APPEAL NO. 000107

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 December 20, 1999. The issue at the CCH was stated as whether the first certification of maximum medical improvement (MMI) and the impairment rating (IR) assigned to the appellant, who is the claimant, became final under Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 130.5(e) (Rule 130.5(e)). There was a counterpart issue as to the proper IR to be assigned to the claimant.

The hearing officer found that the respondent (carrier) had received the first IR "on May 15, 1999" but had timely disputed this in a Payment of Compensation or Notice of Refused/Disputed Claim (TWCC-21) dated June 4, 1998. He found that the proper IR was seven percent as certified by the designated doctor, which was not against the great weight of the contrary medical evidence.

The claimant appeals, and argues that there was insufficient evidence that the carrier disputed the first IR within 90 days. The claimant asserts that the TWCC-21 which was proved to be filed within that time did not adequately indicate a dispute of the first IR. The claimant disputes the credibility of a date stamp that is on a purported second page of the TWCC-21 which the hearing officer found constituted a timely dispute. The claimant asserts that because the first IR became final, the opinion of the designated doctor should not have been given presumptive weight by the hearing officer. The claimant also asserts that the hearing officer relied on documents not within the certified copy of the claim file or Texas Workers' Compensation Commission (Commission) logs. The carrier responds that the decision of the hearing officer is correct, and that "magic words" are not required to constitute a dispute which will obviate applicability of Rule 130.5(e).

DECISION

We affirm.

According to histories of the injury set out in other medical records in evidence, the claimant sustained a low back injury on _____. He did not have surgery. MMI was stipulated to have occurred on March 27, 1998.

Although the carrier argued that the first IR was its own reasonable assessment of seven percent, which is asserted as the report of its peer review doctor, Dr. G, we observe that Dr. G's letter begins: "I have reviewed the documents you have submitted regarding the disability [IR] performed on the above referenced claimant." (Emphasis added.) Dr. G goes on to acknowledge he has been asked to review medical records for the claimant and opine as to what he believes would be the "likely" IR for claimant's injuries. Dr. G (not having performed an examination) could only assess a seven percent IR, based upon Table 49 of the Guides to the Evaluation of Permanent Impairment, third edition, second

printing, dated February 1989, published by the American Medical Association. He speculated that it might be appropriate to also assess an additional 10% due to claimant's surgery from another compensable injury, but concluded that seven percent was the appropriate IR based on the records. This report was written on April 9, 1998. It was received by the carrier, according to its date stamp, on May 22, 1998.

The certified copy of the claims file in evidence shows that the carrier's request for a required medical examination was granted in July 1997, for examination by Dr. W. The stated purpose of the examination was to determine MMI and IR.

On May 5, 1998, the treating doctor, Dr. J, completed a Report of Medical Evaluation (TWCC-69) in which the doctor certified that the claimant reached MMI on March 27, 1998, with a 21% IR. (This is date stamped in the Commission file on May 13, 1998.) Dr. J used the same specific IR from Table 49, combined with a 15% range of motion (ROM) deficit based upon examination of the claimant. This was shown to have been faxed by counsel for the claimant on May 13, 1998, to the adjuster, Ms. M.

A TWCC-21 was put into evidence by the carrier. It is dated May 15, 1998, and indicates it was completed by Ms. M. It states, under "notice of refused or disputed claim":

> We have rec'd TWCC-69 from [Dr. J] by fax from his atty. We are having it reviewed based on excessive rating of 3-27-98 21%. We previously made a 7% assessment based on [peer review] information, this was done at 104 weeks or statutory assessment.

In the certified copy of the entire claim file, the only copy of this TWCC-21 that is in the file is date stamped May 10, 1998, by the Commission. Assuming the claims file was retained in the sequence in which received, this document is out of sequence and may be part of the exchange of one of the parties that was copied to the Commission. The bottom portion of the date stamp is not on the form and it cannot be ascertained what office of the Commission received this document. It is stamped also at the top with a "Mail Updated" stamp of January 19, 1999.

It appears that Dr. J's IR was sent to another peer review firm, which stated that it was "not performing an [IR] on this claimant," and was only reviewing that which had been done. The peer review firm questioned the validity of some of the claimant's recorded ROM movements, and determined that the only valid IR was four percent. Thus, the peer review firm argued that only 11% was valid. A copy of this report was received by the Commission on May 22, 1998.

There is another TWCC-21 in evidence, dated June 4, 1998, attributed also to Ms. M. It indicates that an adjustment to attorneys' fees is being made. Under Notice of Refused or Disputed Claim, it states in total:

> Reassessing the impairment based upon an analysis of the submitted [IR] to 11%- 11% x 3 weeks = 33 weeks 3-27-98 - 11-5-98[.]

There is a reference on this form to Dr. J's report (although not using her name) in the section of the TWCC-21 indicating the reason for terminating temporary income benefits. There is attached to the exhibit what purports to be a second page to this document, and which has, at the top, the statement that customarily appears at the bottom of the TWCC-21 form as to sending of copies. There is handwriting on this second page which indicates a computation relating to attorneys' fees. It is date stamped several times; pertinent to the hearing officer's decision is a date stamp from the (City 1) office of the Commission of June 8, 1998. This page appears in the certified claims file.

