APPEAL NO. 94322

This appeal arises under the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act). On February 10, 1994, a contested case hearing was held in (city), Texas, with (hearing officer) presiding as hearing officer. The issue unresolved from the benefit review conference was: "What is Claimant's whole body impairment rating?" The hearing officer correctly, and appropriately, noted that "[t]he real dispute in this case is whether Claimant timely disputed within 90 days the impairment rating of 9% given by his treating doctor, notice of which he received by certified mail return receipt requested on June 14, 1993." The hearing officer determined that claimant had not timely disputed the treating doctor's finding of maximum medical improvement (MMI) on June 4, 1993, with an impairment rating of nine percent within 90 days in accordance with "TWCC Rule 130.5(e)" (Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 130.5(e)) and based his finding of impairment rating on the treating doctor's assessment.

Appellant, claimant herein, appealed contending that although carrier had knowledge that claimant was represented by an attorney, carrier did not provide notice of the treating doctor's rating to the attorney, and that the Texas Workers' Compensation Commission (Commission) provided notice, dated July 28, 1993, to claimant and claimant's attorney of a final date to dispute of September 16, 1993. Claimant requests that we reverse the hearing officer's decision and render a decision "that the claimant's whole body impairment rating is not 9% . . . ." Respondent, carrier herein, responds that the decision of the hearing officer should be affirmed, and that there is no good cause exception to Rule 130.5(e).

DECISION

We reverse the determination of the hearing officer and remand the case for further proceedings in accordance with this decision.

Claimant injured his lower back on (date of injury), while working as a carpenter for the employer. Claimant was seen by a number of doctors, and on June 4, 1993 (all dates will be 1993, unless otherwise noted), claimant's treating doctor was (Dr. U).

On an undated Report of Medical Evaluation (TWCC-69) Dr. U certified MMI on June 4th, with a nine percent impairment rating. No separate narrative was included, however, objective clinical findings and "specific body part/system and rating" sections on the TWCC-69 were completed. The report indicates it was received by carrier on June 8th. Carrier mailed the TWCC-69 and a Payment of Compensation (TWCC-21) form stating that "carrier does not dispute 9% whole body" to the claimant by certified mail, with a return receipt requested. Carrier did not send a copy of the TWCC-69 and TWCC-21 to claimant's attorney, who had represented claimant from the inception of the claim, even though carrier was aware of claimant's attorney representation and address. Claimant signed the return receipt indicating receipt of the correspondence on June 14th. Claimant testified, through an interpreter, that he ultimately took the notice to his attorney but he did not remember the date, and that it possibly was before September 16th.

By letter dated July 28th, a disability determination officer (DDO) sent claimant and his attorney (as well as carrier) a notice that claimant's treating doctor had stated that claimant had reached MMI with an impairment rating of nine percent. The notice states "[t]he report is from [Dr. U] and is dated 07-08-93." (We note this is incorrect as the report is undated and was in existence on June 8, 1993.) This notice letter goes on to state:

> Your certification of "Maximum Medical Improvement" and your impairment rating may be considered final if not disputed by 09-16-93. If you do not agree that you have reached "Maximum Medical Improvement" or you do not agree with your impairment rating, you should immediately tell the insurance carrier and the Commission Field Office. [Emphasis in the original.]

The testimony (of a legal assistant for claimant's attorney) and evidence indicated claimant's attorney received this correspondence on or about July 29th. Subsequently claimant's attorney disputed Dr. U's nine percent impairment rating by hand delivered letter on September 16th, and requested the Commission to appoint a designated doctor.

(Dr. O) was appointed as a Commission selected designated doctor and by TWCC-69 and narrative report dated December 11th, indicated MMI "[n]ot reached" with a 16% impairment rating. However, as claimant appears to have reached statutory MMI in accordance with Section 401.011(30)(B), the part of the designated doctor's opinion which would be entitled to presumptive weight, and would have to be overcome with a great weight of other medical evidence, is the impairment rating. There is nothing in the record to indicate that the carrier opposed the Commission's initiation of steps to appoint a designated doctor.

(Dr. S), who appears to be a doctor who performed an independent medical evaluation at request of the carrier by TWCC-69 dated October 18th, certified MMI on "10/18/93" with five percent impairment rating. (There are other impairment ratings from other doctors in the record not pertinent to the issue before us on appeal.)

At the CCH, claimant stated that the carrier had routinely sent documents to claimant's attorney, and then did not in this instance. The claimant therefore noted that because the Commission told claimant he had until a specific date to dispute the findings and claimant's attorney relied on that date to his detriment, the dispute was viable. Claimant argued also that he does not speak English and is not astute in such matters.

