APPEAL NO. 991805

This appeal arises pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act). A contested case hearing was held on July 1 and 29, 1999, with the record closing on August 5, 1999. He (hearing officer) determined that the first impairment rating (IR) of 14% assigned by Dr. W became final and that the respondent's (claimant) IR was 15%. The appellant (carrier) appeals this determination, citing legal error. The claimant replies that the decision is correct 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." In Rodriguez v. Service Lloyds Insurance Company, 42 Tex. Sup. Ct. J. 900 (July 1, 1999), the Texas Supreme Court held that there were no exceptions to this rule.

Dr. W completed a Report of Medical Evaluation (TWCC-69) on May 20, 1998, in which he certified a 14% IR. In an attached narrative, he listed the components of this IR as five percent for loss of lumbar range of motion (ROM) and 10% for a specific disorder of the lumbar spine. The narrative expressly reflected that the sum of these components was 14%. The Combined Values Chart of the Guides to the Evaluation of Permanent Impairment, third edition, second printing, dated February 1989, published by the American Medical Association (AMA Guides) provides that the combination of five percent and 10% yields a whole body IR of 15%.[1] On July 27, 1999, Dr. W wrote the ombudsman that under the AMA Guides the IR "should have been 15%." It was unclear what motivated this letter at this time, some 14 months after he completed the TWCC-69. In his discussion of the evidence, the hearing officer interpreted Dr. W's letter as an acknowledgment that he made "a clerical or mathematical error when using the Combined Values Chart."

The hearing officer made the following pertinent findings of fact, none of which have been appealed:

FINDINGS OF FACT

3. [Dr. W] prepared a [TWCC-69] and certified that the Claimant reached maximum medical improvement [MMI] with a [14% IR].

4. This was the Claimant's first certification of MMI/IR.

[1] It is worth noting that the Combined Values Chart does not provide a simple sum in all cases.

8. The Claimant did not dispute the original certification of [MMI] and the resulting [IR] within ninety days.

10. [Dr. W] did not use the Combined Values Chart properly.

11. According to the Combined Values Chart of the AMA Guides, the Claimant should have a [15% IR].

The hearing officer thereafter concluded that the first IR from Dr. W "became final pursuant to Rule 130.5(e)" (Conclusion of Law No. 1) and that the claimant reached MMI on May 20, 1998, "with a [15% IR]." Conclusion of Law No. 2.

The carrier appeals only Conclusion of Law No. 2, arguing that an "incorrect use of the AMA Guides does not invalidate an [IR]" and that the IR of 14%, not 15%, became final by operation of Rule 130.5(e). In support of its position, the carrier relies on our decision in Texas Workers' Compensation Commission Appeal No. 94475, decided June 3, 1994, which in turn relied in part on Texas Workers' Compensation Commission Appeal No. 94049, decided February 18, 1994. In both opinions, we wrote that an error in "computation" did not create a situation where Rule 130.5(e) was not dispositive of the issue of finality. The carrier further notes that since the Supreme Court's decision in Rodriguez, *supra*, there can be no exception to Rule 130.5(e) even for such "computational errors."

The hearing officer did not resolve this case in terms of an impermissible "exception" to Rule 130.5(e), but apparently in terms of what he perceived to be a simple "clerical or mathematical" error, and that Dr. W had really intended all along to assign a 15% IR. Our review of Dr. W's TWCC-69 and attachments reflect that not only on the face of the TWCC-69 did he write "14%" but he also stated in the attached narrative that the claimant "has a combined total [IR] of the whole person of 14%." In another calculation sheet attached to his report, the components of the IR are listed as totaling or equaling 14% whole person. The text of Dr. W's letter of July 27, 1999, refers only to what the IR "should have been." From this, we are unwilling to conclude that the 14% was in the nature of a clerical or mathematical error, but that, correctly or incorrectly, Dr. W intended to assign a 14% IR when he completed the TWCC-69. The hearing officer's implied finding of a clerical or mathematical error is, under these circumstances, contrary to the great weight and preponderance of the evidence.