Ms. M sent a notice to the claimant concerning the assignment of the 11% IR, and informed him he had 90 days to dispute this IR or it would become final. It is not clear when it was sent.

On October 26, 1998, Ms. M filed a Notice of Maximum Medical Improvement/ Impairment Rating Dispute (TWCC-32) disputing Dr. J's 21%, and countering with its own reasonable assessment of 11%. This stated on its face that the TWCC-69 being disputed was received May 18, 1998. A dispute to the IR only was indicated. This document is date stamped, again by the City 1 rather than local office of the Commission, on November 5, 1998. On this same day, Ms. M completed a Request for Benefit Review Conference [BRC] (TWCC-45) stating:

> Claimant has not disputed carrier's assessment 11% [IR]. We are requesting a BRC to appoint a designated doctor to confirm that claimant has not disputed assessment within 90 days of assessment.

The claimant's attorney responded promptly to this by asserting that the first IR of Dr. J had become final; the attorney further asserts that "falsified" documents were submitted as a TWCC-21. A BRC appears to have been scheduled for December 3, 1998, on the 90-day issue. There is no report, but it appears that the benefit review officer (BRO) went ahead and appointed a designated doctor on or about December 23, 1998. The carrier's TWCC-21, filed December 30, 1998, recited that per a BRC agreement reached on December 22nd, the carrier would resume payment of impairment income benefits (IIBS) until the designated doctor's examination. The claims file also contains a letter marked "confidential" to the adjuster, from the carrier's previous attorney. This reiterates what led to the appointment of the designated doctor although the claimant initially disputed it. This further recites the impression of counsel that the carrier agreed to pay IIBS if the claimant would drop the disagreement with appointing a designated doctor, and that the claimant's counsel agreed. However, the BRO's handwritten draft report noted that the claimant maintained his 90-day dispute although benefits would be paid.

On an unknown date sometime prior to the CCH, Ms. M answered interrogatories on behalf of the carrier. She stated that the carrier first became aware of the treating doctor's

21% IR on "5/18/99," and was taking the position that a proper dispute to this had been filed on "5/14/98: TWCC-21; 6/4/98: TWCC-21."

On January 19, 1999, Dr. J filed a report recommending lumbar surgery. However, this was not on the Commission's formal form for recommending surgery. Another doctor rendered a second opinion in favor of surgery. It appears that claimant has not decided to pursue this recommendation.

On March 19, 1999, Dr. P, the designated doctor, filed a TWCC-69 certifying MMI on February 5, 1999, with a seven percent IR. Lumbar flexion and extension ROM was invalidated, and lateral lumbar ROM was found to have no impairment. Dr. P noted that he tested ROM on two different dates, over a month apart.

Rule 130.5(e) operates to finalize only the first IR assigned to a claimant; it cannot be used to claim finality of subsequent ratings. Texas Workers' Compensation Commission Appeal No. 93428, decided July 5, 1993. The first report is that which is chronologically the first, not the first "valid" report. Texas Workers' Compensation Commission Appeal No. 941137, decided October 10, 1994. However, we cannot agree, nor find authority for, the carrier's assertion that the initial reasonable assessment by Dr. G, based upon a records review, is an "assignment" of an IR.

The question then remained for the hearing officer to determine if there was a timely dispute filed within 90 days after the date the report of Dr. J was received by the carrier. Although there is confusion in the record, the hearing officer has found the date he believed it was received, albeit found with a typographical error. We hereby correct his finding of fact to read that the report was received by the carrier on "May 15, 1998" rather than 1999.

While the TWCC-21 dated May 15, 1998, would plainly suffice as a dispute over the first IR, there is a question raised by the record as to when, or even if, it was filed with the Commission. These doubts were apparently resolved by the hearing officer in favor of accepting the June 1998 TWCC-21 as the document proven to be filed. He agreed with the carrier's assertion that the language on this document, taken as a whole, conveyed a dispute to the 21% IR. The document is contained in the file, contrary to claimant's assertions. As to whether a dispute appears on any other Commission logs, none were in evidence and this cannot be evaluated.

We will not disturb the hearing officer's resolution of the facts to construe this as a dispute. Because the TWCC-21 specifically cites the existence of the 21% IR and the associated MMI date, and indicates that the "submitted" IR is being reassessed, the hearing officer's conclusion that this was notice of dispute for purpose of the 90-day rule is sufficiently supported. The record plainly indicates that the adjuster was confused as to the manner in which a dispute should be made or where it should be filed. Nonetheless, as carrier pointed out, the Appeals Panel has not held that the claimant is required to use the TWCC-32 or even that a dispute must be filed with the Commission in obviating

applicability of the 90-day rule. It appears to us that the rule was intended to apply where there was no indication, from either party, of discord with the first assigned IR.

The decision of the hearing officer will be set aside only if the evidence supporting the hearing officer's determination is so weak or against the overwhelming weight of the evidence as to be clearly wrong or manifestly unjust. Atlantic Mutual Insurance Company v. Middleman, 661 S.W.2d 182 (Tex. App.-San Antonio 1983, writ ref'd n.r.e.). We cannot agree that this is the case, here, and affirm the decision and order.

Susan M. Kelley
Appeals Judge

CONCUR:

Robert W. Potts
Appeals Judge

Tommy W. Lueders
Appeals Judge