APPEAL NO. 990479

A contested case hearing was held on January 28, 1999, pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act), with hearing officer, to resolve the sole disputed issue, to wit: whether the first certification of maximum medical improvement (MMI) and impairment rating (IR) assigned by Dr. W on February 6, 1993, became final pursuant to Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 130.5(e) (Rule 130.5(e)). The hearing officer determined that the certification of an IR by Dr. J on July 28, 1992, was the first certification of an IR and that since Dr. J's certification was invalid on its face because no MMI date was chosen and the wrong edition of the Guides to the Evaluation of Permanent Impairment published by the American Medical Association (AMA Guides) were relied on, the subsequent certification of MMI and an IR by Dr. W on February 6, 1993, did not become final under Rule 130.5(e). The appellant (carrier) urges on appeal that Dr. J's report did not qualify as a certification of the first IR and should not preclude Dr. W's valid certification of an MMI date and IR from being considered final under Rule 130.5(e). The carrier further asserts that the hearing officer failed to address the carrier's additional argument that notwithstanding the application of Rule 130.5(e), respondent (claimant) delayed far too long, over five years, in bringing about this dispute of Dr. W's MMI date and IR. Claimant's response urges the correctness of the hearing officer's resolution of the disputed issue.

DECISION

Affirmed.

This is a Rule 130.5(e) case. That rule provides 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. Although documentary evidence was introduced by both parties, no witnesses were called and the parties commented that the facts essential to the resolution of the disputed issue were not in dispute.

According to the July 28, 1992, report of Dr. J, who evaluated claimant at the request of her treating doctor, Dr. D, claimant was employed as an assembler and was injured on _____, lifting boxes. Dr. J reported that claimant had undergone back surgery in 1985, 1987, and 1988 and had long-standing low back pain, and that after her most recent exacerbation and injury on _____, she returned to full-time work in June 1991. Dr. J stated his provisional diagnosis as status post anterior interbody fusion at L4-5 and L5-S1 and chronic low back pain with multiple surgical procedures. Referring to the AMA Guides Third Edition (Revised), Dr. J stated that claimant's whole person IR was 38%. Dr. J's report is silent concerning claimant's having reached MMI. The copy of the report in evidence bears the carrier's date stamp showing receipt on September 16, 1992. In statements to the hearing officer, the parties indicated that there was no Report of Medical Evaluation (TWCC-69) in conjunction with Dr. J's narrative report and they recognized that this report failed to state that claimant had reached MMI and referred to a version of the AMA Guides other than the version required by Section 408.124(b). In a note responding

to claimant's attorney, Dr. J stated that in comparing claimant's IR under the Third Edition and the Third Edition (Revised), there was no difference in her rating. There was no dispute that Dr. J's IR was not disputed within 90 days of its receipt by the carrier.

Also in evidence is the February 10, 1993, TWCC-69 of Dr. W, who apparently examined claimant at the request of the carrier, which states that claimant reached MMI on "02/06/93" with an IR of "7%." The exhibit bears a date stamp showing receipt on February 17, 1993. Again, it was undisputed that this IR was not disputed within 90 days. In a narrative report of February 6, 1993, Dr. W indicated that the seven percent IR was for degenerative changes at L3-4.

The carrier introduced a letter from Dr. D dated October 28, 1992, stating that notwithstanding his annotation on a TWCC-69 form that claimant reached MMI on October 21, 1992, that date was the date of her next appointment and that she had not reached MMI and her MMI date was not yet determined. Also in evidence is an undated TWCC-69 signed by Dr. D stating that claimant reached MMI on "3-1-93," that Dr. D agrees with Dr. W's report, and that the seven percent is for the lumbar spine.

Claimant's first position at the hearing was that the hearing officer could infer from the context of the medical records in evidence that Dr. J's unstated MMI date for claimant was July 28, 1992, the date of his examination, and thus determine that Dr. J's 38% IR became final for lack of dispute by the carrier within 90 days. Claimant acknowledged that she had been unable to locate any Appeals Panel decisions affirming a hearing officer's having inferred an MMI date from other medical records in order to save an IR from being invalid. In the alternative, claimant contended that whether or not Dr. J's IR was invalid on its face for lack of a determination that claimant had reached MMI and/or for Dr. J's reliance on the Third Edition (Revised) version of the AMA Guides, Rule 130.5(e) applies only to the first IR assigned a claimant, whether or not valid. Therefore, argued claimant, Dr. W's IR did not become final under Rule 130.5(e) and she is entitled to be evaluated by a designated doctor. The carrier contended that Dr. J's report, assigning the 38% IR, did not qualify as a "certification" of an IR because it failed to state an MMI date and referred to an incorrect version of the AMA Guides and, therefore, Dr. J's IR did not even qualify to be considered under Rule 130.5(e), and Dr. W's IR is the first IR disputable under Rule 130.5(e) and it has become final for lack of dispute by claimant within 90 days.

In support of her position claimant cited the hearing officer to the decision in Texas Workers' Compensation Commission Appeal No. 981585, decided August 28, 1998, which we regard as on point and dispositive. The sole issue in that case was whether the first certification of MMI and IR assigned by a Dr. S became final under Rule 130.5(e). The evidence showed that Dr. S's TWCC-69 with a zero percent IR did not include any date of MMI. The hearing officer found that Dr. S's certification did become final but the Appeals Panel reversed and rendered a new decision that it did not. Our decision stated the following:

We have previously held that Rule 130.5(e) applies to only the first certification and not to any later rating even if the first certification is invalid on its face. We stated the rationale for this in Texas Workers' Compensation Commission Appeal No. 941137, decided October 10, 1994, stating as follows:

> We conclude that Rule 130.5(e) applies only to the chronologically first, written certification of MMI or IR. Whether that certification is ultimately found valid or invalid is important for considerations of finality under the rule. A determination that it is valid, obviously brings the rule into play. A contrary determination--that it is invalid--serves only to make the rule inapplicable to that certification. It does not preserve the rule for possible reapplication to a later "first valid" rating. To hold otherwise would expose parties to numerous possible final ratings, each succeeding the other, without any confidence as to which is "first" until all prior ratings in due course are determined invalid. This would force a party to dispute each rating as he or she received written documentation of it. We do not consider this to have been the intention of the [Texas Workers' Compensation] Commission when this rule was promulgated and do not so interpret the rule.

See also Texas Workers' Compensation Commission Appeal No. 950431, decided May 4, 1995; Texas Workers' Compensation Commission Appeal No. 951326, decided September 25, 1995.

The carrier contends that the hearing officer failed to address its alternate argument that claimant waited too long to raise this IR dispute. However, there was no disputed issue involving claimant's having waived the IR issue and the carrier cited no authority for its contention. We find no error.

We are satisfied that the evidence sufficiently supports the appealed findings. In re King's Estate, 150 Tex. 662, 244 S.W.2d 660 (1951).

The decision and order of the hearing officer are affirmed.

_____
Philip F. O'Neill
Appeals Judge

CONCUR:

_____
Thomas A. Knapp
Appeals Judge

_____
Elaine M. Chaney
Appeals Judge