APPEAL NO. 000372

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 January 12, 2000. The hearing officer determined that the compensable injury of the appellant (claimant) extends to and includes a cervical injury and that the first certification of maximum medical improvement (MMI) and impairment rating (IR) certified by Dr. M (first certification) became final pursuant to the 90-day rule, Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 130.5(e) (Rule 130.5(e)). Claimant appealed, contending that there was no valid or complete IR for his cervical injury to become final under the 90-day rule. The file does not contain a response from respondent (carrier). The determination regarding extent of injury was not appealed by the parties.

DECISION

We affirm.

Claimant contends that the hearing officer erred in determining that the first certification became final under the 90-day rule. Claimant did not assert at the CCH or on appeal that he disputed the first certification within 90 days. Claimant contends that he should receive a separate IR for his cervical injury, which he did not discover until after the first certification became final. Claimant asserts that an IR should not be considered final when all of the injury is not rated and the injured employee does not discover a part of the injury until after the 90 days has passed.

It is undisputed that claimant was treated for a shoulder injury after he slipped and fell at work on _____. Claimant also sustained an abrasion to his head. The record reflects that on February 2, 1999, Dr. M certified that claimant reached MMI on December 22, 1999, with an IR of zero percent. After this time, claimant began to have headaches and pain and numbness in his upper extremity and was then diagnosed with a cervical injury. Claimant testified that he did not have any neck pain or idea that he had a cervical injury until after the 90 days had passed. The hearing officer in this case also determined that claimant's compensable injury extended to his cervical injury.

The hearing officer determined that: (1) claimant received Dr. M's February 2, 1999, Report of Medical Evaluation (TWCC-69) on March 17, 1999; (2) claimant did not dispute the first certification within 90 days; and (3) the first certification became final pursuant to the 90-day rule.

The version of Rule 130.5(e) in effect at the time the IR in this case became final provided that the first IR assigned to an injured worker will become final if not disputed

within 90 days after it is assigned.[1] In Rodriguez v. Service Lloyds Insurance Company, 997 S.W.2d 248 (Tex. 1999), the Texas Supreme Court considered whether there are any exceptions to Rule 130.5(e). The court's majority opinion stated that: (1) "[t]he plain language of the 90-day Rule does not contain exceptions"; (2) "[t]he Rule's language is consistent with the Commission's [Texas Workers' Compensation Commission] intent"; (3) "in interpreting this rule . . . the Commission's appeals panels have created exceptions"; and (4) "given the language and intent of the 90-day Rule, we cannot recognize the exceptions to the 90-day Rule that [the injured worker] pleads, including substantial change of condition."

The 1989 Act provides that the hearing officer is the sole judge of the weight and credibility of the evidence. Section 410.165(a). Where there are conflicts in the evidence, the hearing officer resolves the conflicts and determines what facts the evidence has established. As an appeals body, we will not substitute our judgment for that of the hearing officer when the determination is not so against the great weight and preponderance of the evidence as to be clearly wrong or manifestly unjust. Cain v. Bain, 709 S.W.2d 175, 176 (Tex. 1986); Texas Workers' Compensation Commission Appeal No. 950456, decided May 9, 1995.

From the evidence, the hearing officer could determine that the first certification became final. Regarding the complaint that Dr. M did not consider the entire injury, claimant was required to raise any complaints in this regard within the 90 days. Claimant asserts that he should receive another IR for his cervical injury, which he could not have known about within the 90-day period. However, Section 401.011(24) states that an IR is the percentage of permanent impairment from a "compensable injury." Claimant's compensable injury includes the cervical injury. The 90-day rule applies to the first certification regarding the compensable injury in this case. The Commission has since amended the 90-day rule and created exceptions regarding finality under Rule 130.5(e). These exceptions were included in the new version of Rule 130.5 after public notice and comment. Again, however, these exceptions were not in effect at relevant time periods in this case. The hearing officer did not err in his interpretation of the 90-day rule in this case. We have reviewed the record and we conclude that the hearing officer's determinations are not so against the great weight and preponderance of the evidence as to be clearly wrong or manifestly unjust. Cain, *supra*.

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[1]Subsection (f) of amended Rule 130.5 states that the rule "applies to certifications of MMI and [IRS] that have not become final prior to the effective date of this rule." The effective date of this amendment is March 13, 2000.

We affirm the hearing officer's decision and order.

