

APPEAL NO. 001499
FILED AUGUST 4, 2000

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 June 5, 2000, in _____, Texas, with _____ presiding as hearing officer. He determined that the first certification of maximum medical improvement (MMI) and impairment rating (IR) assigned by (Dr. K) became final under Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 130.5(e) (Rule 130.5(e)) and that the appellant (claimant) reached MMI on June 3, 1999, with a nine percent IR. The claimant and her attorney both filed appeals. They urged that Dr. K did not rate all of the claimant's injury and that Dr. K's report is invalid, said that Dr. K would reexamine the claimant, and requested that the Appeals Panel reverse the decision of the hearing officer. The respondent (carrier) replied; contended that Dr. K considered the injury to the claimant's neck and did not assign an impairment for it; urged that even if Dr. K did not rate the injury to the claimant's neck, the claimant was required to dispute the first certification of MMI and IR within 90 days of receiving the certification; and requested that the decision of the hearing officer be affirmed.

DECISION

We affirm.

At the request of the carrier, Dr. K examined the claimant and reviewed medical records. In a Report of Medical Evaluation (TWCC-69) dated June 4, 1999, Dr. K certified that the claimant reached MMI on June 3, 1999, with a nine percent IR. Attachments to the TWCC-69 indicate that range of motion (ROM) tests of the cervical spine were conducted. In a narrative attached to the TWCC-69, Dr. K stated that the claimant had a work-related injury to her lower back and right shoulder on July 10, 1998, and wrote:

Her abnormal range of neck motion is consistent with her age of 60 and her structural kyphosis. Her Employer's First Report of Injury does not note that her neck was injured in her slip-and-fall injury at work, and I have not considered this in terms of impairment. In my opinion she does not have abnormal [ROM] in regard to the factors mentioned.

If this is interpreted as Dr. K not rating all of the compensable injury, the claimant should have disputed on that basis. In Texas Workers' Compensation Commission Appeal No. 941748, decided February 13, 1995, the Appeals Panel held that if a claimant was aware of a condition that is part of the compensable injury, the doctor who rendered the first certification of MMI and IR did not include impairment for that condition in the IR, and the claimant did not dispute that first certification within 90 days of receiving written notice of it; the first certification becomes final under the provisions of Rule 130.5(e). If

this is interpreted as Dr. K considering the injury to the neck as part of the injury and not assigning an impairment for the neck injury, the first certification also became final if it was not disputed within 90 days. Under either interpretation, the claimant had to dispute the first certification within 90 days of receiving written notice of it to prevent it from becoming final. She did not.

The claimant also contended that the first certification was invalid and did not become final. The Appeals Panel has held that an invalid first certification of MMI and IR cannot become final. In Texas Workers' Compensation Commission Appeal No. 950339, decided April 17, 1995, the Appeals Panel held that a first certification with a prospective date of MMI was invalid and could not become final under the provisions of Rule 130.5(e). In Texas Workers' Compensation Commission Appeal No. 950624, decided June 5, 1995, the same result was reached because the first certification did not have a date the claimant reached MMI. A failure to comply with the provisions of the Guides to the Evaluation of Permanent Impairment, third edition, second printing, dated February 1989, published by the American Medical Association does not make the first certification of MMI and IR invalid and is something that must be disputed within 90 days to prevent the first certification of MMI and IR from becoming final under the provisions of Rule 130.5(e). In Texas Workers' Compensation Commission Appeal No. 941619, decided January 20, 1995, the Appeals Panel said that the TWCC-69 appeared valid on its face and should have been disputed within 90 days to prevent it from becoming final under the provisions of Rule 130.5(e). In Texas Workers' Compensation Commission Appeal No. 931170, decided February 3, 1994, the Appeals Panel wrote:

This panel has never held that a flaw in a doctor's report renders the report void such that the 90-day dispute does not apply. Rather, we have held that the rule "affords a method by which the parties may rely that an assessment of impairment and MMI may safely be used to pay applicable benefits" by providing for a "liberal time frame" in which such assessment will be open to dispute. Texas Workers' Compensation Commission Appeal No. 92670, decided February 1, 1993. Therefore, the rule's intent is to give either party an opportunity to challenge a doctor's finding of MMI or impairment for whatever reason.

In Texas Workers' Compensation Commission Appeal No. 950358, decided April 18, 1995, the Appeals Panel held that if the doctor who made the first certification of MMI and IR rescinded the report within the 90-day period, the first certification did not become final under the provisions of Rule 130.5(e). In Texas Workers' Compensation Commission Appeal No. 950359, decided April 24, 1995, the Appeals Panel stated that if a doctor rescinded his first certification of MMI and IR after the passage of 90 days after notice to the party who disputed the rating, the rescission had no effect on the finality of the first certification unless the first certification was invalid on its face.

The hearing officer did not err in determining that the first certification of MMI and IR became final under the provisions of Rule 130.5(e) and that the claimant reached MMI on June 3, 1999, with a nine percent IR. We affirm the decision and order of the hearing officer.

Tommy W. Lueders
Appeals Judge

CONCUR:

Thomas A. Knapp
Appeals Judge

Philip F. O'Neill
Appeals Judge