As to the Appeals Panel decisions relied on by the carrier, we observe that these dealt with an absent component of an IR, that is, a failure to include a number for or to rate a ROM or neurological deficit. While admittedly the word "computation" was used in these cases, it was not used in the sense of a simple arithmetical mistake from a given set of numbers. Thus, we do not concede that they are directly controlling on the issue before us. More relevant, we believe, is our decision in Texas Workers' Compensation Commission Appeal No. 962037, decided November 27, 1996. In this case, we rendered a decision that the first certification of MMI and IR became final. The hearing officer found that the first

certification did not become final because it was invalid in that the percentage given for a specific disorder of the spine (five percent) did not appear in the relevant section of Table 49 of the AMA Guides and, according to the hearing officer, "[t]here is absolutely no evidence of where he got that figure." While recognizing the holding of Appeal No. 94475, *supra*, the hearing officer nonetheless concluded that "this is an error of sufficient magnitude as to invalidate" the first certification. In reversing and rendering, the Appeals Panel wrote that even if the observations of the hearing officer about Table 49 were accurate, they did not invalidate the first certification, but this was "just the type of error or flaw in the rating that the claimant is to raise in the 90-day period." *See also* Texas Workers' Compensation Commission Appeal No. 961334, decided August 23, 1996, which suggests that even the absence of any attachments reflecting how a rating was calculated would not render the certification invalid and Rule 130.5(e) not dispositive.

We believe that Appeal No. 962037, *supra*, is the controlling precedent in the case we now consider. In these cases, the question was not whether the wrong version of the AMA Guides was used or whether an examination of the claimant was contrary to the AMA Guides. Rather, it was whether the doctor correctly applied a chart in the AMA Guides to the data he obtained from his clinical examination. In this case, Dr. W obviously did not. Such a flaw was precisely the type that the claimant was bound under Rule 130.5(e) to dispute under pain of finality. His failure to do so is not excused by ignorance of the law or ignorance of the Combined Values Chart.[2] Texas Workers' Compensation Commission Appeal No. 970898, decided June 27, 1997.

One final comment on the impact of the Rodriguez, *supra,* decision on this case is in order. This case was disputed in terms of the validity of the first certification or, alternatively, in terms of what the first certification really was. This presented a threshold question of whether there was and what was the first certification, not whether there are still viable "exceptions" to an otherwise valid first certification. This latter question was resolved by Rodriguez. While our disposition of this case is consistent with Rodriguez, we stress that we do not believe Rodriguez was dispositive.

[2]The five percent and 10% total 15% under both the table and simple addition. Whether the claimant knew of the table would have no bearing on raising a question about the arithmetical sum of the two.

For the foregoing reasons, we reverse the conclusion of law of the hearing officer that the claimant's IR is 15% and render a decision consistent with the findings of fact and remaining conclusion of law that the claimant's correct IR is 14%.

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Alan C. Ernst
Appeals Judge

CONCUR IN RESULT:

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Robert W. Potts
Appeals Judge

CONCURRING OPINION:

I concur in the decision to reverse this case and render a new decision that the impairment rating (IR) that became final under Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 130.5(e) (Rule 130.5(e)) is the 14% that Dr. W certified, albeit by incorrectly using the Combined Values Table of the Guides to the Evaluation of Permanent Impairment, third edition, second printing, dated February 1989, published by the American Medical Association. I agree that under our prior decisions interpreting Rule 130.5(e), Dr. W's error in using the Combined Values Table is the type of defect or flaw in a rating that a party challenging that rating is required to raise within the 90-day dispute period. Nonetheless, I feel constrained to comment that, in my opinion, decisions such as this one which serve to perpetuate an obvious error and result in a claimant being denied the opportunity to even apply for a category of benefits to which she might be entitled with a 15% IR, namely supplemental income benefits, are difficult to justify in the name of hastening finality. Although finality may be an important objective, where, as here, it is advanced to the exclusion of the claimant 's receipt of and the carrier's being responsible for the benefits that might otherwise be due, I believe that a serious question exists as to the continuing need for Rule 130.5(e). In my opinion, the reasons for the rule should be reexamined and weighed against the seemingly unintended consequences of its application.

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Elaine M. Chaney
Appeals Judge