APPEAL NO. 94354

This appeal arises under the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq*. (1989 Act). At a contested case hearing held in (city), Texas, on December 30, 1993, the hearing officer, (hearing officer), took evidence and heard arguments on three disputed issues, to wit: whether the appellant (claimant) disputed the certification of maximum medical improvement (MMI) and/or the impairment rating (IR) assigned her by her treating doctor, (Dr. GP), on or about January 15, 1993, within 90 days of its being assigned, as required by Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 130.5(e) (Rule 130.5(e)); whether claimant has reached MMI and, if so, on what date; and what is claimant's IR. The hearing officer found, among other things, that on January 15, 1993, Dr. GP determined that claimant had reached MMI as of that date with a zero percent IR and told her so; that on that date claimant was notified or had knowledge of the fact that Dr. GP had determined that she had reached MMI with a zero percent IR; that claimant was so unhappy with Dr. GP's findings that she called her attorneys about them that same day; that she was told the attorneys would await receipt of Dr. GP's Report of Medical Evaluation (TWCC-69) and then take appropriate action; that claimant had 90 days from January 15, 1993, that is, until April 14, 1993, to dispute Dr. GP's findings and did not dispute them until June 15, 1993; and that claimant's attorneys received a copy of the TWCC-69 on July 14, 1993. Based on these factual findings, the hearing officer concluded that claimant did not timely dispute Dr. GP's findings; that his certification of MMI and zero percent IR on January 15, 1993, became final on April 14, 1993, because such certification was not disputed by claimant within 90 days of the date she was notified of the certification; that claimant reached MMI on January 15, 1993; and that her IR was zero percent.

Claimant's request for review asserts that she could not recall the doctor telling her on January 15, 1993, that she had reached MMI, but that he did advise her of the zero percent IR and said he would mail her a copy of the report; that the doctor's TWCC-69 was not received until July 14, 1993; and, therefore, that her IR dispute of June 15, 1993, was timely having been made even before receipt of a writing communicating the IR. The respondent (carrier) replies that the 90 day period under Rule 130.5(e) "begins to run from the time the Claimant or her counsel had actual notice of" the IR, that there is no requirement that such knowledge must come from a written document, that there is no requirement that the claimant must have actually received the TWCC-69, and that "an oral statement from the doctor that a certification is being made the date of the exam will support a finding of Claimant's knowledge of said certification. . . ."

Claimant further contends that she timely raised an additional disputed issue for the hearing officer concerning the validity of Dr. GP's certification of MMI based on his not having performed a proper examination on January 15, 1993, having argued that the invalidity of the MMI certification for that reason was even more basic and a threshold issue which mooted the timely dispute issue. The hearing officer made no findings on this issue but merely stated in his "statement of the evidence" that the matter was not timely identified as a disputed issue and thus would not be considered as a disputed issue. Claimant asserts that her response to the benefit review conference (BRC) report did timely identify and raise the matter as a disputed issue and satisfied the requirements of Rule 142.7. The carrier

contends that this appealed issue is without merit, noting that claimant argued the issue at the hearing.

DECISION

Reversed and rendered.

Claimant, the sole witness, testified that she sustained an injury on (date of injury), which was diagnosed as "overuse syndrome," that her injury involved pain in her hands, wrists, arms and neck, which she still has; that after first receiving treatment on September 17, 1992, she was referred to Dr. GP, a hand surgeon, who treated her in the September - November 1992 period and then referred her to (Dr. JP) after indicating he could do nothing more for her condition. Claimant said that Dr. JP did not become her treating doctor, only saw her on the one occasion (November 11, 1992) for a consultation, and told her she could return to work. She said she thereafter did return to work on November 30, 1992, and that she did not see another doctor, aside from her January 15, 1993, visit to Dr. GP, until May 14, 1993, when she went to an emergency room for pain. Records were in evidence showing that after January 15, 1993, claimant was evaluated by certain doctors and treated by several doctors, some of whom stated opinions that she had not yet reached MMI. The hearing officer did not refer to such medical records in his decision. Since the hearing officer's MMI and IR findings were based on his determination that Dr. GP's January 15, 1993, MMI date and zero percent IR findings became final under Rule 130.5(e) and not on an evaluation of all the medical evidence, we need not detail such other medical evidence.