Carrier's position was that there is no good cause exception to Rule 130.5(e) which 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. Carrier contended that since claimant received notice of the treating doctor's impairment rating on June 14th, he had until September 12th, to dispute it. Carrier argued that the Appeals Panel has said that notice to claimant's attorney is a courtesy and not required by the 1989 Act or by rule.

The hearing officer was obviously aware of the problems created by the DDO's letter of July 28th and noted in his discussion:

Although the Commission gave notice to the attorney of the wrong date, it is noted that this was 45 days after Claimant had received notice of the impairment rating and 45 days before the 90 day deadline imposed by TWCC Rule 130.5(e). Although it is certainly unfortunate, and even regrettable, that the Commission notified Claimant and his attorney of the wrong deadline date, such a dereliction does not obviate Claimant's total abdication of his responsibility to deliver documents he receives to his attorney.

We do not regard the failure of carrier to mail the TWCC-69 to claimant's attorney as the critical factor upon which the case is decided. Clearly, the attorney received the TWCC-69 within the ninety day deadline calculated by the hearing officer. In addition, Texas Workers' Compensation Commission Appeal No. 931011, decided December 10, 1993, indicated that the failure of receipt of a TWCC-69 by a claimant's attorney does not constitute a basis for attacking the substance of that report or its finality. (We would note, however, that Rule 102.4(b) requires that such communications as the one in dispute here be mailed to the attorney as well as the claimant; administrative penalties may be imposed for violations of commission rules, in accordance with Section 415.002(a)(22).)

While the indignation of the claimant's attorney is understandable in being left out of the loop of the mailing of Dr. U's TWCC-69, we regard the true matter on the appeal of this case as whether the agency, having issued written direction to both parties setting a date by which a dispute is due, and having apparent authority and responsibility to do so, is estopped from finding through its hearing system that the dispute, filed within those stated limits, is nevertheless untimely, where reliance on that notice is proven, the reliance is reasonable under the circumstances, and where the relying party has acted to his detriment. We find that the Commission, under the facts of this case, is so estopped.

Rule 130.5(e) provides that the first impairment rating assigned to a claimant becomes final if not disputed within 90 days after the rating is assigned. The literal words of this rule have been subjected to much administrative interpretation through the decisions of the Appeals Panel. It has been held to operate to finalize a certification of maximum medical improvement as well the undisputed impairment rating. Texas Workers' Compensation Commission Appeal No. 92670, decided February 1, 1993. The Appeals Panel has also held, notwithstanding an argument that the date "assigned" could run from the doctor's examination date, that the time period begins to run when the claimant becomes aware of the impairment rating. Texas Workers Compensation Commission Appeal No. 92693, decided February 8, 1993. Also we have held that such a dispute, conveyed to the carrier, preserves the timeliness of the dispute even if not conveyed to the Commission at the same time. Texas Workers' Compensation Commission Appeal No. 93200, decided April 14, 1993. We have further noted that a prospective MMI date, a new diagnosis of a previously undiscovered condition, or a conditional certification are circumstances that can cause the ninety day deadline to not even start. Texas Workers' Compensation Commission Appeal No. 93259, decided May 17, 1993; Texas Workers' Compensation

Commission Appeal No. 93501, decided August 2, 1993; and Texas Workers' Compensation Commission Appeal No. 93965, decided December 10, 1993. Neither is the rule self-actualizing; that is, the first impairment rating does not automatically become a final rating where failure to comply with Rule 130.5(e) is not asserted timely. Texas Workers' Compensation Commission Appeal No. 92608, decided, December 30, 1992. Although the agency would not be free to rewrite a statutory limitation or time deadline, this agency may administer the procedural deadlines set forth in administrative rules. As noted in Texas Workers' Compensation Commission Appeal No. 92670, decided February 1, 1993, the case most often cited for the proposition that there are "no exceptions" to Rule 130.5(e), the Appeals Panel observed that "we may, however, interpret agency rules to the facts at hand."

In the letter in question, the DDO has set out, for the benefits of both parties, the date that he computed to be the end point of the 90 day period. The written deadline did not come from a person at the reception desk or in another office; it came from a denoted claims representative on the claim. The date he set, although wrong, was within the general time frame of a ninety day ending period, and was not an obvious typo such as a mistake on the year would have been. The notice was plainly relied upon by the claimant, to his detriment. He filed a dispute that is supported by some medical evidence rather than a broad and general disagreement. Under the facts here, it would be unjust to allow the agency to confer a dispute resolution time period with one division, but take it back with another.

