APPEAL NO. 950069
FILED FEBRUARY 17, 1995

On December 6, 1994, a contested case hearing was held. The hearing was held under the provisions of the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq*. (1989 Act). The issues at the hearing were: (1) whether the first certification of maximum medical improvement (MMI) and impairment rating (IR) assigned by (Dr. S) on June 29, 1993, became final under Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 130.5(e) (Rule 130.5(e)); (2) whether the appellant (claimant) reached MMI, and if so, on what date; and (3) the claimant's IR. The claimant disagrees with the hearing officer's decision that the first certification of MMI and IR assigned by Dr. S became final under Rule 130.5(e) and that she reached MMI on June 29, 1993, with a 14% IR. The respondent (carrier) requests affirmance.

DECISION

Affirmed.

The claimant is a 35 year old licensed vocational nurse who injured her back at work on _____, when a patient she was helping to walk fell on her. The claimant was represented by an attorney in her workers' compensation claim from 1991 to August 10, 1994, when he withdrew as her counsel. (Dr. T) diagnosed spondylolysis and a bulging disc at L4-5 and he recommended that the claimant have a laminotomy, discectomy, and fusion at L4-5 which he performed in October 1991. The claimant said that the fusion did not fuse so a second fusion surgery was done by Dr. T in April 1992. X-rays showed that the claimant still had motion at the L4-5 level so Dr. T referred the claimant to (Dr. P) for further treatment. In January 1993 Dr. P performed a posterior lumbar innerbody fusion with radical discectomy at L4-5 and a lateral mass fusion at L4-5 with steffee instrumentation.

In April 1993 the carrier advised Dr. P that the claimant would reach statutory MMI (104 weeks after income benefits begin to accrue) on September 3, 1993, and it requested Dr. P to determine whether the claimant had reached MMI and to assess an IR. It requested Dr. P to do this no later than September 3, 1993. On June 8, 1993, Dr. P noted that the claimant was doing quite well and he referred her to (Dr. S) for an IR. At the bottom of the form in which he made the referral to Dr. S, Dr. P noted that the claimant should have a return appointment in six months and under that notation is the notation "& impair @ 6 mo."

The claimant testified that she knew that Dr. P referred her to Dr. S for an IR and that Dr. S examined her on June 29, 1993. However, she said that Dr. S did not discuss MMI or IR with her. In a Report of Medical Evaluation (TWCC-69) dated June 29, 1993, with an accompanying narrative report, Dr. S certified that the claimant reached MMI on

June 29, 1993, with a 14% IR. It is undisputed that the IR assigned by Dr. S was the first IR assigned to the claimant. Dr. S's report is addressed to Dr. P. The claimant testified that the carrier sent a copy of Dr. S's TWCC-69 and narrative report to her attorney in August 1993, and she does not dispute the hearing officer's finding that her attorney received Dr. S's medical evaluation and TWCC-69 in August 1993. The claimant testified that her attorney never showed her a copy of Dr. S's report or sent her a copy. In a letter dated August 31, 1994, the claimant's attorney stated that through inadvertence on the part of his office staff, the claimant did not receive a copy of her IR. She also testified that neither the carrier or Dr. S sent her a copy of Dr. S's report, and that she never received any document from the carrier which advised her of the IR. She said that on some unspecified date her income benefit checks were reduced in amount so she called the carrier to find out why that was and she was told that she was being paid "impairment benefits." She said nothing else was explained to her. The benefit review conference (BRC) report indicates that the claimant was paid 42 weeks of impairment income benefits (IIBS), which is three weeks of IIBS for each percentage point of impairment. The claimant said that after her attorney withdrew as her counsel in August 1994, she picked up her papers from him and in the papers were two copies of Dr. S's report.

