APPEAL NO. 001461

This appeal arises pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act). A contested case hearing was held on May 24, 2000. The hearing officer determined that the first certification of maximum medical improvement (MMI) and impairment rating (IR) assigned by Dr. S on August 29, 1999, has become final under Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 130.5(e) (Rule 130.5(e)). The appellant (claimant) appeals, contending, first, that the great weight of the evidence establishes that the nine percent IR assigned by Dr. S could not become final under Rule 130.5(e) because it was invalid and, in the alternative, that even if it was valid, it was rescinded within 90 days. The respondent (carrier) asserts in its response that the evidence is sufficient to support the hearing officer's determination.

DECISION

Affirmed.

The claimant testified that he injured his low back mixing concrete at work on _____, and also that day developed pain in his left groin area while lifting a ladder; that on April 24, 1999, he underwent surgical repair of a left-sided hernia by Dr. E, who at the same time performed additional surgery on a right-sided hernia which she had first repaired in 1997; and that he continued to have low back pain and pain in the area of the right hernia. He further stated that in August 1999 he was asked by the carrier to see Dr. S; that he saw Dr. S on August 6, 1999; and that within a few days of September 24, 1999, he received a copy of Dr. S's September 24, 1999, letter to the carrier along with Dr. S's Report of Medical Evaluation (TWCC-69) dated "9-29-99" certifying that the claimant reached MMI on "08-06-99" and assigning him a nine percent IR.

The claimant further testified that he subsequently began treating with Dr. S and that on December 16, 1999, Dr. S operated on his low back. The claimant's Employee's Request to Change Treating Doctors (TWCC-53) reflects that he requested to change from Dr. E to Dr. S on September 10, 1999, and that his request was approved on September 23, 1999.

Dr. S's September 24, 1999, letter to the carrier, which bears Dr. S's signature, states that the claimant "has sustained 9% partial permanent medical impairment to the whole body with regard to the lumbar spine." Following this sentence, in clearly different type, is the following sentence: "The date of [MMI] is 8/6/99."

Ms. W testified that she has been Dr. S's office manager for 15 years and that she typed in the sentence about MMI after consulting Dr. S's August 9, 1999, report of his examination of the claimant on August 6, 1999. In that report, Dr. S states that "[w]ith respect to non-operative management, [the claimant] probably would be at [MMI]" and that "[h]e is probably at [MMI] at this time." She also said that she did not consult Dr. S about typing in the sentence before the letter was mailed. Ms. W further stated that Dr. S's

TWCC-69 was "computer generated"; that it bore Dr. S's rubber-stamp signature; that she is not sure whether she or another employee generated the TWCC-69 and applied the stamped signature; and that both she and the other employee are authorized by Dr. S to use his signature stamp. She also said that the TWCC-69 was attached to the copy of the September 24th letter mailed to the claimant.

Also in evidence is a copy of a Notification Regarding [MMI] and/or [IR] (TWCC-28) sent to the claimant by the carrier along with copies of United States Postal Service certified mail receipt documents bearing the claimant's signature and a date stamp of October 26, 1999. We observe that in his recitation of the evidence the hearing officer erroneously states the date as October 6, 1999. The claimant does not dispute a finding that on or before October 26, 1999, he received written notice of the certification of MMI on August 6, 1999, with a nine percent whole body IR, as evidenced by the postal receipt which is part of Carrier's Exhibit No. 5 and which has an October 26, 1999, stamp and the claimant's signature.

The claimant further stated that in February 2000 he discussed with Dr. S the rescission of Dr. S's IR because his impairment income benefits were to expire on February 11, 2000, and he had only recently had the back surgery; and that he did not dispute Dr. S's IR until sometime in February 2000. Dr. S's February 10, 2000, report to the carrier states, among other things, that the claimant asked that he, Dr. S, rescind his MMI date; that he, Dr. S, feels this is reasonable since the claimant had to have surgery; and that he has rescinded the MMI.

Among the factual findings challenged by the claimant are findings that on September 29, 1999, Dr. S certified that the claimant reached MMI on August 6, 1999, with a nine percent whole body IR and this was the first IR assigned to the claimant; that the September 29, 1999, certification of MMI on August 6, 1999, with a nine percent whole body IR is not invalid on its face; and that the claimant did not dispute the certification of MMI and the assigned IR until on or after February 1, 2000, as evidenced by the claimant's testimony.

Rule 130.5(e), effective January 25, 1991, provides that the first IR assigned to an employee is considered final if the rating is not disputed within 90 days after the rating is assigned. The majority opinion in Rodriguez v. Service Lloyds Insurance Company, 997 S.W.2d 248 (Tex. 1999) held in effect that Rule 130.5(e) admits of no exceptions. Although Rule 130.5(e) was substantially amended effective March 13, 2000, neither party mentioned, let alone urged, the application of the amended Rule 130.5(e) to this case. The claimant contends that notwithstanding the Rodriguez decision, the Appeals Panel has said that a party does not have to dispute the first assigned IR if it is "invalid," citing as authority Texas Workers' Compensation Commission Appeal No. 000065, decided February 24, 2000, and asserting that Dr. S's nine percent IR is invalid because it does not include the hernia injury; that the TWCC-69 does not have attached to it the narrative history described in block 16 of the TWCC-69; and that Dr. S did not actually sign the TWCC-69.

We see no merit in the claimant's contentions concerning the invalidity of the nine percent IR and do not find the challenged factual findings to be 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); In re King's Estate, 150 Tex. 662, 244 S.W.2d 660 (1951). We first observe that the citation to Appeal No. 000065 is inapposite. That decision dealt with a doctor's having rescinded his IR within 90 days of having assigned it and the Appeals Panel stating that such rescission did not run afoul of Rodriguez, *supra*. Further, Dr. S's September 24, 1999, letter assigning the IR was signed by Dr. S; there was no evidence that Dr. S had not determined that the claimant had reached MMI prior to assigning the IR; and any complaint of the incompleteness of the TWCC-69 is one of the matters that must be raised within 90 days of the assignment of the first IR. *See* Texas Workers' Compensation Commission Appeal No. 001477, decided August 4, 2000, for a discussion of applicable case law.

The decision and order of the hearing officer are affirmed.

Philip F. O'Neill
Appeals Judge

CONCUR:

Tommy W. Lueders
Appeals Judge

Robert W. Potts
Appeals Judge