Dr. GP's initial narrative report of September 23, 1992, stated that claimant worked at a keyboard with prolonged, intense, repetitive use, and that about one month earlier developed discomfort in her wrists. Dr. GP's impression was "overuse syndrome characterized by tendinitis/myositis/synovitis bilaterally" for which he initiated conservative treatment and limited claimant to one hour of keyboard work followed by 30 minutes of rest throughout the work day. His October 14, 1992, report stated that recent electrical studies showed "mild right CTS [carpal tunnel syndrome]" and he changed medications and continued the work restrictions. Dr. GP's November 4, 1992, report stated his impression as "persistent overuse syndrome resistant to conservative care." He recommended that claimant be evaluated and her rehabilitation supervised by Dr. JP, a physical medicine specialist, and he continued the work restrictions. Dr. JP's narrative report of November 11, 1992, stated an impression of no major pathology seen, no clinically significant CTS or ulnar nerve entrapment at that time, possibly some myalgia and tendinitis but no definite evidence or objective findings thereof, and a recommendation that claimant, then 26 years of age, resume her work activities effective November 30, 1992.

The carrier introduced an undated TWCC-69 signed by Dr. GP stating in Item 14 that claimant reached MMI on "1-15-93" with an IR of "0%." Dr. GP's TWCC-69 did not refer to any other report; however, the carrier introduced along with that form Dr. GP's unsigned, narrative report bearing the date "15 January 1992." (The carrier asserts without challenge that the 1992 date was understood and treated by the parties as a typographical error which should have read 1993.) Dr. GP's report stated that claimant had improved since her last visit, was working regularly, but still had some electrical twinges and discomfort. He

detailed his examination results including full range of motion of all upper extremity joints, absence of tenderness, normal sensation, and normal motor strength. This report concluded that claimant could perform "regular duty," noting that she was working regularly without any physical restrictions, that she still had "some symptoms," that she "has reached [MMI]," and that she had "no permanent physical impairment based on the examination today." This report was not addressed to any person or entity nor did it reflect any copies being sent to anyone.

Claimant further testified that when she saw Dr. GP on January 15, 1993, she told him she still had the same pain and same symptoms, that he did not examine her, that he pulled a book off a shelf, commented that he had "not done this before," and talked about her "disability." Claimant said that Dr. GP told her he did not think she had a disability and said he "was going to give me a zero percent rating and that I would get it in the mail." She twice testified she could not remember whether Dr. GP also mentioned her reaching MMI. Claimant stated that after leaving Dr. GP's office, she returned to work, called her attorney's office, "told them what happened" and that "he gave me a zero percent disability rating." She said she was advised not to worry about it and that it would be disputed "when we get the paperwork in." Claimant said that sometime later, she got a call from her attorney's office asking if she had received Dr. GP's report, which she had not, and was told they were trying to get it. Claimant said she never received any writing concerning Dr. GP's IR until July 1993. Claimant offered the affidavit of her attorney's legal assistant detailing efforts to obtain Dr. GP's report and the latter's demand that $35.00 be forwarded first. However, the affidavit was excluded from evidence by the hearing officer on the objection of the carrier. Since claimant has not appealed that ruling, we do not consider either its correctness or the excluded evidence.

Claimant's attorneys sent a letter to the Texas Workers' Compensation Commission (Commission) dated "6-15-93" stating that claimant disputed Dr. GP's MMI and IR determinations. The letter further stated that they had not yet been provided with the TWCC-69, were therefore not sure of the MMI date and IR, and that the TWCC-69 had been requested from the carrier the previous week.

Claimant argued at the hearing that the threshold issue was the validity or not of Dr. GP's certification of MMI, that based on claimant's testimony the evidence established that Dr. GP failed to examine her on January 15, 1993, that the Commission's Rules (Rule 130.2(a) and Rule 130.3(a)) require an examination prior to certifying that MMI has been reached and assigning an IR, and that because Dr. GP did not examine her, his certification was invalid. This being so, argued claimant, her dispute of Dr. GP's MMI date and IR could not be untimely since there was no valid certification to dispute. In the alternative, claimant argued that Dr. GP's oral communication to her of her IR on January 15, 1993, was insufficient to start the 90-day period under Rule 130.5(e) and that some written communication was required. She maintained that she received nothing in writing communicating Dr. GP's determinations until July 14, 1993, the date her attorneys received Dr. GP's report. She acknowledged having disputed Dr. GP's MMI date and IR in her June 15, 1993, letter "without really having knowledge of the contents of the Form 69." The

carrier argued that the Appeals Panel has only required "some communication of MMI and IR to the claimant" citing Texas Workers' Compensation Commission Appeal No. 93330, decided June 10, 1993, as dispositive. Incidentally, this case was also cited in the BRC report and by the hearing officer.

