

APPEAL NO. 991746

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 June 23, 1999. The issues at the CCH were: what is the first impairment rating (IR), did the IR become final pursuant to Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 130.5(e) (Rule 130.5(e)), what is the IR, and did the Texas Workers' Compensation Commission (Commission) abuse its discretion in appointing a designated doctor to determine the IR. The hearing officer determined that the first IR was 58% from Dr. W; that the first IR of 58% was invalid on its face and did not become final under Rule 130.5(e); that the Commission did not abuse its discretion in appointing a designated doctor; and that the correct IR is 19%. The appellant/ cross-respondent (carrier) appeals, urging that the hearing officer erred in failing to grant the carrier's request for continuance until after judicial review of a previous Commission determination; erred in excluding the carrier's Exhibit No. 14; erred in admitting the claimant's Exhibit No. 17, and therefore finding that Dr. W's certification of maximum medical improvement (MMI) and IR was the first certification of MMI and IR; and erred in determining that the respondent/cross-appellant's (claimant) IR was anything other than zero percent. The claimant filed a document titled "Claimant's Response to Carrier's Request for Review" which was timely filed as an appeal. The claimant states that he is in agreement with certain findings of fact; however, he also states that the hearing officer erred, that the hearing officer's statement of the evidence and findings of fact are not based on complete and sufficient evidence and are against the great weight and preponderance of the evidence and that the conclusions of law are not correct, and requests that the decision of the hearing officer be affirmed. We will consider this document not only as a response to the carrier's appeal, but as an appeal. The carrier responds that the evidence is sufficient to support the complained-of findings of fact and conclusions of law.

DECISION

Affirmed.

On _____, the claimant was working as an operating technician when he was struck in the left side of his head by an overhead light. The extent of the injury has been the subject of two prior CCHs. On April 16, 1997, a CCH was held to determine whether the compensable injury extended to the lumbar and cervical spine, a hematoma, head injuries, seizures, and post-traumatic disorder. The hearing officer determined that as a natural probable result of the incident, the claimant developed seizure disorder, head injuries, post-traumatic stress disorder and post-concussive syndrome. The Appeals Panel affirmed the hearing officer's decision on July 11, 1997. The carrier timely appealed the decision and it is currently pending in district court. On August 4, 1998, a CCH was held to determine whether the compensable injury sustained by the claimant extended to an injury to his right shoulder, the condition of mental depression, and an aggravation of asthma. The hearing officer determined that the compensable injury did not extend to these

conditions. The Appeals Panel affirmed the hearing officer's decision on October 26, 1998, and it has become final.

In May 1998, the adjuster, Ms. P, sent a letter to the claimant informing him that he was approaching statutory MMI, that his treating doctor had not furnished a properly completed Report of Medical Evaluation (TWCC-69) indicating his IR, and that she was making a reasonable assessment of a 13% IR. On May 11, 1998, the claimant's attorney sent a letter to Ms. P requesting preauthorization for the treating doctor, Dr. W, and other doctors to evaluate the claimant for an IR. On May 8, 1998, Dr. W sent a letter to Dr. G requesting an IR for the claimant's shoulder. On May 8, 1998, Dr. W also sent a letter to Dr. L stating that she had assigned a 58% IR for brain pathology and was requesting an IR for the claimant's cervical and lumbar injuries, vertigo, concussions, contusions and the effects of his medications. Dr. W advised Dr. L that his rating was necessary for her to complete the claimant's IR.

On May 14, 1998, after examining the claimant, Dr. L certified that the claimant reached MMI on May 14, 1998, with an 18% IR. Dr. L's IR was based on cervical pathology, lumbar pathology, and brain pathology. On June 3, 1998, after examining the claimant, Dr. G assigned a 17% IR. Ms. P testified that the carrier received Dr. G's certification and assignment of an IR in a TWCC-69 on June 9, 1998, and that it was the first one received. Ms. P filed a Notice of Maximum Medical Improvement/Impairment Rating Dispute (TWCC-32) with the Commission on June 12, 1998, disputing Dr. G's 17% IR. Ms. P testified that the carrier received Dr. L's TWCC-69 on June 27, 1998, and she filed a TWCC-32 with the Commission on August 19, 1998, disputing Dr. L's IR. As a result of the carrier's dispute of Dr. G's IR, the Commission appointed a designated doctor, Dr. T. However, on July 10, 1998, the Commission canceled the appointment because "the treating doctor has rescinded his initial [IR] evaluation, therefore, the issue of disputing his evaluation is moot at this time."