The claimant further testified that Dr. P referred her to (Dr. H) and that she first saw Dr. S's TWCC-69 when she picked up her records at Dr. P's office in January 1994. She said that in January 1994, after seeing the TWCC-69, she called (Mr. O), who was the adjustor handling her claim, and he told her that she could dispute the IR but that she had had 90 days from when the IR was done to dispute it. She said Mr. O asked her if she wanted to dispute it and she replied in the affirmative. She said she thought Mr. O was going to file the dispute for her and when she heard nothing about it for three months she called the Texas Workers' Compensation Commission. She further testified that she did not know that she could dispute the IR until Mr. O informed her of that. Neither party disputes the hearing officer's finding that the claimant first became aware of Dr. S's initial certification of MMI and IR of 14% in January 1994.

As previously noted, the claimant's third surgery was done in January 1993 and Dr. S certified that the claimant reached MMI on June 29, 1993, with a 14% IR. The claimant testified that she started having problems and that Dr. P sent her for more tests. In September 1993 further x-rays were done and in October 1993 a CT scan and myelogram were done. At Dr. P's request, (Dr. SM) examined the claimant on November 15, 1993, for consideration of an anterior lumbar fusion and he reported that he agreed that the claimant would need an anterior fusion and a possible 360 degree fusion. On November 16, 1993, Dr. P noted that the claimant's grafts appeared to be stable but that she continued to have weight-bearing pain and he indicated that further surgery may be needed. A discogram was done on December 10, 1993, and, as previously noted, Dr. P referred the claimant to Dr. H in January 1994 for surgery evaluation. On January 20, 1994, Dr. H diagnosed the claimant as having "recurrent lumbar radicular syndrome and a multiply failed surgically operated lumbar spine with pseudoarthrosis," and he

recommended a 360 degree fusion with removal of the steffe plates and screws. He noted that there was at least one broken screw. A "Patient Information" form states that a 360 degree fusion is a two-part surgical procedure in which the spine is fused from both the front and the back and that the procedure is used on select individuals who have had previous failed surgery. Dr. H performed the recommended surgery on February 28, 1994. The claimant underwent physical therapy with lumbar stabilization exercises in April and May 1994. In July 1994 Dr. H noted that the claimant's bone graft was in excellent position and that she seemed to be doing well, except that she was having some coccygeal discomfort. On October 12, 1994, the claimant underwent a fifth surgery in which residual instrumentation was removed from her back.

On September 21, 1994, Dr. P wrote that he did not agree with the 14% IR, that he believed the claimant would probably reach MMI in December 1994 (after her fifth surgery), and that he had set up an appointment for the claimant to be reevaluated for an IR by Dr. S. In a letter dated September 26, 1994, Dr. H stated that a tentative date the claimant should reach MMI after her October 1994 surgery would be on or about December 2, 1994. Dr. S examined the claimant on December 2, 1994, and she reported that the claimant "has reached [MMI]" with a 22% IR.

The claimant's position at the hearing was that the first certification of MMI and assignment of IR by Dr. S did not become final under Rule 130.5(e) for a number of reasons, all of which she sets forth in her appeal, and that she reached statutory MMI on August 28, 1993, and that she has a 22% IR as was reported by Dr. S on December 2, 1994. The carrier's position at the hearing was that the first certification of MMI and assignment of a 14% IR by Dr. S became final under Rule 130.5(e) and that the claimant reached MMI on June 29, 1993, with a 14% IR.

The hearing officer found that the claimant's attorney received Dr. S's TWCC-69 in August 1993; that the claimant first became aware of Dr. S's initial certification of MMI and 14% IR in January 1994; that the claimant told the carrier's adjustor in January 1994 that she wished to dispute Dr. S's IR; that the claimant had a fourth surgery in February 1994 and a fifth surgery in October 1994 for her back condition; that Dr. S provided a revised IR of 22% in 1994; and that the claimant "received constructive notice of [Dr. S's] certification of [MMI] and [IR] in August 1993 when a copy of the certification was received by her attorney." The claimant does not dispute that her attorney received a copy of Dr. S's initial TWCC-69 in August 1993, and that she, the claimant, first disputed the initial IR in January 1994. The hearing officer concluded that the first certification of MMI and IR assigned by Dr. S on June 29, 1993, became final under Rule 130.5(e) because the claimant did not dispute the IR within 90 days. He further concluded that the claimant reached MMI on June 29, 1993, with a 14% IR.

