APPEAL NO. 960038
FILED FEBRUARY 20, 1996

This appeal arises under the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq*. (1989 Act). On November 3, 1995, a contested case hearing (CCH) was held. In response to the sole issue before her, the hearing officer determined that the first certification of maximum medical improvement (MMI) and impairment rating (IR) assigned by Dr. T (Dr. T) on December 10, 1993, did not become final under Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 130.5(e) (Rule 130.5(e)) because claimant did not receive written notice of that report and IR.

Appellant, carrier, asserts error, in essence arguing that the first IR assigned became final when claimant became aware of the rating and that claimant was at some time verbally advised of that IR by the treating doctor. Carrier requests that we reverse the hearing officer's decision and render a decision in its favor. Respondent (claimant) responds that the decision is supported by the evidence and requests that we affirm the decision.

DECISION

Affirmed.

The parties stipulated that claimant suffered a compensable injury, apparently to her neck, back and shoulders, on _____. Claimant testified that she had surgery, apparently a "diskectomy and fusion," in early 1993. Subsequently, claimant's treating doctor, on a Report of Medical Evaluation (TWCC-69), certified MMI on March 4, 1993, with a 14% IR. There is substantial testimony regarding various conversations between the claimant and Dr. T and between claimant and individuals which we speculate are carrier representatives. The testimony is vague and specific dates are non-existent. Dates of claimant's conversations with Dr. T are referenced around when a nurse died, with no evidence when that may have been. What is fairly clear, and what claimant testified to, is that claimant was never given a copy of Dr. T's report by either Dr. T or the carrier. Eventually claimant came to the Texas Workers' Compensation Commission (Commission) field office on June 28, 1995, and at that time was given a copy of Dr. T's December 1993 TWCC-69, which claimant promptly disputed. Carrier had filed a Payment of Compensation or Notice of Refused or Disputed Claim (TWCC-21) dated August 16, 1993, which indicated that carrier had assessed a 10% IR. There is no indication that a copy of this was sent to claimant; however, claimant's testimony would indicate that she was aware of this assessment and that her checks were based on this assessment.

Rule 130.5(e) states that the first IR assigned to an employee is considered final if the rating is not disputed within 90 days after the rating is assigned. The Appeals Panel

early interpreted that "assigned" means when a party has knowledge of the rating since a party could hardly dispute something unknown to him or her. Texas Workers' Compensation Commission Appeal No. 93046, decided March 5, 1993; Texas Workers' Compensation Commission Appeal No. 93111, decided March 29, 1993. Subsequently, and for exactly the type of situation such as we have here, where there were disputes as to who told what to whom and when, the Appeals Panel interpreted Rule 130.5(e) to hold that the knowledge of the first IR must be imparted in writing. Texas Workers' Compensation Commission Appeal No. 94354, decided May 10, 1994, cited by the hearing officer, reviewed the evolution of interpretations of Rule 130.5(e) and 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 could 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.

The Appeals Panel has held that the certification of MMI and impairment and the communication of such to the parties under Rule 130.5(e) requires a writing. As we have stated, 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 they 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.

The carrier, in its appeal, speculates what one could reasonably expect claimant to do and states that "[t]he only logical conclusion is that the claimant was made aware of the impending suspension [of income benefits] between the dates of December 10, 1993 and February 8, 1994." Carrier alleges that "Claimant's own testimony at the [CCH] was replete with self-contradiction." All of this may be true, and we would add that claimant's testimony was very vague, unresponsive and nonspecific as far as dates go, but that testimony was irrelevant in the absence of proof that claimant was not only aware of Dr. T's December 1993 IR but that she had been given written notification of that IR, pursuant to the interpretation of Rule 130.5(e) in Appeal No. 94354, *supra*. We are unpersuaded by the carrier's attempt to distinguish Appeal No. 94354 from the instant case based on the

facts and note that the Appeals Panel has many times reaffirmed the principle that communication of MMI and the IR requires a written communication before the 90 days begins to run. Texas Workers' Compensation Appeal No. 951659, decided November 17, 1995; Texas Workers' Compensation Commission Appeal No. 950982, decided July 28, 1995; Texas Workers' Compensation Commission Appeal No. 950969, decided July 27, 1995; Texas Workers' Compensation Commission Appeal No. 94547, decided June 13, 1994; Texas Workers' Compensation Commission Appeal No. 941309, decided November 14, 1994; and many more. We reject the carrier's argument that requiring written communication of the first IR to the parties in order to begin the 90-day period "jeopardizes the ability of the parties in future cases to rely on Rule 130.5(e)." It is exactly the vacillating testimony regarding who told whom what and when that leads us to the interpretation of requiring a written communication to begin the 90-day dispute period. The claimant testified that she had not received such a written notice and thereby satisfied her burden, with the burden of going forward to show claimant was in error then being shifted to the carrier.

Of some concern to us was the carrier's allegation that the hearing officer had turned off the recorder, told claimant she had not met her burden of proof and thereby induced the carrier "to rest and make its closing arguments." Carrier charges the hearing officer's comments "were inappropriate and an unfair comment on the weight of the evidence" which mislead the carrier and justifies a reversal. A careful review of the record indicates the carrier's allegations to be mischaracterizations of what actually occurred. Our review indicates that as the claimant was finishing a sentence while on cross-examination, the tape ended and the recorder automatically shut off. The hearing officer then obviously changed (or turned over) the tape. When the tape begins again the hearing officer is speaking to the ombudsman instructing the ombudsman to explain to the claimant that the claimant has to present evidence to prove her case that the first certification (of MMI and the IR) has not come final. (The better procedure would have been for the hearing officer to recite that she had changed the tape and obtain agreement from the parties that no evidence had been taken while the tape was being changed.) The hearing officer went on to say that she had heard a lot about conversations she (the claimant) had with other people "but I'm not getting any dates." The hearing officer went on to say that the documents provide some dates "but I need to hear relevant testimony that is going to clarify the documents . . . and we are not getting there. . . . I want to be sure that claimant understands that the burden is hers," and cautions carrier to stay within "the parameters [of the issues]." After obtaining verification from the claimant that she understands the instructions, the hearing officer tells the carrier to proceed with the cross-examination. Based on the record before us, we cannot conclude that the remarks and instructions given by the hearing officer were "inappropriate" or constituted an "unfair comment on the weight of the evidence which suggested the carrier should present no further evidence." In fact, we interpret the hearing officer's instructions to the carrier to be that the carrier is to remain on the subject and proceed with its cross-examination. We find no procedural error which would require a reversal.

Finding that there was no evidence that the certification of MMI and the first IR were communicated to the claimant in writing and having many times affirmed that requirement, we affirm the hearing officer's decision and order that Dr. T's first certification of MMI and IR of December 10, 1993, had not become final under Rule 130.5(e).

Thomas A. Knapp
Appeals Judge

CONCUR:

Lynda H. Nesenholtz
Appeals Judge

Gary L. Kilgore
Appeals Judge