On June 9, 1998, Dr. W completed a TWCC-69 and narrative indicating MMI was reached "statutory June 9, 1998" and assigned a 77% IR. On June 9, 1998, Dr. W sent a letter to the claimant's attorney which states in pertinent part:

I'm sorry for the delay in completing [the claimant's] final IR. I assigned [the claimant's] first IR on May 8, 1998. I assigned 58% whole body impairment rated under brain pathology (i.e. Sleep and Arousal Disorder). [The claimant] reached statutory MMI on May 14, 1998. Due to multiple diagnoses being rated, I felt it necessary to attempt to obtain opinions from evaluators who specialized in each rated area. On May 8, 1998, I referred [the claimant] to [Dr. L] and [Dr. G] for impairment ratings. They were also informed of [the claimant] reaching statutory MMI. I delayed completing his final rating pending [Dr. L's] and [Dr. G's] reports.

Ms. P submitted an affidavit which states that as of the date of the benefit review conference on March 25, 1999, the carrier had not received a 58% IR from Dr. W; that the carrier did not receive a copy of the Dr. W's June 9, 1998, letter to the claimant's attorney until April 1999; and that the carrier did not receive the 77% IR from Dr. W until August 25, 1998. On August 11, 1998, the claimant's attorney submitted a Request for Benefit Review Conference (TWCC-45) indicating that the claimant was disputing the reasonable assessment of 13%, and that on June 9, 1998, Dr. W assigned a 77% IR. (Dr. FG) was appointed by the Commission as the designated doctor. Dr. FG examined the claimant on September 3, 1998, and certified MMI on June 9, 1998, with a 23% IR.

At the hearing, during the claimant's direct examination of Ms. P, the claimant offered claimant's Exhibit No. 17, a TWCC-69 signed by Dr. W on May 8, 1998, indicating MMI "statutory May 14, 1998" with a 58% IR. On the back of the TWCC-69 it states, "[Claimant] this report is for your records. I have included the referrals [sic] for Dr. [L] and Dr. [G]. I will complete this rating as soon as possible." The carrier objected to the admission of the document on the basis that it was not previously exchanged. The claimant argued that he did not know the document existed until it was given to him by one of his attorneys at a deposition for an unrelated matter the day before the CCH, and that the attorney who had the document received it from another attorney who represents the claimant in a discrimination case. The carrier argued that the claimant's attorney was acting as the agent of the claimant, therefore, the document was in the claimant's possession. The hearing officer, after considering argument from both parties, stated that he accepted claimant's representation that he was not aware of the document until 24 hours before the hearing, that even though the claimant was represented by counsel and counsel may have had the document in his possession the claimant was not aware of it, and found good cause to admit the document.

During closing argument, the claimant objected to carrier's Exhibit No. 14, medical records from Dr. N in 1994, that had been admitted earlier in the CCH without objection. The claimant objected to the admission of the exhibit on the basis of relevancy. The carrier argued that the exhibit was offered for the purpose of indicating the claimant's preexisting psychological condition. The hearing officer stated that the records did not appear to concern the conditions which were compensable and did not have anything to do with the issues before him, and excluded the document.

We first address the carrier's contention that the hearing officer erred in failing to grant the carrier's request for continuance until after judicial review of a previous Commission determination. Issues involving the extent of the injury are pending in district court. Section 410.205(b) provides that the decision of the Appeals Panel is binding during the pendency of an appeal under Subchapters F or G, and Section 410.207 provides that during judicial review of an Appeals Panel decision on any disputed issue relating to a workers' compensation claim, the Commission retains jurisdiction of all other issues related to the claim. The 1989 Act created an "issue driven" system where issues "are adjudicated as they arise and are raised for resolution before the Commission." Texas Workers' Compensation Commission Appeal No. 960916, decided June 25, 1996. We conclude that

the hearing officer did not err in refusing to grant a continuance as our decision on the extent of injury is binding during the pendency of the appeal of our decision.

The carrier asserts that the hearing officer erred in admitting into evidence claimant's Exhibit No. 17, and in not admitting carrier's Exhibit No. 14. Evidentiary rulings by a hearing officer on documents which are admitted or not admitted are generally viewed as being discretionary and will be reversed only if there is an abuse of discretion. Texas Workers' Compensation Commission Appeal No. 941414, decided December 6, 1994. In determining whether there is an abuse of discretion, the Appeals Panel looks to see if the hearing officer acted without reference to any guiding rules or principles. Appeal No. 941414. The hearing officer did not abuse his discretion in ruling that the claimant had good cause for failure to timely exchange claimant's Exhibit No. 17, and did not abuse his discretion in ruling that carrier's Exhibit No. 14 was not relevant. Even if the hearing officer had erred in admitting claimant's Exhibit No. 17, or erred in not admitting carrier's Exhibit No. 14, it would not have been reversible error because there is no showing that such error was reasonably calculated to cause and probably did cause the rendition of an improper decision. Texas Workers' Compensation Commission Appeal No. 92241, decided July 24, 1992.