The situation in this case is analogous to that set forth in Roberts v. Haltom City, 543 S.W.2d 75 (Tex. 1976). This case, which at Page 77 cites other cases that had preceded it, involved a deadline set in a city charter for the filing of liability claims against the city. The court noted that compliance with such filing deadlines had been held to be mandatory and a condition precedent to suing a city with such a provision. The Haltom City provision allowed thirty days, and the plaintiff in the case had not complied. Not one, but several, city officials were proven to have misinformed the plaintiff as to her rights, with the result that she did not timely file her claim. The Court, noting that it was not departing from the rule of general application that cities could not be estopped in the exercise of governmental functions by acts of its employees or agents, nevertheless found that under the facts of this case, it would apply estoppel. Part of what it took into consideration was that the information given could have been interpreted to be a waiver of the applicable deadline, and that a reasonably prudent person would have relied on the advice.

It is true that the Haltom City case involves an aspect not present here, in that the city in that case stood to profit from the advice. However, we found no authorities directly on point. What we would observe here is that the Commission has in place an impartial system for resolving disputes over impairment, the designated doctor system, to which both parties have equal access. The Commission has an interest in the credible administration of this policy. That credibility is undermined when it notifies parties on one hand that certain procedural deadlines, based on its rules, apply, and then on the other hand does not stand behind such advice. Also, there is another party in interest, the carrier. Where the Commission is faced with balancing equities, however, it must be noted that the carrier now

seeks to benefit from advice which it was in the best position to know was erroneous. There is no evidence that it sought to correct the Commission's communication. We do not believe this creates an "exception" to Rule 130.5(e), because the dispute was filed within the date the DDO deemed to comply with that Rule.

The dissent cites City of San Angelo v. Deutsch, 91 S.W.2d 308 (Tex. 1939) in support of its position that the DDO's letter does not work an estoppel. That case, which indicated that there were exceptions to the general principal that estoppel would not lie, discussed the public policy reasons behind such the application of the doctrine, noting that the governmental entity should not be estopped by any negligence or bad advice of an employee in exercise of its governmental functions, those in which the interests of the public at large were affected, as opposed to a situation in which it acts in a private or proprietary interest. We would note here that our dispute resolution process on a particular case arguably does not directly involve the interests of the greater public (for example, the collection of taxes) as opposed to direct resolution of a private claim; the agency (and the general public) does not sustain a loss, as a tax collecting entity does, if a case is directed through the statutory dispute resolution process of the designated doctor because of misinformation by an employee. The case of Dillard v. Aetna Insurance Company, 518 S.W.2d 255 (Tex. Civ. App.- Austin 1975, writ ref'd n.r.e.) involved advice which purported to vary the terms of a statutory deadline for filing claims, and is, therefore, distinguishable from the case at hand.

Although there are no facts in this record indicating when the carrier first protested the designated doctor's appointment in the case, a designated doctor was in fact appointed and rendered a report. We would note that in Texas Workers' Compensation Commission Appeal No. 93501, decided August 2, 1993, we observed in a footnote that there is an element of estoppel when a party allows the designated doctor process to run its course, only to claim finality of the first impairment rating after the designated doctor's results are known. The Appeals Panel pointed out that finalizing a first impairment rating could be action violative of the statutory directive in Section 408.125(e) to accord presumptive weight to the designated doctor's report "if the designated doctor is chosen by the commission" unless the great weight of other medical evidence were to the contrary. The same paradox presents itself here.

We stress that this ruling is a narrow one. The particular facts that persuade the majority that the Commission should, in this case, honor its written communication are that: 1) the communication involved a deadline set forth in a rule, rather than a statute; 2) the communication was written; 3) the communication emanated from a person cloaked with the apparent authority to do so; 4) it was issued to both parties, who had equal benefit of the mistake; and, 5) it was relied upon, reasonably, by the party who sustained a detriment. In further support of the last point, we have noted that actually reading the literal rule itself would not necessarily yield all aspects in which that rule has been interpreted, making reliance on the interpretation of a Commission official more reasonable under the circumstances.

For these reasons, the determination of the hearing officer is reversed, and the case remanded for determination of the correct impairment rating (the broader issue reported from the BRC in this case, of which the "ninety day rule" in Rule 130.5(e) was but one aspect).

Susan M. Kelley
Appeals Judge

CONCUR:

Gary L. Kilgore
Appeals Judge

FISSENTING OPINION:

I respectfully dissent. Although the majority makes a very appealing and cogent argument based on principles of equity, estoppel and the ability of the parties to rely on the written communication of an agent of the Commission, in my opinion, the majority decision is not based on sound legal (as opposed to equitable) principles.

