearing officer for determinations whether Dr. W's first IR of 10% had become final pursuant to Rule 130.5(e) and, if not, the rationale for those determinations. Pending resolution of the remand, a final decision has not been made in this case. However, since reversal and remand necessitate the issuance of a new decision and order by the hearing officer, a party who wishes to appeal from such new decision must file a request for review not later than 15 days after the date on which such new decision is received from the Texas Workers' Compensation Commission's division of hearings, pursuant to Section 410.202. *See* Texas Workers' Compensation Commission Appeal No. 92642, decided January 20, 1993.

Thomas A. Knapp
Appeals Judge

CONCUR:

Philip F. O'Neill
Appeals Judge

Alan C. Ernst
Appeals Judge