APPEAL NO. 000202

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 30, 1999. The issues at the CCH were the date of maximum medical improvement (MMI); whether the first certification of MMI assigned by Dr. S on October 22, 1997, became final pursuant to Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 130.5(e) (Rule 130.5(e)); who is the correct designated doctor; and whether the Texas Workers' Compensation Commission (Commission) abused its discretion in appointing a second designated doctor. The hearing officer determined that the appellant (claimant) reached MMI on October 22, 1997; that the first certification of MMI assigned by Dr. S on October 22, 1997, became final under Rule 130.5(e); and that the correct designated doctor is Dr. G because the Commission abused its discretion in appointing a second designated doctor.

The claimant appealed, contending that the great weight and preponderance of the evidence proves that the claimant disputed both the impairment rating (IR) and the date of MMI within 90 days of notification; that the Commission did not abuse its discretion in appointing a second designated doctor; and that the claimant reached MMI on September 30, 1998. The respondent (carrier) responds, urging affirmance of the hearing officer's decision and order. However, the carrier points out that it timely disputed the first IR (but not the MMI date) contrary to the hearing officer's finding that it did not timely dispute the first IR. The carrier agrees that the Commission abused its discretion in appointing the second designated doctor.

DECISION

Reversed and remanded on the issue of the date of MMI. Affirmed that the Commission abused its discretion in appointing a second designated doctor.

The claimant was injured on _____, when she fell and caught her leg. She said that she has had four surgeries on her knees, three on the left, on December 12, 1996, and in December 1997 and February 1998 (a total knee replacement). On September 1, 1998, she had right knee surgery. Her surgeon was Dr. H.

A doctor for the carrier, Dr. S, certified MMI on October 22, 1997, with a 17% IR. Dr. S's cover letter of the same date shows that this report was sent to the carrier, the claimant, the Commission, and Dr. H. At the beginning of the CCH, the carrier said that there was no question that the carrier had timely disputed the IR (but not the date of MMI). Indeed, the carrier filed a Notice of Maximum Medical Improvement/Impairment Rating Dispute (TWCC-32) on November 3, 1997, disputing the IR only. All information requested about the IR being disputed cited the 17% IR and October 22, 1997, date, but listed the doctor as Dr. H, instead of Dr. S. However, there was no evidence that Dr. H had issued his own MMI certification and IR. In response to the dispute, the Commission appointed Dr. G as designated doctor, and there is no evidence that the appointment of a designated doctor was disputed by either party.

Dispute Resolution Information System (DRIS) notes from the Commission show that claimant called on November 7, 1997, to ask about the carrier disputing the IR. The notes show that the designated doctor process was explained to her. Claimant also expressed a concern about having medical treatment continue after MMI/IR and was told that it would. The claimant contended that she talked not only with the Commission on this day, but also with the adjuster, Ms. H, to say she did not agree with Dr. S's MMI and IR (questioning why she would be at MMI if further surgery was expected). She was uncertain of the date. Claimant said she received Dr. S's rating in late October or early November 1997. Another adjuster, Ms. R, stated that she became the adjuster "in November 1997" and did not talk with the claimant until December 3, 1997, in which they discussed the rescheduling of the designated doctor appointment. Ms. R denied that she had spoken to claimant on November 17th. A similar letter from Ms. H denied having any conversations with the claimant about Dr. S's certification.

Claimant was examined by Dr. G on December 10, 1997. He noted a history of knee injuries and surgery while claimant was in her teens. Dr. G assessed a 14% IR based upon the left knee, and said this amount was "above and beyond any pre-existing impairment." Dr. H indicated his disagreement with this on the bottom of the Report of Medical Evaluation (TWCC-69).

On June 2, 1998, the benefit review officer (BRO) wrote to Dr. G and forwarded additional records and simply asked him to review these records to determine if there was any effect on his IR. The address that the BRO used was the one on the TWCC-69 form, although Dr. G's attached narrative used a different address.

The DRIS notes also show that on October 13, 1998, a new designated doctor was to be appointed for the stated reason that Dr. G was not responding to Commission letters. The DRIS notes prior to that are devoid of any attempt to contact Dr. G by telephone. The second designated doctor, Dr. HY, was not appointed until November 3, 1998. Dr. HY was appointed to review both IR and MMI.

At the CCH, the hearing officer contacted Dr. G's office, and spoke to Ms. J, the office manager, who verified that the address where the BRO had sent requests for clarification was only a location where Dr. G performed designated doctor examinations, not his regular offices, and that this location did not forward Dr. G's mail to him but had been returning it to sender, which created problems for their office. Ms. J said that if a request for clarification on claimant's IR had been received, she would know about it, and she had not seen any communications requesting clarification, including one that a Commission employee had told her the month before would be sent to Dr. G. There is a letter dated August 27, 1999, in evidence from the Commission to Dr. G, asking for the review of additional information, and noting that previous correspondence may not have been received. Dr. HY examined the claimant on November 24, 1998, and certified that claimant reached MMI on that date with an 18% IR, for her lower extremities. The DRIS notes show that the carrier questioned the appointment for MMI on December 15, 1998.

