APPEAL NO. 950058
FILED FEBRUARY 22, 1995

This appeal is considered in accordance with the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act). This hearing, presided over by (hearing officer), was held after remand of the case in Texas Workers' Compensation Commission Appeal No. 94654, decided July 6, 1994. The hearing, after apparently several continuances, was held on December 8, 1994. The claimant is _____, who is the appellant, and who was injured on _____. The issue remained whether claimant's first impairment rating (IR) became final because it was not disputed within 90 days. As pointed out in the previous decision, Texas W. C. Comm'n, 28 TEX. ADMIN. CODE § 130.5(e) operates to finalize an IR (and only then the underlying maximum medical improvement (MMI) certification) if that rating is not disputed within 90 days. The case was remanded because there were no findings of fact identifying when claimant first received notice of his IR.

The hearing officer determined that claimant had not disputed his IR and MMI status within 90 days and they therefore became final in accordance with Rule 130.5(e). The hearing officer determined that claimant's receipt on April 28, 1993, of a Subsequent Medical Report, TWCC-64, disclosing that he had reached MMI, coupled with a discussion with an employee of the Texas Workers' Compensation Commission (Commission) on April 29th put him on notice that he had "an" IR and 90 days to dispute it. The hearing officer determined that claimant had not disputed the report within 90 days.

The claimant appeals this decision, arguing that he did not receive a copy of the treating doctor's IR until January 25, 1994. The claimant argues that he went to the Commission on April 29, 1993, with a work statement from his doctor, and that after his employer told him there was no work, he wanted guidance from the Commission. He stated that the Commission representative told him that he should ask his doctor if a TWCC-69 was going to be issued, and that "if" there was an IR the carrier would initiate impairment income benefits (IIBS). Claimant argues that he was not told that there actually was an IR until November 29, 1993, when he called the Commission because he was no longer receiving "a weekly check." The carrier's response is that the hearing officer is the sole judge of the weight and credibility of the evidence and her decision should not be set aside.

DECISION

After reviewing the record, we reverse and render a decision that claimant's first IR has not become final because there was no evidence offered to show that he received written notice of his IR more than 90 days before he requested a benefit review conference (BRC) on December 3, 1993.

We will incorporate our discussion of the facts previously set forth in Appeal No. 94654, *supra*, setting out here the major facts for the convenience of the reader. The

claimant injured his back on _____, and his treating doctor was (Dr. N). (Claimant changed treating doctors after the time period pertinent to this case).

From a Report of Medical Evaluation (TWCC-69) filed by Dr. N, which the record indicated was received by the carrier and the Texas Workers' Compensation Commission (Commission) (city) Office on May 3, 1993, it was evident that Dr. N assigned claimant a 10% IR, and determined that claimant reached MMI on April 22, 1993. Uncontroverted evidence supplied by a clerk for Dr. N indicated that claimant was not sent a copy of this report by Dr. N, through oversight.

Subsequent TWCC-64 medical reports were filed by Dr. N on April 28, May 12, June 24, and August 30, 1993. All of them state an "anticipated" date of MMI of April 22, 1993; none of them state that claimant received a 10% IR. The diagnosis is lumbar "hnp". The April 28th report stated that claimant was released to work or to retraining.

The evidence indicated that on April 29, 1993, the claimant went to the (city) office of the Commission and spoke to a representative, (Ms. M), about the fact that Dr. N had told him he could return to work. Claimant testified on remand that he brought with him a single sheet of paper from the doctor that stated he was released to work or should retrain. The Commission's computer log note of that date states:

> Clmt came in with reports from [Dr. N] stating that per evaluation he may return to work or retrain. TWCC-69 has not been filed. Employer says they do not have any work for him. Told him he may want to go to TEC. Also told him to speak to [Dr. N] and inquire if dr is going to file TWCC-69 and if he is then if there is impairment carrier would need to initiate IIBS, also explained he has 90 days to dispute treating dr assessment. I am sending TRC ltr in case clmt wants to pursue this.

Claimant's testimony was that he asked Dr. N's office for such a statement but that he was not provided with any document stating what his IR was until the actual BRC in this case.

