APPEAL NO. 992958

This appeal arises pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq*. (1989 Act). On December 13, 1999, a hearing was held. He (hearing officer determined that the initial impairment rating (IR) of Dr. F did not become final under the provisions of Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 130.5(e) (Rule 130.5(e)). Appellant (carrier) asserts that it was error to determine that Dr. F's assignment of IR, and certification of maximum medical improvement (MMI) that accompanied it, was conditional; since no dispute was made within 90 days the initial IR became final. Respondent (claimant) replied that the decision should be affirmed.

DECISION

Reversed and rendered.

Claimant worked for (employer) on _____. He testified that he fell about 10 feet off a satellite dish while working for employer in (state). He received medical care in Kuwait and several days later returned to the United States. He received some care from Dr. G in (city 1) upon returning, but then saw Dr. F in (city 2). Dr. F's first note of September 8, 1995, says that claimant hurt his back and that an MRI had been made but was not available. Dr. F says claimant had pain at that time but that it was improving. Dr. F did various tests as part of his examination, such as decreased range of motion (ROM), and considered claimant to have lumbar radicular syndrome. Dr. F's note of September 22, 1995, is short, saying that claimant had completed physical therapy and has "little or no symptoms at this stage." He added that claimant was "neurologically and motor function wise intact in the lower extremities" and had good ROM. Dr. F returned claimant to work as of September 25, 1995, and said he would see him one more time in a month "at which stage we will do a TWCC-69 form [Report of Medical Evaluation] and rate him and release him if he is still doing well. He is in total agreement with that."

Then, on February 26, 1996, Dr. F replied to a letter from carrier. He repeated that he had not seen the MRI that claimant obtained, but noted the physical therapy claimant was provided. Dr. F added that on September 22, 1995, claimant was "virtually pain free," that he gave claimant a full release to work, and said claimant was being transferred (by employer) to Saint Louis. Dr. F then pointed out that he told claimant to "follow up" if he had problems, but said he has not heard from him, but understands that claimant is due back in July 1996. He referred to carrier's request for a TWCC-69 and said he reviewed the medical records. He said he completed the TWCC-69 "in accordance with" the Guides to the Evaluation of Permanent Impairment, third edition, second printing, dated February 1989, published by the American Medical Association (AMA Guides). He provided a date of MMI of September 22, 1995, with a zero percent IR. Then, on the second page of this letter that accompanied the TWCC-69, Dr. F said:

> However I would like to state for the record that should he return in July and become symptomatic or have been symptomatic in the interim without my

> knowledge, that it would be appropriate at that stage for me to make various treatment options available to him and to in fact be permitted to provide medical care without any undue difficulty or interference. [Emphasis added.]
>
> With this understanding, I will go ahead and issue this form and expect to hear from you if to the contrary.

The TWCC-69 was signed by Dr. F on February 26, 1996, stating that MMI was reached on September 22, 1995, with a zero percent IR; it stated nothing on its face that in any way indicated that the IR or MMI was provisional or conditional. *See* Texas Workers' Compensation Commission Appeal No. 982212, decided November 2, 1998.

The hearing officer found that claimant was deemed to have received written notice of the initial IR on March 16, 1996, and did not dispute within 90 days; those findings of fact are not appealed.

Dr. F next saw claimant on October 21 and 23, 1996, for pain in the lumbar and flank area, which was said to have started within the time frame relative to July 1996. Dr. F did not see claimant again until September 17, 1997. Dr. F examined an MRI that had been done two weeks after the injury in 1995; he referred to it as normal but said it may have been done too soon after the injury. He recommended a repeat of the MRI. On October 8, 1997, Dr. F said that the MRI was "negative for HNP [herniated nucleus pulposus] or disc injuries." (This MRI is dated October 3, 1997.) Dr. F saw claimant approximately 25 more times between October 8, 1997, and July 28, 1999; a myelogram in March 1998 found a "mild disc bulge at L3-4," while an EMG of the same date examined the lower left leg and found it "normal"; Dr. F on July 28, 1999, wrote:

> I did do an [IR] back in 96, at which stage without a crystal ball, it was thought he was at his MMI. Based on his overall presentation the last four years, I think that was premature and I would like to repeat his [IR]. [Emphasis added.]

Claimant disputed the initial IR in August 1999; as stated, he was found to have received notice of it on March 16, 1996.

The hearing officer found that the initial IR was conditional and therefore did not become final. He cited Texas Workers' Compensation Commission Appeal No. 991489, decided August 30, 1999 (Unpublished). That appeal affirmed a hearing officer's decision that the initial IR did not become final for two reasons. One reason was that a dispute was timely made; the other was that the IR was conditional in that it was "conditioned on a future determination of whether the lower back was part of the original injury." (Emphasis added.) That appeal also stated:

> [W]here, as here, 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. [Emphasis added.]