Turning to what the claimant has characterized as the "threshold issue," the BRC report's statement of disputed issues stated the three disputed issues set forth above. The claimant's response to the BRC report recited and concurred in the benefit review officer's [BRO] description of the claimant's positions taken at the BRC on the three disputed issues. Respecting the MMI issue, however, claimant's response went on to state: "Claimant agrees with the [BRO's] report except that in addition, claimant's position is that the certification of [MMI] by [Dr. GP] is invalid for failure to conduct the required examination prior to certifying [MMI]." At the outset of the hearing, claimant asserted that this portion of the response raised an additional disputed issue which should be considered at the hearing. The carrier argued that such was a mere "restatement" but that it had no objection to claimant's making the argument. Claimant insisted it was an additional issue and that if she prevailed on it, the issue of the finality of Dr. GP's MMI date and IR under Rule 130.5(e) would become moot, there being no valid certification to dispute within 90 days. The hearing officer stated that it did not appear to him that claimant's response "rises to the level which would have given me an understanding that that was an additional and separate dispute." The hearing officer, while stating his understanding that additional disputes could be requested through the mechanism of a response to a BRC report, made no mention of the timeliness of the response as a request to add another issue, nor of the matter of good cause for adding the issue, but simply went on with the hearing without adding the requested issue. While claimant argued the issue, the hearing officer, as previously noted, made no findings thereupon. The hearing officer's decision stated: "The Claimant attacked the validity of [Dr. GP's] findings on January 15, 1993, on the grounds that he did not do a proper examination of her. This point, however, was <u>not timely identified</u> as a disputed issue and will not be considered as such. [Emphasis added.]"

Section 410.151(b) provides that an issue not raised at a BRC may not be considered unless the parties consent or, "if the issue was not raised, the commission determines that good cause existed for not raising the issue at the conference." Rule 142.7(a) provides, in part, that "[a] dispute not expressly included in the statement of disputes will not be considered by the hearing officer." Rule 142.7(b) provides, in part, that the statement of disputes includes not only the BRC report but the parties' responses, if any, as well as additional disputes added by unanimous consent or upon a showing of good cause. Rule 142.7(c) addresses responses to BRC reports and provides, in part, that they shall be in writing and sent to the Commission no later than 20 days after receipt of the BRO's report. The BRO's report was sent to the parties by a Commission cover letter dated November 19, 1993, and claimant's response was sent to and received by the Commission on December 10, 1993. There was no assertion at the hearing that the response was untimely under Rule 142.7(c). The carrier, while stating it had no objection to claimant's arguing the matter, was not asked nor did it state that it consented to the addition of the issue nor did the hearing officer make any good cause determination on the record. *See* Rules 142.7(d) and (e)

providing for the addition of disputed issues by unanimous consent and upon a showing of good cause.

While the hearing officer's statement indicates his decision not to add the issue was based on the untimeliness of the request, his statements at the hearing indicate he felt the request did not sufficiently apprise him that claimant was requesting addition of the issue as distinguished from merely stating an additional position on an existing disputed issue. While the hearing officer may have concluded that the verbiage in claimant's response neither requested the addition of an issue nor stated reasons for the request, as required by Rule 142.7(e)(1), his statement of the evidence indicates his decision was based on the untimeliness of the request. That basis finds no support in the record. Under these circumstances, we determine that the hearing officer abused his discretion in denying claimant's request to add the issue. We need not remand for further consideration, however, in view of our action on the remaining appealed issue.

We further determine that the hearing officer erred in finding that claimant's zero percent IR became final within 90 days of Dr. GP's oral notification to her on January 15, 1993. Section 408.123(a) provides, in part, that after an employee has been certified by a doctor as having reached MMI, the certifying doctor shall evaluate the employee's condition and assign an IR. Section 408.123(b) provides that "[a] certifying doctor shall issue a written report certifying that [MMI] has been reached, stating the employee's [IR], and providing any other information required by the commission" to the Commission, the employee and the carrier. *See also* Rules 130.2 and 130.3.

The hearing officer determined that Dr. GP's oral communication to claimant on January 15, 1993, of her having reached MMI as of that date with an IR of zero percent was sufficient notice to start the 90 day period under Rule 130.5(e). We note that the only evidence of the oral communication of the MMI date was claimant's testimony that she did not remember or recall Dr. GP mentioning MMI. The hearing officer reasoned that while "in common parlance and general usage the Form TWCC-69 has been taken to be the certification of [MMI] and [IR]," such form does not on its face mention certification and "is not the certification of [MMI]; that has already been done by a doctor before the Form TWCC-69 is completed." The hearing officer deduced that "there is no requirement for any special form of `certification' that would require the `certification' to be in writing, and the `certification' has already been accomplished by the time the doctor completes the written report, i.e., the Form TWCC-69; . . . " The hearing officer further postulated, referencing Section 408.123 and Rules 130.2 and 130.3, that only after a doctor "certifies" MMI, and then "evaluates" the employee's condition, and then "assigns" an IR does the doctor complete a written report, and that such written report "is neither the certification of [MMI] nor the evaluation of the employee nor the assignment of an [IR]. . . . " The hearing officer stated that while ordinarily it is the TWCC-69 that provides the employee with knowledge of "the certification and assignment," in this case "it is clear from the Claimant's testimony that [Dr. GP] informed her on January 15, 1993, that she had reached [MMI] as of that date with an [IR] of zero. In other words, [Dr. GP] had already certified [MMI], evaluated the Claimant, and assigned the Claimant's [IR]." The hearing officer further stated that even though Dr. GP did not give

claimant a written report on January 15, 1993, it was "not necessary" and Dr. GP "still had another seven days to prepare the report." (*See* Rule 130.2(b)(2)).