There is only one TWCC-21 form in evidence; the carrier did not seek to admit any more on remand. This TWCC-21 stated only that TIBS had been terminated by the carrier due to MMI having been reached on April 22, 1993. There is no mention of an IR nor reference to the initiation or payment of IIBS. There is a statement in the payment section of the form that says: "Amended A-2, clmt's c.r. 281.62, carrier will pay deficit owed." There was no evidence, at either hearing, that the carrier sent a copy of the TWCC-69 of Dr. N to the claimant or otherwise informed of his IR.

According to the record, the claimant contacted the (city) field office of the Commission on November 29, 1993, and spoke to another representative about why his checks had stopped. The note of this contact said that claimant was told this occurred

because of Dr. N, and that claimant would have been able to dispute his "MMI" within 90 days. The note further stated that claimant had been so advised on April 29th. Another note recording a contact by claimant on December 3, 1993, with the same representative, recorded that claimant was not aware of any rating sent by Dr. N. Claimant was informed on this date that he could request a BRC and he did. The BRC was held on January 14, 1994, and does not indicate that a TWCC-69 was itself before the BRC officer.

It is possible to review the record and decision in this case and conclude that our previous decision was not fully read or understood. In our previous decision, we stressed that a finding would have to be made concerning the date a written notice of IR was received by the claimant. We noted the insufficiency of a verbal statement to start the 90-day period. We referred to our previous decisions holding that MMI does not become final under Rule 130.5(e) in and of itself, but only when an IR has become final. (Notwithstanding this, carrier continued to argue at remand that notice of MMI was all that was required to trigger the 90-day period).

We commented on what the evidence at that point indicated:

> The first time it appears that the claimant could potentially have had notice of a written [IR] would be during the November 29, 1993, conversation with the [disability determination officer], because the TWCC-69 was in the commission's files at that time and potentially could have been discussed with claimant. The [BRC] was apparently held sometime before the ninety days expired.

Moreover, we pointed out that the subsequent medical reports from Dr. N did not disclose any IR to the claimant (even if received by claimant).

In short, applicable law was discussed and problems with the evidence noted insofar as establishing a written notice of IR. In this decision, the pivotal findings of fact as to the date that the 90-day period started are:

7. On April 29, 1993, claimant brought the April 28, 1993, TWCC-64 from Dr. N to the commission and spoke with customer service representative [Ms. M], who told him that he should also have an [IR] at that time and that he had 90 days to dispute the doctor's assessment.

8. On April 29, 1993, claimant had written notice that he had reached [MMI] on April 22, 1993, and was informed that he also had an [IR] and had 90 days to dispute it.

It is clear that the hearing officer believed that written notice of MMI, coupled with a generalized verbal discussion that claimant had "an" IR, began the 90-day period. We hold that this was error.

Ms. M did not testify at either hearing. Her computer log note does not support the hearing officer's finding that claimant was told he had an IR, or what it was. Rather, the note is consistent with claimant's testimony that Ms. M did not tell him he had an IR, only that if one was assigned, he would have 90 days to dispute it. The carrier has never claimed or proved that it sent claimant a copy or notice of his IR (a practice which would, of course, obviate the need for disputes such as these). There is also no evidence that a properly completed TWCC-21 describing a 10% IR as the basis for initiation of IIBS was filed and sent to the claimant. Claimant's testimony was that he first realized he had a 10% rating on November 29, 1993, and requested a BRC on December 3rd. The hearing officer was in error in determining that a verbal notice of an IR (generalized at that) would start the 90-day period. *See* Texas Workers' Compensation Commission Appeal No. 94354, decided May 10, 1994. Given the failure of proof that claimant received a written notice of his IR more than 90 days before December 3rd, we cannot agree with the holding that his IR (and underlying MMI) became final under Rule 130.5(e).

Because claimant has disputed his IR and MMI, the designated doctor procedure must be completed before a determination of the date of MMI and IR can be made. We note that claimant may already have reached the point of 104 weeks after the date his income benefits accrued (statutory MMI). An expedited resolution of this dispute is, in our opinion, warranted under the circumstances.

For the reasons described, we reverse the hearing officer's determination that claimant's IR became final under Rule 130.5(e), and render a decision that claimant's first IR did not become final and, as he has disputed his IR and MMI, resolution of those matters must be undertaken.

Susan M. Kelley
Appeals Judge

CONCUR:

Stark O. Sanders, Jr.
Chief Appeals Judge

Philip F. O'Neill
Appeals Judge