Rule 130.5(e) provides that "[t]he first [IR] assigned to an employee is considered final if the rating is not disputed within 90 days after the rating is assigned." We have held

that if the first [IR] becomes final, so does the underlying finding of MMI. Texas Workers' Compensation Commission Appeal No. 92670, decided February 1, 1993. We have also held that the certification of MMI and IR and the communication of those findings to the parties under Rule 130.5(e) requires a writing. Texas Workers' Compensation Commission Appeal No. 94354, decided May 10, 1994. In Texas Workers' Compensation Commission Appeal No. 94365, decided May 11, 1994, we stated "[i]t is well-settled that the 90-day period is triggered when a party is notified or has knowledge of the first certification of MMI and assignment of IR . . . ." The claimant contends that the first IR assigned to her did not become final because she disputed it within 90 days of when she first received notice of it. The undisputed facts are that the claimant's attorney received a copy of Dr. S's TWCC-69 in August 1993 and that the claimant did not notify the carrier that she wished to dispute the initial IR until January 1994, which was more than 90 days after the attorney received the TWCC-69. There is no evidence that the attorney ever disputed the initial IR on behalf of the claimant. We find our decision in Texas Workers' Compensation Commission Appeal No. 93644, decided September 8, 1993, to be dispositive of the claimant's contention. In Appeal No. 93644, *supra*, the evidence showed that the claimant's attorney in that case received the initial certification of MMI and IR and the IR was not disputed for over 90 days. However, the claimant denied that he had been sent a copy of the IR report and also denied that he was made aware of the initial IR. In affirming the hearing officer's decision that the first certification of MMI and IR became final under Rule 130.5(e), we stated:

> We have previously observed, and note that we are in accord with Texas case authority, that an attorney employed to represent a claimant before the Commission is the agent of claimant and that the attorney's actions or inaction within the scope of his employment is attributable to the client. Texas Workers' Compensation Commission Appeal No. 93605, decided August 26, 1993, citing Texas Employers Insurance Association v. Wermske, 349 S.W.2d 90 (Tex. 1961). *See also* Texas Workers' Compensation Commission Appeal No. 92412, decided May 11, 1992. We are satisfied that there is sufficient evidence to show, as determined by the hearing officer, that the claimant's attorney was mailed a copy of Dr. T's certification of MMI and IR on July 8, 1992, and that neither the claimant nor the attorney timely disputed Dr. T's certification of MMI or IR. Consequently, the MMI date of April 20, 1992, and the eight percent IR became final.

The claimant also contends that the initial IR did not become final because she was unaware of the need to dispute the IR until the adjustor told her about that in January 1994. This contention is not a basis for disturbing the hearing officer's decision because it has been held that ignorance of the workers' compensation law will not excuse a failure to comply with the law. Allstate Insurance Company v. King, 444 S.W.2d 602 (Tex. 1969). *See also* Texas Workers' Compensation Commission Appeal No. 94269, decided April 20, 1994.

The claimant further contends that the initial IR assigned by Dr. S did not become final because Dr. P did not express agreement or disagreement with the IR. She represented that Dr. P was her treating doctor at the time of Dr. S's initial report. Rule 130.3(b) provides that when a treating doctor receives a TWCC-69 he or she shall mail to the Commission within seven days a statement indicating the doctor's agreement with the certifying doctor's certification and IR, and if the treating doctor disagrees with the finding of MMI or IR, the treating doctor shall mail a TWCC-69 to the Commission within seven days. In the instant case the evidence reflects that Dr. S sent her TWCC-69 to Dr. P (the narrative report dated June 29, 1993, is addressed to Dr. P) and that Dr. P received it. However, it appears that Dr. P did not express his disagreement with Dr. S's certification of MMI and assignment of a 14% IR until September 21, 1994. We find no basis in the law for concluding that delay on the part of the treating doctor in complying with Rule 130.3(b) keeps an initial IR from becoming final under Rule 130.5(e).

