APPEAL NO. 991375

This appeal arises pursuant to the 1989 Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq*. (1989 Act). On May 12, 1999, a hearing was held. He determined that the respondent's (claimant) initial impairment rating (IR) did not become final under Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 130.5(e) (Rule 130.5(e)). He also found that the claimant had disability from June 26, 1998, "to the date of MMI [maximum medical improvement], 3-16-99," and that the IR is 24% as found by the designated doctor. Appellant (carrier) pointed out errors in the decision and states that the determination that there was a clear misdiagnosis "incorrectly interpret[s]" the 1989 Act "and Rules" and said that the initial IR became final; it also states that the designated doctor's report could not be the basis for an IR, that there was no disability, and that the Texas Workers' Compensation Commission (Commission) should not have appointed a designated doctor. The appeals file contains no reply from claimant.

DECISION

Reversed and rendered.

The initial IR was provided by Dr. S on December 17, 1997, certifying MMI on December 15, 1997, with a zero percent IR. The date of injury was _____. The hearing officer found that claimant received written notice of the initial IR between January 12, and January 17, 1998, but did not dispute the initial IR until March 17, 1999 (over a year later). Those dates were not appealed. They indicate that the claimant did not dispute the initial IR within 90 days as is required by Rule 130.5(e). The hearing officer's Statement of Evidence and Discussion states that claimant did not timely dispute the initial IR even though there is no finding of fact to that effect.

The hearing officer found a misdiagnosis even though there is no medical opinion that the initial IR was based on a misdiagnosis or that tests that should have been done at the time of the initial IR were not done. Indeed, the hearing officer's Statement of Evidence and Discussion only mention that the initial IR occurred two days after injury, that an MRI made in 1997 before the compensable injury of _____, showed no recurrent disc herniation, and that an MRI made in March 1998 showed recurrent disc herniation.

The hearing officer identified the basis for the "clear misdiagnosis" as the MRI of March 19, 1998, and claimant testified on page 43 of the transcript that he went to Dr. K in March 1998 for an MRI and was told "at that point" that it showed a "bulging disk," which he had never had a problem with before. Dr. K's records in evidence show that he ordered an MRI on March 3, 1998; on March 24, 1998, he saw claimant who brought the "MRI films and a report of findings." Dr. K then said that it was the "Impression" that there is a "recurrent disc herniation at L5-S1." At that point, less than 90 days had lapsed since the receipt of the written notice of initial IR on January 12 to January 17, 1998. *See* Texas Workers' Compensation Commission Appeal No. 982355, decided November 12, 1998 (Unpublished), and Texas Workers' Compensation Commission Appeal No. 982099,

decided October 19, 1998, which said that even if a determination of "clear misdiagnosis" is sufficiently supported by the evidence, such misdiagnosis does not invalidate an initial IR when a claimant learns of it within the 90 days and could have disputed before the 90 days had expired. Therefore, since the only basis provided for the initial IR not to have become final is a determination of clear misdiagnosis and the basis for that misdiagnosis has been shown to have been communicated to claimant prior to the end of the 90-day period for disputing, the determination that the initial IR did not become final is reversed and a new determination is hereby made that the initial IR did become final.

In addition, Texas Workers' Compensation Commission Appeal No. 991307, decided July 28, 1999, cited Rodriguez v. Service Lloyds Insurance Company, 42 Tex. Sup. Ct. J. 900 (July 1, 1999), which stated that there are no exceptions to Rule 130.5(e), although it did not say that the requirement for notice, also not set forth in Rule 130.5(e), should be discarded; neither did it say that there could be a final initial IR without MMI having been reached, although Rule 130.5(e) says nothing of MMI. Appeal No. 991307 stated that Rodriguez is "presently binding" on the Appeals Panel and this writer agrees that the Rodriguez decision is another reason why the decision in the case under review must be reversed and rendered. However, as stated, the court in Rodriguez appears to have accepted the requirement that Rule 130.5(e) must be consistent with the 1989 Act which requires MMI before an initial IR may be assigned, even though Rule 130.5(e) is silent as to MMI; the 1989 Act in Section 401.011(24) also states that an IR "means the percentage of permanent impairment of the whole body resulting from a compensable injury." (Emphasis added.) Whether or not other "exceptions," previously applied to Rule 130.5(e), had a basis set forth in the 1989 Act, an affirmed determination of misdiagnosis equates to an IR for something other than the compensable injury; as such, misdiagnosis, as a reason to invalidate an initial IR, may be said to have an underlying basis in the 1989 Act. *See* Texas Workers' Compensation Commission Order on Motion for Reconsideration No. 99025, decided July 15, 1999, which declined reconsideration stating that the misdiagnosis in that case resulted in an IR for the shoulder when the injury was actually to the cervical spine.

As pointed out by Appeal No. 982099, *supra*, the appointment of a designated doctor does not dictate that the initial IR did not become final. Similarly, without a Commission determination that the initial IR had become final, it was not inappropriate for the Commission to appoint a designated doctor. Whether or not this designated doctor's report could withstand scrutiny is not necessary to determine since the initial IR has been determined to have become final (for two reasons) as set forth above. We do comment that a straight leg raise of 36E, as found by the designated doctor, would raise a question of whether the claimant could even sit in a chair.

The hearing officer determined that disability ran from June 26, 1998, when a doctor took claimant off work, until "the date of MMI, 3-16-99." (The decision contains dates of MMI stated as "3-16-98" and "3-16-99"; they do not have to be corrected because the date of MMI rendered by this decision is December 15, 1997, as certified in the initial IR.) The hearing officer's Statement of Evidence and Discussion states that disability began on June 26, 1998, when claimant was taken off work and ran until April 2, 1999, when he was released to work; this statement reflects a factual determination correctly applied to a legal

standard. Disability has nothing to do with MMI; disability could be found, and affirmed, to run for a year, for instance, past MMI. Temporary income benefits cease at MMI; disability does not cease at MMI. Since disability's ending date in this case will have no effect on income benefits because no income benefits will be due past December 15, 1997, when there is a zero percent IR, there is no need to correct, or remand for the hearing officer to address, the ending date of disability.

The decision in this case, found at the end of the hearing officer's opinion, is reversed and a new decision is rendered which states that the first certification of IR assigned by Dr. S did become final. The claimant's date of MMI is December 15, 1997, and the impairment rating is zero percent. Disability, as specifically determined in a finding of fact and conclusion of law by the hearing officer, is from June 26, 1998, to March 16, 1999. Claimant is entitled to no income benefits. The order in this case, found at the end of the hearing officer's opinion, is affirmed.

_____
Joe Sebesta
Appeals Judge

CONCUR:

_____
Judy L. Stephens
Appeals Judge

_____
Dorian E. Ramirez
Appeals Judge