Judy L. Stephens
Appeals Judge

CONCURRING OPINION:

I believe that a reversal of the case under review would be perceived to be contrary to the Rodriguez v. Service Lloyds Ins. Co., 997 S.W.2d 248 (Tex. 1999) decision. As a result, this concurring opinion is reluctantly written. Regardless of any "exceptions" that may have been applied by the Appeals Panel, there is another, underlying, reason why the IR should not become final in this case. An impairment rating (IR) is not assigned until maximum medical improvement (MMI) has been certified. *See* Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act). Any IR is to be assigned for the compensable injury. *See* the 1989 Act. When medical evidence clearly shows that pain was mistakenly thought to emanate from, for instance, a shoulder, but later is found to be from the cervical spine, an IR for the shoulder could not be assigned because the injury includes more than the shoulder and MMI has not been reached for the cervical spine injury. *See* the 1989 Act.

The controlling criteria of the 1989 Act, as opposed to the rule, has been set forth previously in considering whether an IR is final under Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 130.5(e) (Rule 130.5(e)); one instance was in Texas Workers' Compensation Commission Order No. 99025, decided July 15, 1999. It, too, said that Rule 130.5(e) contains no exceptions, as had just been stated in the Rodriguez decision. That order cited Section 408.123 as stating that an IR is not assigned until MMI has been reached. It also cited Section 401.011(24) as stating that the IR is a percentage of impairment from the compensable injury, not just from part of a compensable injury that is discovered in the first weeks, or even days, after the accident.

While it is true that the Appeals Panel cannot create "exceptions" to a rule, the rule cannot turn a blind eye to unambiguous standards set forth in the 1989 Act that the rule should complement. The term "exception" was unfortunate; if it must be used, then it would be appropriate to observe that the "exceptions" were not created out of whole cloth, but reflect the criteria of the 1989 Act.

Joe Sebesta
Appeals Judge

DISSENTING OPINION:

I respectfully dissent.

The Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act) contains provisions that must be met for the Texas Workers' Compensation Commission (Commission) or a court to make a determination that an injured worker has reached maximum medical improvement (MMI) and to assign an impairment rating (IR). Section 401.011 contains general definitions. Subsection (26) provides:

> "Injury" means damage or harm to the physical structure of the body and a disease or infection naturally resulting from the damage or harm. The term includes an occupational disease.

Subsection (10) states "'Compensable injury' means an injury that arises out of and in the course and scope of employment for which compensation is payable." Subsection (23) provides:

> "Impairment" means any anatomic or functional abnormality or loss existing after [MMI] that results from a compensable injury and is reasonably presumed to be permanent.

Subsection (24) states "'impairment rating' means the percentage of permanent impairment of the whole body resulting from a compensable injury." Section 408.123 states that after an injured employee has been certified as having reached MMI the certifying doctor shall evaluate the condition of the employee and assign an IR. Section 408.124 provides that an award of impairment income benefits (IIBS), whether by the Commission or a court, shall be made on an IR determined using the Guides to the Evaluation of Permanent Impairment, third edition, second printing, dated February 1989, published by the American Medical Association. Subsection (30) provides:

> "Maximum Medical Improvement" means the earlier of:
>
> (A) the earliest date after which, based on reasonable medical probability, further material recovery from or lasting improvement to an injury can no longer reasonably be anticipated;
>
> (B) the expiration of 104 weeks from the date on which income benefits begin to accrue; or
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> (C) the date determined provided by Section 408.104. [Section 408.104 pertains to MMI after spinal surgery and applies to compensable injuries with a date of injury on or after January 1, 1998.]

JOHN T. MONTFORD, *ET AL.*, A GUIDE TO TEXAS WORKERS' COMP REFORM (1991) is authored by Senator John T. Montford, the lead sponsor of the 1989 Act, and Will Barber and Robert Duncan (now a state senator), who worked closely with Senator Montford. It contains the following hypotheticals on pages 4-114 and 4-115:

> *Hypothetical No. 4B-15. Substantial Change in IIBS Condition*. What if the claimant's condition deteriorates and impairment becomes worse following an initial [IR]?
>
> *Result*. If the employee's treating doctor assesses a new [IR] because of a substantial change in condition, the employee should be entitled to a benefit review conference to obtain an order increasing the duration of IIBS based on the new [IR]. If the carrier disputes that new [IR], under these hypothetical facts, the carrier is entitled to an order directing the employee to be examined by a "designated doctor" to resolve the dispute.
>
> *Hypothetical No. 4B-16. Improved Impairment*. What if, after the carrier initiates IIBS, it reasonably appears to the carrier that the employee's condition may have substantially changed, so that the employee's initial [IR] has become excessive?
>
> *Result*. The carrier should be entitled to request the Commission to issue an order directing the claimant to be examined by a "designated doctor." There is no provision in the [1989] Act that should be construed to prevent the carrier from going forward, after IIBS are initiated, with new evidence of a substantial change of condition that raises bona fide questions as to the initial [IR].

