APPEAL NO. 94324

This appeal is considered in accordance with the Texas Workers' Compensation Act (1989 Act), TEX. LAB. CODE ANN. § 401.001 *et seq.* On December 17, 1993, a contested case hearing was held in (city), Texas, with (hearing officer), presiding. The issue was whether the claimant, (hearing officer), who injured his back on (date of injury), in the course and scope of his employment with (employer), had a 10% percent impairment rating because he did not dispute within 90 days the first impairment rating and certification of maximum medical improvement (MMI) assigned to him by a consulting doctor.

The hearing officer determined that this issue was "moot" because the impairment rating in question was based upon a prospective date of MMI, and therefore was not a valid certification. The hearing officer announced at the beginning of the hearing that he considered the date of MMI as part of the issue and there was no objection. He consequently found that claimant had reached "statutory" MMI on March 7, 1993. He ordered, among other things, that a designated doctor be appointed to resolve the issue of impairment.

The carrier has appealed, noting that the first impairment rating was not based upon prospective MMI, and further noting that because claimant reached statutory MMI "no later than March 11, 1993, or March 7, 1993 as per the hearing officer," the MMI date certified by the doctor would not be relevant to the validity of the impairment rating. The carrier asks that the decision be reversed to finalize the 10% impairment it contends was first assigned to the claimant and not disputed within 90 days. There is no response from the claimant.

DECISION

After reviewing the record, we affirm the order of the hearing officer insofar as it determined that a designated doctor should be appointed to resolve impairment. We reverse his determination that the impairment rating was invalid for being based on a prospective MMI, and render a decision, based upon the undisputed evidence in the record, that claimant timely disputed the impairment rating within 90 days.

The record was not as well developed as it could have been. We have based our analysis of the facts on the record, not upon the argument of the parties, which raised some matters not developed in the evidence in the case.

The claimant injured his back (date of injury). According to documents filed by the employer, his first day of lost time from work was March 7, 1991. He returned to work briefly on March 18, 1991, and left work again sometime in May 1991, and did not return to work up to the date of the hearing. Claimant had back surgery performed by (Dr. G) in May 1992. Claimant stated that he had "rods" put into his back during this surgery, which is referred to as involving laminectomy, diskectomy, and Rogozinski instrumentation with bilateral lateral fusion. This surgery was approved after an independent medical examination with (Dr. L) was obtained by the carrier, and Dr. L concurred with the need for surgery.

The claimant was sent again to Dr. L beginning February 22, 1993, apparently when the question of the need for a second surgery came up. Dr. L's letter of that date to the adjuster for the carrier stated that claimant had "pretty good" range of motion. No nerve or neurological deficits are indicated. Dr. L commented that x-rays revealed an abnormality below the level of claimant's last surgical "instrumentation". He referred claimant for further discogram testing, indicating that a recommendation for further surgical treatment for the abnormal level could result. As of April 19, 1993, Dr. L's notes indicate that he discussed the discogram with claimant and felt that a surgical extension of the instrumentation to the abnormal level was in order. That note made no reference to performing an impairment assessment on that date.

Claimant could not recall the exact date that he last saw Dr. L but did not rule out that it could have been on May 3, 1993. On May 3, 1993, Dr. L completed a Report of Medical Evaluation (TWCC-69). Under item 16 of the report, Dr. L noted that claimant reached MMI as of that date with a 10% impairment. However, the text below the rating made clear that Dr. L felt that claimant still needed surgery, but if claimant felt no further surgery was needed then his impairment would be "a 20% disab. of the spine or 10% whole body." The doctor contended that due to a legal requirement that he "must give this rating despite recommending he still needs surgery . . . I am complying with a hypothetical response."

Claimant, who stated he was represented at this time by an attorney, said that he received the TWCC-69, not from Dr. L, but from the carrier around June 1, 1993. He stated that he immediately called Dr. L to question why he was assigned an impairment rating when further surgery was indicated. He said Dr. L assured him that this rating would not hurt him. Claimant said he nevertheless also called the carrier's adjuster, (Mr. C), to dispute the impairment rating, sometime "around the middle of June". He could not recall what the adjuster told him, nor recall the details of the discussion. He could not recall if he also discussed the rating with his attorney, whom he terminated in August 1993.

