

## APPEAL NO. 990777

This appeal arises pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act). A contested case hearing (CCH) was held on March 23, 1999. He determined that the first certification of a date of maximum medical improvement (MMI) and an impairment rating (IR) became final because it was not timely disputed. The appellant (claimant) appeals this determination, asserting various legal errors. The respondent (carrier) replies that the decision is correct, supported by sufficient evidence, and should be affirmed.

### DECISION

Reversed and a new decision rendered.

Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 130.5(e) (Rule 130.5(e)) 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." If the IR becomes final by virtue of this rule, the underlying date of MMI also becomes final. Texas Workers' Compensation Commission Appeal No. 92670, decided February 1, 1993. The 90 days begins to run on the date the disputing party receives written notice of the certification. Texas Workers' Compensation Commission Appeal No. 950666, decided June 12, 1995.

The essential facts of this case are undisputed. The claimant sustained a compensable injury on \_\_\_\_\_. The first IR for purposes of Rule 130.5(e) was assigned by Dr. D, a carrier-selected doctor, in a Report of Medical Evaluation (TWCC-69) signed by Dr. D on August 12, 1998, based on an examination of that date. In this report, Dr. D certified MMI on August 12, 1998, and assigned an 11% IR. Dr. D attached a seven-page report to the TWCC-69. On the third page, in a paragraph titled "DISCUSSION," he noted the claimant's prior surgery (unrelated to the \_\_\_\_\_, injury) with excessive scar formation which necessitated a second surgery and concluded that "the majority of his difficulties arise from his pre-existing surgically deficient spine." This TWCC-69 and attached report have two date stamps indicating receipt by the carrier on both August 19 and September 2, 1998. The parties stipulated that the claimant received a copy of these documents on September 5, 1998, and that it was disputed by his attorney on December 11, 1998, which was more than 90 days after the date of receipt.

Also in evidence was a two-page document titled "PARTIAL REPORT" signed by Dr. D. The document refers to a "date of evaluation," *i.e.*, examination of the claimant on August 12, 1998. This document indicates that it was dictated and transcribed on August 18, 1998. It was date stamped as received by the carrier on August 27, 1998. There is no indication that it was contemporaneously sent to the Texas Workers' Compensation Commission, the claimant, or the claimant's attorney. The hearing officer commented in his decision and order that this report "does not appear to have been attached to [Dr. D's] [IR] report nor does it appear to have been transmitted to anyone other than the Carrier and was not a part of the TWCC-69." The carrier does not take issue with this comment and

appears to have conceded as much at the CCH. The report contains a section entitled "HISTORY OF PRESENT ILLNESS" which is not identical with, but is substantially similar to, the same section in the report attached to the TWCC-69. The "PARTIAL REPORT" also has a "DISCUSSION" section which begins similarly to the same section in the report attached to the TWCC-69, but is substantially longer and adds the comment that it "would certainly be most reasonable before making final judgement to have electrodiagnostic evaluation of the back and lower extremities performed to determine if, in fact, there is evidence of acute radiculopathy" related to the \_\_\_\_\_, injury or to the preexisting condition. This section concludes:

Formal impairment has been performed based on today's examination and will be withheld until I have had the opportunity to review the EMG and nerve conduction of the lower extremity.

These further studies were apparently done on October 21, 1998. The claimant testified that he was called by Dr. D's office several days after the examination to attend an EMG evaluation. He said he did not know why.

The hearing officer quoted at length from the "PARTIAL REPORT" in his decision and order and then commented that Dr. D's TWCC-69 was "valid on its face" and that it had to be disputed within 90 days of receipt or would become final. He reached this conclusion without attaching significance to the claimant's and his attorney's lack of knowledge of the existence or contents of the "PARTIAL REPORT."

We agree that the TWCC-69 and its attached report have a facial validity. We further conclude that the "PARTIAL REPORT" has such a profound and substantial effect on the TWCC-69 that a reasonable response to the TWCC-69 could not be made without it. Under these circumstances, the finding that receipt of only the TWCC-69 and its attached report triggered the 90-day dispute provisions of Rule 130.5(e) raises questions of fundamental fairness.<sup>1</sup> See generally Guerrero-Ramirez v. Texas State Board of Medical Examiners, 867 S.W.2d 911 (Tex. App-Austin 1993, no writ). Rather than deciding solely on the basis of a lack of fundamental fairness, we also believe that the "PARTIAL REPORT" had the practical and legal effect of rescinding, within a week and before the claimant even received it, Dr. D's certification of IR. We have held that a proper rescission of the first certification within the 90-day period prevents the application of Rule 130.5(e). See Texas Workers' Compensation Commission Appeal No. 982002, decided October 5, 1998; Texas Workers' Compensation Commission Appeal No. 950359, decided April 24, 1995; Texas Workers' Compensation Commission Appeal No. 93987, decided December 14, 1993. Alternatively, we believe that the "PARTIAL REPORT" rendered the TWCC-69, at worst, ambiguous as to whether the claimant was at MMI and, at best, tentative, subject to future verification of the date of MMI after additional medical testing. With no valid date

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<sup>1</sup>According to the un rebutted testimony of the claimant's attorney at the CCH, the claimant did not receive the "PARTIAL REPORT" until sometime after the benefit review conference (BRC). So, if one were to construe the first report for purposes of Rule 130.5(e) to be complete only with the "PARTIAL REPORT," it would have been timely disputed.

of MMI, there is no valid IR and nothing to dispute under Rule 130.5(e). Texas Workers' Compensation Commission Appeal No. 970522, decided April 30, 1997.

A substantial portion of the CCH was devoted to whether the claimant's treating doctor disputed Dr. D's TWCC-69 on behalf of the claimant by checking the disagreement blocks at the bottom of a copy of the TWCC-69. The hearing officer held that this procedure did not constitute a dispute because it was not done on behalf of the claimant. The claimant appeals this determination, contending that the Appeals Panel should clarify existing precedent on this issue. See Texas Workers' Compensation Commission Appeal No. 990790, decided May 19, 1999. Because of our resolution of the disputed issue in this case on other grounds, we need not address this question. For the same reasons, we do not address various administrative deficiencies cited by the claimant for the proposition that alone or collectively they rendered Rule 130.5(e) inapplicable in this case.

For the foregoing reasons, we reverse the decision of the hearing officer that the claimant's first certification of MMI and IR became final under Rule 130.5(e) and render a decision that it did not. A designated doctor should be appointed to resolve MMI and IR.

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Alan C. Ernst  
Appeals Judge

CONCUR:

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Robert W. Potts  
Appeals Judge

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Elaine M. Chaney  
Appeals Judge