Appeal No. 991489 cited certain other appeals. As a result, Texas Workers' Compensation Commission Appeal No. 990799, decided June 2, 1999, was also reviewed; it affirmed a decision in which another initial IR was found not to be final. That determination went further a field by not just looking to the TWCC-69 but to a "chart note" dated 10 days later which said that claimant "needed a second opinion." Appeal No. 990799 then said that the doctor providing the initial IR had provided that IR at the "same time that he urged the necessity of a second opinion precisely to evaluate whether further surgery would be warranted." Then Appeal No. 990799 said, generally, "a contingent IR that indicates it is provisional or temporary pending the occurrence of further specified treatment or surgery which ultimately occurs could be interpreted as an IR which falls by its own terms because it was provisional from the outset." (Emphasis added.) (Appeal No. 990799 does not provide facts showing that the IR involved was written as conditional, but the opinion also considered the doctor's subsequent notes.)

Texas Workers' Compensation Commission Appeal No. 971771, decided October 22, 1997, rendered a new decision that the initial IR of zero percent was not final. That IR was issued on June 25, 1996. The form providing the IR did not contain a date of MMI, but the hearing officer had found such a date in documents "accompanying" the form. Those documents also showed that the doctor assigning the zero percent IR stated that the IR was for the hands and arms but that his "major concern" was the head, for which a neurologist needed to give an opinion. With the accompanying papers being necessary to determine the date of MMI, there can be no criticism in considering those papers as showing that the IR was conditional. The words used by Appeal No. 971771 were "by its express terms . . . the certification was conditional. . . ." (Emphasis added.)

Texas Workers' Compensation Commission Appeal No. 970522, decided April 30,1997, said that a letter attached to the TWCC-69 in question contained the doctor's condition, which was, "should he choose to undergo the work hardening program, this would obviously invalidate my opinion that he has reached maximum medical benefit at the present time. . . ." (Emphasis added.) The initial IR was conditional.

Texas Workers' Compensation Commission Appeal No. 961178, decided July 31, 1996, affirmed a determination that the initial IR did not become final; the doctor in point provided an IR of 19% on December 28, 1994, but that doctor then met with carrier within 90 days and told carrier that the IR was for the neck and that claimant's back would be at MMI later; Appeal No. 961178 said that the doctor made his initial IR "conditional and temporary" by his communication to carrier within 90 days.

Texas Workers' Compensation Commission Appeal No. 941247, decided October 27, 1994, affirmed a hearing officer's determination that the initial IR did not become final because that IR was provided after surgery had been scheduled and the IR was contingent on the surgery results. This opinion also used the word "expressly" as in "the first IR was

expressly made subject to change depending on the results of scheduled surgery. . . ." (Emphasis added.)

Finally, Texas Workers' Compensation Commission Appeal No. 94324, decided May 4, 1994, reversed a determination that the initial IR was invalid as being prospective, but affirmed based on a timely dispute. In that case, the doctor said on the TWCC-69 that claimant still needed surgery. The opinion indicated that the doctor at some point said that since he was required to provide an IR, he "[complied] with a hypothetical response."

The cases cited were found by tracing references in the cited case, Appeal No. 991489, *supra*. These cases do not show that broad language has been interpreted as indicating an initial IR is conditional. Three of the cases dealt with conditional IRs because the IR given stated that it did not include a body part, *i.e.*, low back, head, and back. Two of the cited opinions dealt with pending surgery or surgery that was needed. One dealt with work hardening which would fall under the guidance of "further specified treatment" set forth in Appeal No. 990799, *supra*. Appeal No. 991489, *supra*, spoke of "an event." The IR in the last case was found not to be provisional, although it stated on its face that the claimant still needed surgery (this opinion dealt with other findings also, so the determination as to provisional IR was not as clear as it might have been without other issues).

The above cited cases also used modifiers such as "clearly, express, and specified"; one doctor said his IR would be "invalidated." The doctors providing the IRs in the cited cases also make it clear that they were addressing the IR or MMI as being conditional–except for Appeal No. 990799, *supra*, which considered a chart note 10 days later which spoke of claimant needing a second opinion as to surgery. These cases may be compared to the case under review in which Dr. F did not refer to any specific pending problem, any pending treatment, or any question of what body part was affected, and he did not indicate that the future, unspecified, possible treatment he referred to would affect his IR or MMI but only said that if claimant became "symptomatic," "treatment options" and "medical care" should be available or permitted, neither of which depend upon whether IR or MMI have been reached, at least according to Section 408.021.

In addition, the record sets forth that after claimant returned to Dr. F in October 1996, Dr. F did not indicate then that his initial IR and MMI were invalidated by events or had been made moot; claimant did not dispute the IR at that time. Dr. F commented in July 1999, about his initial IR, indicating that he agreed that he earlier thought claimant was at MMI, not that he had thought claimant was at MMI, "if___." Dr. F then said that claimant's "overall presentation the last four years" was what changed his mind. Claimant then disputed the IR in August 1999.

These facts do not support a determination that the initial IR was conditional. The determination that the initial IR did not become final is reversed and a new decision is rendered that the initial IR of zero percent became final under Rule 130.5(e).

Joe Sebesta
Appeals Judge

CONCUR:

Thomas A. Knapp
Appeals Judge

Judy L. Stephens
Appeals Judge