A benefit review conference was held on October 29, 1993, on the single issue of whether claimant timely disputed the MMI and impairment rating. Thus, it is apparent that the Commission treated the case as if a dispute was raised by one of the parties. However, there was no evidence in this record of the date that the dispute was conveyed to the Commission. Mr. C was not present at either the BRC or the contested case hearing to refute claimant's testimony that a dispute had been broached with the carrier within 90 days.

Because the carrier in its appeal expressed some equivocation on the date statutory MMI was reached, we would refer the parties to Texas Workers' Compensation Commission Appeal No. 93678, decided September 15, 1993, and applicable statutes, which make clear that statutory MMI is reached 104 weeks after claimant's eighth day of disability, not the first day.

Texas W.C. Comm'n, 28 TEX. ADMIN. CODE § 130.5(e) (Rule 130.5(e)) provides that the first impairment rating assigned to a claimant becomes final if not disputed within 90 days. As we have held previously, the time period begins to run when the claimant receives

notice or becomes aware of the impairment rating. Texas Workers Compensation Commission Appeal No. 92693, decided February 8, 1993. The undisputed testimony in this case indicated that this was June 1, 1993. Further undisputed was that claimant called the adjuster in mid-June to dispute the rating. We have also 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. The great weight and preponderance of the evidence, indeed the only evidence on the date a dispute was made, was that claimant disputed the rating to Mr. C around the middle of June, 1993. Because the hearing officer's decision in no way indicated that he found claimant not to be credible, and there is no controverting evidence to weigh, we therefore render a decision that claimant timely disputed the impairment rating.

The hearing officer erred by "mooting" this issue for the recited reason that the MMI on the TWCC-69 was prospective. On its face, it was not. Although the hearing officer may have surmised that claimant's last examination by Dr. L preceded the MMI date, claimant did not deny that he had seen Dr. L on May 3, 1993. There is no evidence, let alone sufficient evidence, to support an inference that the MMI certification was prospective. *Compare* Texas Workers' Compensation Commission Appeal No. 93259, decided May 17, 1993. Further, as the carrier points out, Dr. L's assessment of an MMI date is the aspect of this claim that is "moot," because statutory MMI had been reached by May 3rd. Given the fact that there exists in the 1989 Act a statutory MMI date which may or may not reflect "medical" MMI, there are likely to be many "104 week" impairment ratings that are assigned prior to medical MMI, and they should not be disregarded for that reason alone, as the hearing officer has done in this case.

Although not the primary reason for our holding, we would further observe one problem with finalizing the rating in question here: it is ambiguous. Dr. L's February 1993 letter indicates that claimant had "pretty good range of motion" and no neurological deficits are noted. Although we are not favored in this record with a description of the medical condition warranting claimant's extensive surgery, it is nevertheless apparent that claimant would be entitled an impairment rating near the higher end of the scale from Table 49 of the American Medical Association Guides to the Evaluation of Permanent Impairment, third edition, second printing, February 1989 (AMA Guides), which is entitled Impairments Due to Specific Disorders of the Spine. There is nothing in Dr. L's TWCC-69 to indicate that he based impairment upon range of motion or anything but the specific disorder he observed. The text preceding Table 49, on page 72 of the Guides, states that "all impairments in this section have already been adjusted for each regional percentage, permitting their expression as a percent impairment of the whole person." In short, to the extent that Dr. L's 20% spinal impairment comes from Table 49, it would be error to further reduce that rating to a "whole body" rating, and the 20% assigned by Dr. L for the spine would stand. This, plus Dr. L's own description of his rating as "hypothetical," or contingent on claimant's decision to have surgery, renders the report analogous to a "conditional" MMI which was not finalized as in Texas Workers' Compensation Commission Appeal No. 93965, decided December 10, 1993.

For these reasons, the determination of the hearing officer is reversed, and a new decision rendered that claimant timely contested the first impairment rating assigned to him, and that the claim is ripe for dispute resolution through the designated doctor appointment process.

Susan M. Kelley
Appeals Judge

CONCUR:

Philip F. O'Neill
Appeals Judge

CONCUR IN RESULT:

Stark O. Sanders, Jr.
Chief Appeals Judge