First of all, as the majority recognizes, Roberts v. Haltom City, 543 S.W.2d 75 (Tex. 1976), and cased cited therein, including Cawthorn v. City of Houston, 231 S.W. 701 (Tex. Comm'n App. 1921, jdgm't adopted), are all municipal law cases where the courts have asserted the rule "that municipalities may be estopped from asserting failure of compliance with notice of claim provisions . . . ." I would submit that Haltom City, relied upon by the majority is both factually and legally distinguishable from the instant case. As the majority concedes Haltom City involved a case where the city stood to profit from its bad advice. In the instance case, the Commission neither profited nor lost by its bad advice. As far as the general principles involving equitable estoppel go, I believe the black letter law to be that equitable estoppel does not run against the state. For support of my belief, quoting from James E. Cousar, *Informal Agency Decisions*, in STATE BAR OF TEXAS PROFESSIONAL DEVELOPMENT PROGRAM, ADVANCED ADMINISTRATIVE LAW COURSE (1989):

> Texas Courts are not likely to protect a person relying on an agency statement or interpretation not adopted through a rulemaking. With limited exceptions, Texas courts have long held that the equitable doctrine of estoppel does not run against the state. City of San Angelo v. Deutsch, 91 S.W.2d 308 (Tex. 1939); Leonard v. State, 242 S.W.2d 199 (Tex. Civ. App.-San Antonio 1951, no writ); Gayburg Oil Company v. State, 50 S.W.2d 355 (Tex. Civ. App.-Austin 1932, writ ref'd).

The author goes on to say that these cases do not deal with publications, but rather that the "no estoppel" principle applies to advice directed to a particular person.

Further, as the majority has anticipated, I rely on Dillard v. Aetna Insurance Company, 518 S.W.2d 255 (Tex. Civ. App.-Austin 1975, writ ref'd n.r.e.) as authority for the proposition that "bad legal advice given by a workman's attorney concerning the time in which the claim for compensation must be filed does not constitute good cause." I would note this is a workers' compensation law case which goes on to state: "[l]ikewise, bad legal advice from a non-attorney, even though a clerk at the Industrial Accident Board [the predecessor of the Commission] . . ." does not provide, as a matter of law, good cause for failing to timely file a claim for compensation. We are mindful that Rule 130.5(e) does not contain a "good cause" exception, however in applying Dillard, it would appear that even if it did, bad legal advice would not excuse the failure to timely dispute the first impairment rating. I believe these cases provide far better precedential authority than Haltom City.

The majority would appear to be establishing a "good cause" exception for cases of Commission written communication, emanating from a person cloaked with apparent authority and relied upon by one of the parties to its detriment. As the majority notes, Appeal No. 92670 states:

> The Commission has determined that 90 days is a sufficient time frame for raising questions about the accuracy of a certification or impairment rating, and there are no exceptions in the rule.

The Appeals Panel has even more frequently held that Rule 130.5(e) does not contain a good cause exception for failure to dispute within the 90 day period. *See* Texas Workers' Compensation Commission Appeal No. 93917, decided November 23, 1993; Texas Workers' Compensation Commission Appeal No. 93684, decided September 21, 1993; Texas Workers' Compensation Commission Appeal No. 931011, decided December 10, 1993; Texas Workers' Compensation Commission Appeal No. 93783, decided October 19, 1993; Texas Workers' Compensation Commission Appeal No. 94229, decided April 11, 1994; Texas Workers' Compensation Commission Appeal No. 93139, decided April 8, 1993; Texas Workers' Compensation Commission Appeal No. 92657, decided January 15, 1993. The majority appears to disregard this solid precedent that there is no "good cause" exception to Rule 130.5(e) and seems to say under certain circumstances involving equitable estoppel and detrimental reliance that there may be a good cause exception. I would only note that the Commission, through the proper rule making process, could have established a good cause exception, as they have in a number of other instances, but apparently chose not to do so in the case of Rule 130.5(e). Should the majority argue that they are not advocating a "good cause" exception, I would only note, a rose by any other name smells just as sweet.

Finally, I would argue that the majority's decision, if followed, would in effect nullify Rule 130.5(e). That rule, known as the "90-day rule" would become known as the 102 day rule, or 104 day rule or whatever date a DDO chose to pick "within the general time frame of a ninety day ending period."

I do not argue that Rule 130.5(e) should not have a "good cause" exception, and in fact would wholeheartedly endorse such a change. However, I strongly believe that agency statement or interpretation should be left to the rule making process, such as the Commissioners (or perhaps the legislature) particularly when it runs counter to a definitively stated time frame. The Commission, thorough the rule making process, should decide whether a good cause exception should be adopted rather than applied whenever the Appeals Panel believes it is appropriate. The Appeals Panel should not create inconsistencies in applying equitable estoppel principles on an ad hoc basis.

I would affirm the decision and order of the hearing officer.

Thomas A. Knapp
Appeals Judge