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. The Appeals Panel has held that the 90-day period begins to run from the date that the party receives notice of the certification of MMI and IR in writing. Texas Workers' Compensation Commission Appeal No. 94354, decided May 10, 1994. The Appeals Panel has 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. The Appeals Panel 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 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 Appeals Panel has held that a certification that contains a prospective MMI date is invalid on its face and does not become final under Rule 130.5(e). Texas Workers' Compensation Commission Appeal No. 941098, decided September 29, 1994. The Appeals Panel has also recognized that conditional certifications do not become final under Rule 130.5(e) when the condition is subsequently met. That is, where the certifying doctor clearly articulates that the rating is subject to change upon the occurrence of an event, Rule 130.5(e) does not operate to finalize the certification when the event has transpired. See, e.g., Texas Workers' Compensation Commission Appeal No. 990799, decided June 2, 1999; Texas Workers' Compensation Commission Appeal No. 971771, decided October 22, 1997.

In the present case the underlying issue is which is chronologically the first IR. It is the claimant's position that the May 8, 1998, letter of referral to Dr. L from Dr. W was the first certification of the 58% IR, was received by the carrier in May 1998, and has become final. The claimant further asserts that the carrier was notified in writing of Dr. W's 58% IR on August 20, 1998, and that the carrier was notified verbally at the December 18, 1998, benefit review conference of the 58% IR assigned by Dr. W on May 8, 1998. It is the carrier's position that the first valid IR was Dr. L's which was disputed timely. The hearing officer determined that the 58% IR given by Dr. W on May 8, 1998, was chronologically the first IR assigned to the claimant, but that it was invalid on its face and did not become final under Rule 130.5(e) because it had a prospective MMI date and was conditioned upon the receipt of Dr. L's and Dr. G's reports. Review of the record indicates that Dr. W's TWCC-69 dated May 8, 1999, is chronologically the first IR, despite subsequent IRs which were assigned but received by the carrier prior to Dr. W's TWCC-69 dated May 8, 1999. Dr. W's certification was invalid on its face because it contained a prospective statutory MMI date and was conditioned upon the receipt of Dr. L and Dr. G's reports. Since Rule 130.5(e) does not apply to any other certification but the first, Rule 130.5(e) is inapplicable in this case. We find the evidence sufficient to support the hearing officer's determinations that the first IR was 58% from Dr. W, and that the first IR of 58% was invalid on its face and did not become final.

Section 408.125(e) provides that the report of the designated doctor selected by the Commission has presumptive weight and that the Commission shall base its determination of IR on that report "unless the great weight of the other medical evidence is to the contrary." The claimant argues that the designated doctor, Dr. FG, did not consider or rate his post traumatic stress disorder, which has been determined to be compensable by the Commission. The hearing officer reviewed Dr. FG's report and states that Dr. FG did not believe the claimant's psychological conditions were permanent and chose not to rate them. Dr. FG's report indicates that he did consider the claimant's post-traumatic stress disorder and did rate the condition, assigning a zero percent impairment. The hearing officer considered all of the medical evidence presented, gave presumptive weight to

Dr. FG's IR, and did not find that the other medical evidence rose to the level of great weight against the IR assigned by Dr. FG. The report of the designated doctor indicates that he used the proper Guides to the Evaluation of Permanent Impairment, third edition, second printing, dated February 1989, published by the American Medical Association, and properly applied them to the compensable injury. The hearing officer mathematically corrected Dr. FG's IR to 19%, after deducting a five percent rating for the shoulder using the combined values chart. The determination of the hearing officer that the claimant's IR is 19% is not so against the great weight and preponderance of the evidence as to be clearly wrong or manifestly unjust. In re King's Estate, 150 Tex. 662, 244 S.W.2d 660 (Tex. 1951).

The decision and order of the hearing officer are affirmed.

Dorian E. Ramirez
Appeals Judge

CONCUR:

Tommy W. Lueders
Appeals Judge

Judy L. Stephens
Appeals Judge