The DRIS notes record that the claimant's attorney questioned the date of MMI on February 3, 1999, after payment of impairment income benefits was begun based upon Dr. S's MMI date, and was told by the Commission that the MMI had not been disputed and was final. It appears that the Commission initially denied a request for a benefit review conference (BRC). Eventually, there was a BRC, and on April 21, 1999, the carrier raised a dispute as to the Commission's authority to appoint Dr. HY.

It is important to emphasize that IR was not in issue because it had been resolved by agreement between the parties at the BRC in a signed agreement dated November 3, 1999. This agreement specifically provided that the IR was 18%, as certified by Dr. HY.

We affirm the determination that the Commission acted in error in appointing Dr. HY as a second designated doctor, as there was no evidence that Dr. G declined to serve or failed to cooperate. It cannot be assumed that the failure to respond to correspondence reflects an affirmative refusal to cooperate, when, as here, the nonresponse could result from the fact that the original communication as not received. In the absence of any evidence of any other contact attempted by the Commission with Dr. G's office given the different addresses, we agree with the hearing officer's assessment that there was no showing that Dr. G was unable or unwilling to serve, and hence no basis for the appointment of Dr. HY as a second designated doctor.

However, we agree that the hearing officer erred by determining that the date of MMI used by Dr. S had become final under Rule 130.5(e). There is no rule of the Commission allowing the MMI date to become finalized separate and apart from the associated IR, especially when the IR is timely disputed. Early on, the Appeals Panel held that the IR and MMI become final together under Rule 130.5(e), or they do not. Texas Workers' Compensation Commission Appeal No. 92670, decided February 1, 1993. The argument advanced by the carrier that an MMI date may become final under Rule 130.5(e) if only the IR is disputed was rejected by the Appeals Panel in Texas Workers' Compensation Commission Appeal No. 971955, decided November 5, 1997.

The amendments in Rule 130.6(j) involve matters different from consideration of whether an IR and MMI date have become final for purposes of Rule 130.5(e). Rule 130.6 does not impose a time deadline for allowing a dispute of MMI to be added to an ongoing dispute of IR. Rule 130.6(j) speaks only in terms of the parameters of the designated doctor's examination vis-a-vis the disputed issues. While disputes to MMI should be diligently raised, the failure to do so in 90 days does not make an MMI date "final" where IR has been designated.

In addition, leaving aside the matter of whether a timely dispute to the IR was made, the BRC agreement of the parties that claimant's IR is 18% effectively removed the issue of finality from consideration, as the parties have in essence agreed that the first IR was not final. The parties are bound by this agreement absent good and sufficient cause for setting it aside. Section 410.030(a) and (b).

We additionally hold that the determination that the IR was not timely disputed is against the great weight and preponderance of the evidence. As the carrier noted, the first IR was disputed by filing the TWCC-32 within 90 days after it was rendered by Dr. S. It appears that the use of Dr. H's name on the TWCC-32 was a typographical error and that the form was intended as a dispute of Dr. S's IR. The carrier's filing of this form is plainly responsive to the carrier receiving its copy of Dr. S's report directly from him. The effectiveness of a dispute to an IR is not undermined if it is filed earlier than receipt of an official notice from the Commission. It is the late filing of a dispute, not the early filing of one, which results in finality pursuant to Rule 130.5(e).

Because the MMI date set forth in Dr. S's report did not become final, the hearing officer must determine the correct date of MMI. While it is true that Dr. G's MMI date does not have presumptive weight, since he was appointed to determine IR only, and that Dr. HY's status is not that of designated doctor in considering this issue, both reports may be considered by the hearing officer as medical evidence on the matter of MMI. Determination of MMI must be made with reference to the definition set out in Section 401.011(30), as well as to pertinent medical records. We note that nothing in this remand would preclude the parties from reaching an agreement of the disputed issues if they deem this appropriate.

Pending resolution of the remand, a final decision has not been made in this case. However, since reversal and remand necessitate the issuance of a new decision and order by the hearing officer, a party who wishes to appeal from such new decision must file a request for review not later than 15 days after the date on which such new decision is received from the Commission's Division of Hearings, pursuant to Section 410.202. *See* Texas Workers' Compensation Commission Appeal No. 92642, decided January 20, 1993.

_____
Susan M. Kelley
Appeals Judge

CONCUR:

_____
Stark O. Sanders, Jr.
Chief Appeals Judge

_____
Alan C. Ernst
Appeals Judge