

APPEAL NO. 950033  
FILED FEBRUARY 16, 1995

This appeal is brought pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act). A contested case hearing was held on November 9, 1994. The hearing officer determined that the appellant's (claimant) compensable injury of \_\_\_\_\_, included his back, but not his neck or right shoulder, and that his first certification of maximum medical improvement (MMI) and impairment rating (IR) became final because not timely disputed. The claimant appeals only the finding of finality arguing the certification was invalid because the certifying doctor failed to follow the Guides to the Evaluation of Permanent Impairment, 3d Edition, 2d printing, February 1989 (AMA Guides) with regard to range of motion (ROM) testing. The respondent (carrier herein) replies that the decision of the hearing officer was correct as a matter of law, was supported by sufficient evidence and should be affirmed.

DECISION

We affirm.

The facts pertinent to this appeal are largely undisputed. The hearing officer found that on August 5, 1993, (Dr. R), whom the claimant describes as a "company doctor," completed a Report of Medical Evaluation (TWCC-69) in which he certified that the claimant reached MMI on July 12, 1993, with a zero percent IR. This finding has not been appealed. The parties stipulated that this TWCC-69 was the first certification of MMI and IR in this case. The hearing officer also found, and the claimant does not controvert, that he received notice of this TWCC-69 on August 12, 1993, and did not dispute it within 90 days.

Based on these facts, the hearing officer determined that Dr. R's certification of MMI and IR became final by virtue of Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 130.5(e) (Rule 130.5(e)) which provides that "[t]he 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 hearing, the claimant contended that the rating in his case did not become final because the certification was invalid for a number of reasons.<sup>1</sup> On appeal, the claimant asserts that the certification was invalid, and hence not subject to the finality provisions of the rule, only because Dr. R did not do ROM testing using an inclinometer as required by the AMA Guides.

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<sup>1</sup>These reasons include that Dr. R was not a treating doctor, no ROM testing was done, the TWCC-69 did not include a statement that Dr. R complied with the AMA Guides and there was no narrative report attached to the TWCC-69.

The Appeals Panel has held that if the IR becomes final under Rule 130.5(e), so does the underlying MMI. Texas Workers' Compensation Commission Appeal No. 92670, decided February 1, 1993. In Texas Workers' Compensation Commission Appeal No. 94049, decided February 18, 1994, the Appeals Panel addressed contentions similar to those raised by the claimant. In that case, the claimant argued that the first certification of MMI and IR was invalid, and, therefore, Rule 130.5(e) did not apply, because the certifying doctor did not consider ROM or neurological damage in arriving at an IR and that this constituted "significant error" under our decision in Texas Workers' Compensation Commission Appeal No. 93489, decided July 29, 1993. The Appeals Panel rejected this argument, noting the purpose of the rule, and determined that 90 days provided sufficient time "to consider whether they wish to dispute that rating as either being too high or too low." Texas Workers' Compensation Commission Appeal No. 94475, decided June 3, 1994, relying on Appeal No. 94049, also held that a challenge to a first certification based on failure of the certifying doctor to assess ROM had to be raised within 90 days to avoid application of the finality provisions of the rule. Similarly, in Texas Workers' Compensation Commission Appeal No. 931170, decided February 3, 1994, we held that an allegation that the certifying doctor failed to comply with the Guides had to be raised within 90 days or the rating became final.

We consider these cases dispositive of the issue now appealed. The claimant's first certification contained a zero percent IR. With such a rating, we are hard pressed to justify or even rationalize why a dissatisfied party would not or could not dispute the rating within 90 days. The claimant provides no explanation other than to suggest a per se rule that would invalidate a certification in those cases where ROM testing is not addressed. Recently, in Texas Workers' Compensation Commission Appeal No. 941748, decided February 13, 1995, we discredited such a per se approach where the certifying doctor failed to rate the entire injury. We reject it now. An alleged flaw in Dr. R's first certification, which resulted in a zero percent IR, as alleged by the claimant in this case had to be raised by the claimant within 90 days of his receipt of the certification. This was not done, and both the date of MMI and IR have now become final.

The decision and order of the hearing officer are affirmed.

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Alan C. Ernst  
Appeals Judge

CONCUR:

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Stark O. Sanders, Jr.  
Chief Appeals Judge

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Susan M. Kelley  
Appeals Judge