Section 402.061 provides that the Commission "shall adopt rules as necessary for the implementation and enforcement" of the 1989 Act. The version of Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 130.5(e) (Rule 130.5(e)) that applies to the case before us provides "The first [IR] assigned to an employee is considered final if the rating is not disputed within 90 days after the rating is assigned." A rule of an agency should be interpreted to be in harmony with the statute it implements. It is presumed that the Commission considered all of the 1989 Act when it adopted Rule 130.5(e). The version of Rule 130.5 that applies to the case before us provides:

> Rule 130.5. Impairment Rating Disputes
>
> (a) An insurance carrier that disputes an [IR] shall file with the commission a statement of disputed [IIBS] that gives the insurance carrier's reasonable assessment of the correct rating. A copy of the statement shall be sent to the

employee, and employee's representative, at the same time it is filed with the commission.

(b) If the carrier does not begin paying of [IIBS], the statement shall be filed no later than five days after receiving the report from the certifying doctor.

(c) If the carrier begins payment of [IIBS], the statement shall be filed no later than three weeks after the carrier receives the report from the certifying doctor.

(d) If the carrier elects not to perform its own reasonable assessment, the carrier may file a request for selection of a designated doctor to assess impairment. Section 130.6 of this title (relating to Designated Doctor; General Provisions) shall apply except that:

(1) the examination shall be held no later than 14 days after a designated doctor is agreed to by the parties, or appointed by the commission, whichever is earlier; and

(2) if the request does not indicate agreement on the designated doctor by the employee and the insurance carrier, the commission shall select the designated doctor; and

(3) the employee shall not reschedule the examination other than for an "exceptional circumstance" (as described in §130.4(i)(3) of this title (relating to Presumption That [MMI] Has Been Reached and Resolution When MMI Has Not Been Certified)), and the rescheduled examination must be within 72 hours of the original examination.

(e) The first [IR] assigned to an employee is considered final if the rating is not disputed within 90 days after the rating is assigned.

Rule 130.5 contains some of the provisions of then Section 4.26 [IIBS], now codified at Sections 408.121 through 408.126. Sections 408.127, 408.128, and 408.129 in Subchapter G or Chapter 408 are codifications of other provisions related to IIBS. The requirement for the carrier to begin payments no later than the fifth day after it received the report certifying MMI and the provision for the carrier to make a reasonable assessment of the IR are in Section 4.26. Rule 130.5 (a), (b), (c), and (d) each has "carrier" as the third word in it. The original draft of Rule 130.5 did not contain (e). It was added at the request of a commissioner representing wage earners. Originally, it was apparently thought of as placing another requirement on carriers. In practice, it has most often resulted in a claimant being unsuccessful in disputing a first certification of MMI and IR because the 90-day period has run.

In my opinion, the use of the phrase "is considered final" should be read as permitting the agency to consider the provisions of the 1989 Act in determining whether the first certification of MMI and IR became final. There is no indication that the Commission intended for a certification of MMI and IR that was not rendered in compliance with the 1989 Act to become final. In the case before us, at the time the first certification of MMI and IR was rendered and for 90 days after that certification was rendered, the claimant was unaware that he had a cervical injury. Arguments for not keeping the date a claimant reached MMI and his or her IR for the compensable injury open indefinitely can be made. In my opinion, those concerns are addressed in the provisions for MMI being reached by operation of law in Section 401.011(30). A certification of MMI and IR that does not consider all of a claimant's compensable injury is not a certification in compliance with the 1989 Act. I do not interpret the provisions of Rule 130.5(e) to require that the agency hold that a certification of MMI and IR that does not include impairment for a cervical injury that was unknown during the 90-day period in Rule 130.5(e) became final under the provisions of that rule. That interpretation does not create an exception to Rule 130.5(e) that is prohibited by Rodriguez v. Service Lloyds Insurance Company, 997 S.W.2d 248 (Tex. 1999), but interprets that part of the rule to be in harmony with the 1989 Act and other rules implementing that act. To interpret Rule 130.5(e) otherwise does not afford the claimant the opportunity to prove what his IR for the compensable injury is and denies him due process. I would reverse the decision of the hearing officer and render a decision that the first certification of MMI and IR did not become final under the provisions of Rule 130.5(e).

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Tommy W. Lueders
Appeals Judge