The claimant also asserts that the initial IR assigned by Dr. S did not become final because Dr. P noted on June 8, 1993, that he wanted to have the claimant reevaluated for impairment in six months. We do not see how Dr. P's desire to have the claimant reevaluated in six months keeps the initial IR assigned by Dr. S on June 29, 1993, from becoming final if it was not disputed within 90 days. Rule 130.5(e) clearly contemplates that the first IR assigned to an employee is considered final if it is not disputed within 90 days.

The claimant further contends that Dr. S's initial IR of 14% did not become final because she had two back surgeries following the assignment of the initial IR and because Dr. S issued another report in December 1994 in which she assigned the claimant a 22% IR. In Texas Workers' Compensation Commission Appeal No. 93489, decided July 29, 1993, we affirmed a hearing officer's decision that the treating doctor's findings of MMI and IR became final under the 90-day provision of Rule 130.5(e). However, in doing so we stated that the application of Rule 130.5(e) is not absolute and that "if an MMI certification or [IR] were determined, based on compelling medical or other evidence, to be invalid because of some significant error or because of a clear misdiagnosis, then a situation could result where the passage of 90 days would not be dispositive." In Texas Workers' Compensation Commission Appeal No. 94269, decided April 20, 1994, we reversed a hearing officer's decision that the first IR assigned to the claimant had not become final under Rule 130.5(e) and we rendered a decision that the initial certification of MMI and assignment of an IR had become final because the claimant had failed to dispute the first IR within 90 days. What we stated in that decision applies to the facts of this case:

> As previously noted, we have observed that MMI does not mean that there will not be a need for some future medical treatment, and the need for additional or future medical treatment does not mean that MMI was not reached at the time it was certified. Also, pain is not, in and of itself, an

> indication that MMI has not been reached. *See* Appeal No. 93489, *supra*. Furthermore, the fact that a doctor rescinds his or her finding of MMI after the 90-day dispute period provided for in Rule 130.5(e) has expired, does not automatically mean that the initial certification of MMI and assignment of an [IR] are not final where the initial findings of MMI and [IR] were not based upon a significant error or a clear misdiagnosis. *See* Texas Workers' Compensation Commission Appeal No. 94011, decided February 16, 1993. In addition, the fact that surgery is performed after the 90-day dispute period has expired does not mean that the initial findings of MMI and [IR] are not final under Rule 130.5(e) where the circumstances mentioned in Appeal No. 93489, *supra*, are not involved. *See* Texas Workers' Compensation Commission Appeal No. 93987, decided December 14, 1993.

In Appeal No. 93987, *supra*, we upheld a hearing officer's determination that the treating doctor's initial date of MMI of April 10, 1992, and assignment of a 13% IR became final under Rule 130.5(e) despite the fact that the claimant had shoulder surgery almost a year later in March 1993. In August of 1993, the treating doctor submitted another report in which he certified that the claimant reached MMI on April 10, 1993, with a 25% IR.

The 1989 Act provides that the hearing officer is the sole judge of the relevance and materiality of the evidence and of its weight and credibility. Section 410.165(a). When reviewing a hearing officer's decision to determine the factual sufficiency of the evidence, we consider and weigh all the evidence, and should set aside the determination only if it is so contrary to the overwhelming weight of the evidence as to be clearly wrong and unjust. *See* Cain v. Bain, 709 S.W.2d 175 (Tex. 1986). An appeals level body is not a fact finder, and it does not normally pass upon the credibility of witnesses or substitute its own judgment for that of the finder of fact even if the evidence would support a different result. National Union Fire Insurance Company of Pittsburgh, Pennsylvania v. Soto, 819 S.W.2d 619, 620 (Tex. App.-El Paso 1991, writ denied). We do not substitute our judgment for that of the hearing officer where, as here, his decision is supported by sufficient evidence. Texas Employers' Insurance Association v. Alcantara, 764 S.W.2d 865 (Tex. App.-Texarkana 1989, no writ).

The hearing officer's decision and order are affirmed.

Robert W. Potts
Appeals Judge

CONCUR:

Susan M. Kelley
Appeals Judge

Philip F. O'Neill
Appeals Judge