

APPEAL NO. 000999

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 April 17, 2000. The hearing officer determined that the first certification of maximum medical improvement (MMI) and impairment rating (IR) assigned by Dr. C on June 30, 1998, did become final under Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § Rule 130.5(e) (Rule 130.5(e)). In the document timely filed as an appeal, the appellant (claimant) argues that the respondent (carrier) disputed the first IR and did not withdraw it. The claimant further argues that the first IR was expressly for his back and not his knee. The carrier responds that the claimant must raise incompleteness of an IR within 90 days and argues that any dispute was rescinded.

DECISION

Reversed and rendered.

It was stipulated that the claimant was injured on _____, while entering the premises of the (employer), his employer, on his bicycle. He was struck by a vehicle and his back and left knee were injured. The claimant was treated by Dr. C, who eventually referred him on March 2, 1998, to Dr. S for treatment of his knee. The claimant was paid worker's compensation benefits through June 27, 1998, when it appears he returned to work full duty (according to the carrier's Payment of Compensation or Notice of Refused/Disputed Claim (TWCC-21) that was filed to indicate the last payment of temporary income benefits). The claimant had left knee surgery performed by Dr. S in early April 1998.

On June 30, 1998, Dr. C filed a Report of Medical Evaluation (TWCC-69) which certified that the claimant reached MMI on June 25th with a zero percent IR. The TWCC-69 expressly states: "See clinical narrative on back." The narrative consists of office notes of Dr. C. The June 25th note reads:

[Claimant] is doing well. He has few symptoms about his back and has essentially a negative exam. As far as his back is concerned, he has reached [MMI] and there is no permanent impairment associated with his back injury. He will be seen on an as needed basis regarding his back. [Dr. S] will provide a TWCC 69 in regards to his knee. Source of reference: Guides to the Evaluation of Permanent Impairment, 3rd Ed., published by the AMA [Guides to the Evaluation of Permanent Impairment, third edition, second printing, dated February 1989, published by the American Medical Association].

The claimant said that he received this around July 7, 1998. The claimant testified that Dr. C did not fully examine him on June 25th. The claimant said he attempted to go to Dr. S for an IR because he concluded from Dr. C's report that this was supposed to happen. He said that the carrier would not pay for an IR evaluation from Dr. S.

The claimant said that he called the adjuster, Mr. T, and persons at field offices of the Texas Workers' Compensation Commission (Commission) to dispute the zero percent IR. The claimant admitted he had been angered during the course of the claim, in part due to denial of medical treatment.

On September 23, 1998, Mr. T completed and filed a Notice of Maximum Medical Improvement/Impairment Rating Dispute (TWCC-32). Under the provision "type of dispute", Mr. T checked "other" and typed "claimant called and said he disagrees with the 0% rating." By accompanying cover letter, Mr. T briefly stated that the claimant had called him to disagree with the IR and that the carrier was filing the TWCC-32 "on the claimant's behalf." That same day, the claimant wrote a letter to the Commission, stating that he did not wish to dispute Dr. C's IR for the reasons that this was not a work-related injury and because Dr. S had spent more time with him than Dr. C. This letter indicates that the claimant is represented by counsel because he complains that Mr. T had been advised that he should be contacting his attorneys¹ and had nevertheless written the claimant a letter directly on September 21st (a letter apparently not in evidence).

By September 25, 1998, the claimant had received a copy of the TWCC-32 and cover letter because a vehement letter was written to the Commission on that date expressly denying Mr. T's ability to act on his "behalf" in disputing the IR or that the injury was a worker's compensation injury.

Evidence in the case indicates that the claimant filed a lawsuit² on December 2, 1998, against the employer and the person who struck him, which was successfully defended by the same attorney who represented the carrier in this case, who argued both election of remedies and exclusive remedy of the 1989 Act. The order of the district court dismissing the claimant's lawsuit was entered September 9, 1999.

The Commission's Dispute Resolution Information System notes for the time the TWCC-32 was filed are in evidence. On September 25, 1998, the claimant called the Commission and asked if he had filed a dispute. He said that he agreed with the zero percent IR. On September 28th, the claimant called and said he had filed a civil lawsuit but that the adjuster filed a letter disputing the IR on behalf of the claimant. The claimant

¹ The claimant does not, in fact, appear to have been represented; during opening statement, the claimant's attorney said he had been brought into the case only 10 days before the benefit review conference (BRC). The claimant later testified that he signed a contract with his attorney to represent him in his workers' compensation claim a week before the March 1, 2000, BRC.

² The claimant's attorney in the court case was the same attorney who appeared at the CCH on he matter herein appealed.

was advised to talk to his attorney. The receipt of the letters from the claimant is next recorded on October 2, 1998. There are no entries indicating any contact with the carrier until April 1, 1999, when its attorney called, asking questions about when the claim was established and whether the claimant ever contacted the Commission regarding a third-party claim.

Finally, the claimant was examined in a required medical examination by Dr. L, who found that the claimant had a nine percent IR from his back and knee injuries. The claimant said that this was the only IR that the carrier would approve for him.

It appears that ancillary matters involving the claimant's lawsuit and his changed positions before and after his personal injury lawsuit, to some extent, clouded the issue before the hearing officer. The proper focus must be on the first IR issued by Dr. C, which includes not just the TWCC-69 form but also the attachment thereto. With this focus, we reverse the decision of the hearing officer that the IR became final and render a decision that Rule 130.5(e) did not operate to finalize Dr. C's report as written.

It is true that Texas Workers' Compensation Commission Appeal No. 941748, decided February 13, 1995 (Judge Kilgore dissenting), stated that the omission of a body part from an IR is a matter that must be raised within 90 days when known to a claimant within that time. What is important to note, however, is that the decision expressly distinguished its situation from, and did not overrule, Texas Workers' Compensation Commission Appeal No. 941098, decided September 29, 1994.

Appeal No. 941098 held that a first IR which stated on its face that it was only rating part of the injury, and did not purport to be a whole body IR, could not be accorded finality under Rule 130.5(e). The certifying doctor in that case expressly stated that he was rating the neurological part of the compensable injury only. This was one basis, along with the prospective date of MMI, by which the Appeals Panel agreed that the IR could not become final under Rule 130.5(e). Thus, in Appeal No. 941748, *supra*, the author judge took pains to note that the fact situation in that case did not involve a conditional or equivocal IR. Texas Workers' Compensation Commission Appeal No. 950169, decided March 17, 1995, later cited Appeal No. 941098, *supra*, as support for the principal that an IR that expressly rated only the partial injury could not be accorded finality.

In this case, Dr. C stated in the narrative of his report that he was rating the back only and another doctor would be rendering a rating for the rest of the compensable injury. Consequently, it was not a "whole body" IR on the face of the report. Moreover, rendition of a whole body IR was made conditional upon assessment of IR for the knee. We have also held that conditional, contingent IRs may not be finalized under Rule 130.5(e). These are not decisions that create "exceptions" to Rule 130.5(e) once it would appear to apply; rather, they delineate situations where Rule 130.5(e) is not even invoked.

Because of our determination that the first IR was conditional, we need not address matters relating to the dispute and its asserted recision. We do note that a settlement agreement entered into at that time would have obviated future disputes.

For the reasons stated above, the decision is reversed and rendered on the matter of finality. It would seem advisable that a designated doctor be appointed as soon as possible to avoid further delay in evaluating impairment.

Susan M. Kelley
Appeals Judge

CONCUR:

Robert W. Potts
Appeals Judge

Dorian E. Ramirez
Appeals Judge