Stating that claimant's dispute was two months late, the hearing officer said that Texas Workers' Compensation Commission Appeal No. 93330, decided June 10, 1993, "directly covers this point." That case was mentioned in the BRC report and was also relied on by the carrier. However, as the claimant correctly notes, notwithstanding that the employee in that case had not received a TWCC-69 prior to the passage of 90 days after her doctor assigned an IR, the evidence showed that shortly thereafter she did receive a written report of the doctor which stated her IR and also a Payment of Compensation or Notice of Refused/Disputed Claim form (TWCC-21) which referred to a TWCC-69 and her IR. It was not a case which relied solely on oral notice of the IR to start the 90-day dispute period.

In Texas Workers' Compensation Commission Appeal No. 93691, decided September 15, 1993, the Appeals Panel noted that it "has never indicated that MMI could be certified without a written document addressing the criteria for MMI called for by the statute and applicable rules." That decision held "that rule 130.5(e), making final a first impairment rating 90 days after it is assigned, requires that certification of MMI and assignment of an impairment rating shall have occurred prior to the time the 90 days begins to run. [Citations omitted.]" Rule 130.1(a) provides that a doctor who is required to certify or who during treatment determines that an employee has reached MMI or has an impairment shall complete and file a medical evaluation report and Rule 130.1(b) states that "certification" or "to certify" means the formal assertion of medical facts or expert opinion by a doctor supporting or relating to MMI and IR. *And see* Texas Workers' Compensation Commission Appeal No. 91014, decided September 20, 1991; Texas Workers' Compensation Commission Appeal No. 91045, decided November 21, 1991. Black's Law Dictionary, sixth edition, defines "certify" thusly: "To authenticate or vouch for a thing in writing. To attest as being true or as represented. *See* certificate; certification." In Texas Workers' Compensation Commission Appeal No. 93501, decided August 2, 1993, the employee agreed that her treating doctor told her in March or April 1992 that her "disability" would be 12% and that she called the carrier's adjuster and stated that the doctor intended to give her 12%. However, the employee maintained she never saw a TWCC-69 until December 1992. While describing the matter as "a relative side issue" in the case, the Appeals Panel stated:

> We have noted before that the 90 day deadline for disputing an impairment rating does not run from the date a doctor issues a report, but from the date the parties become aware of the rating. We noted that it is hard to envision that one could dispute something of which one is not aware. *See* Texas Workers' Compensation Commission Appeal No. 92693, decided February 8, 1993. Our decisions involving the 90 day rule have all used some form of written notice as the point at which the 90 day period began. Arguably, notice of an impairment rating is best conveyed through a written report. A written report by the evaluating doctor could raise colorable disputes that a verbal notice

would not. For example, the TWCC-69 requires a doctor to indicate how a percentage is calculated. The written report could show a computation error that verbal discussion would not.

We hold that the certification of MMI and impairment and the communication of such to the parties under Rule 130.5(e) require a writing. Written communication of the IR to the parties should reduce confusion and controversy over the content of the communication. Rule 130.1(c) states that all reports made under Rule 130.1 shall be on a Commission prescribed form and it enumerates the information it shall contain. As regards the use of such form, however, the Appeals Panel has previously determined that a writing which amounts to the functional equivalent of the TWCC-69 form will suffice. *See, e.g.* Texas Workers' Compensation Commission Appeal No. 94222, decided April 7, 1994; Texas Workers' Compensation Commission Appeal No. 94229, decided April 11, 1994.

For the reasons stated above, we find that the hearing officer erred in determining that Dr. GP's IR became final on April 14, 1993, and further erred in determining that claimant reached MMI on January 15, 1993, with a zero percent IR based on the finality of Dr. GP's findings. Accordingly, we reverse the hearing officer's decision and order and render a new decision that claimant timely disputed Dr. GP's MMI date and IR.

Philip F. O'Neill
Appeals Judge

CONCUR:

Stark O. Sanders, Jr.
Chief Appeals Judge

Joe Sebesta
Appeals Judge