APPEAL NO. 001701

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 June 27, 2000. The hearing officer determined that Dr. X certification of maximum medical improvement (MMI) and impairment rating (IR) assigned on June 23, 1999, is considered final under Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 130.5(e) (Rule 130.5(e)). The appellant (claimant) appealed, arguing that Dr. X did not comply with applicable rules which require sending a copy of his report to the Texas Workers' Compensation Commission (Commission). The claimant further argues that the respondent (carrier) waived the right to assert finality of the first report under the 90-day rule.

The carrier responded that it was not estopped from raising the 90-day issue because it began payment of impairment income benefits (IIBs). The carrier argues that there are no exceptions to Rule 130.5(e).

DECISION

We affirm the hearing officer's decision.

The testimony was brief. The claimant injured himself by falling backward onto his buttocks from a ladder on _____. He said that his doctor, Dr. H, had recommended surgery and that he, the claimant, was about to go through the second opinion process. The medical evidence indicates, however, that the claimant's most prevalent diagnosis is chronic pain. Dr. H has diagnosed internal disc derangement.

The claimant was examined by Dr. X, for the carrier, on June 23, 1999. Essentially, Dr. X attributed the claimant's symptoms and range of motion limits to symptom magnification and found he had reached MMI on the date of his examination with a zero percent IR.

The claimant received a copy of this report on July 10, 1999. The carrier also sent a copy of the Report of Medical Evaluation (TWCC-69) to Dr. H on July 28, 1999, and asked him to complete the bottom portion. (If he completed it and returned it to the carrier and/or Commission, the record was not favored with a copy.) The claimant testified that Dr. H advised him that if he got a certified mailing of the report, his attorney probably did also. The claimant contended that he did not read well and thus did not understand the TWCC-69. However, he did not seek clarification from his attorney or from the Commission. There was no evidence offered that any temporary income benefits being paid were continued by the carrier notwithstanding Dr. X's report.

The claimant testified that he eventually took Dr. X's report to his attorney sometime in September. However, no dispute was filed to this report until November 1, 1999. Thereafter, the Commission appointed a designated doctor.

Notes of the Commission Dispute Resolution Information System stated in an October 21, 1999, record that an adjuster (not the one that was identified as the principal adjuster for this claim in the records in evidence) called the Commission to see if a dispute against the report of Dr. X had been filed and was told that there was no record at the Commission of a TWCC-69 or dispute on file.

The designated doctor, Dr. B, examined claimant, certifying a 13% IR with an MMI date of November 23, 1999. The carrier began payment of IIBs based on this report, but on February 16, 2000, the principal adjuster asserted the finality of the first IR by Dr. X. Although the claimant responded three weeks later by requesting a benefit review conference (BRC) for the failure of the carrier to honor Dr. B's report, there is no evidence that the parties had reached an agreement or settlement concerning payment of IIBs.

Whether there are exceptions to Rule 130.5(e) was decided by the Texas Supreme Court, in a 5 to 4 vote, in the case of Rodriguez v. Service Lloyds Insurance Company, 997 S.W.2d 248 (Tex. 1999). There are no exceptions. We cannot agree that failure to comply with all aspects of the filing of reports obviates finality under Rule 130.5(e). Consequently, the first report became final when it was not disputed within 90 days of July 10, 1999. The question presented, therefore, is whether the conduct of the carrier acted as a waiver of the right to assert finality of Dr. X's report. This issue was actually argued and litigated at the CCH. The hearing officer made the finding of fact that the carrier filed its Payment of Compensation or Notice of Refused/Disputed Claim (TWCC-21) asserting the finality of Dr. X's report after it had begun payment of IIBs based on Dr. B's report. As he finalized the first IR, we may imply a conclusion of law that the carrier did not waive its right to assert finality of Dr. X's first IR.

The Appeals Panel has held that there are various disputes that can be waived. For example, although Section 409.021(c) would appear on its face to impose a waiver of defenses if a carrier does not contest compensability within 60 days, the Appeals Panel has held that this waiver must be asserted at the BRC or the claimant will lose the ability to raise that issue in a later proceeding. Texas Workers' Compensation Commission Appeal No. 91016, decided September 6, 1991; Texas Workers' Compensation Commission Appeal No. 950140, decided March 8, 1995. Likewise, the finality of the first IR may not be asserted after the first quarter of supplemental income benefits (SIBs) entitlement and payment of SIBs was made based upon a designated doctor's IR. Texas Workers' Compensation Commission Appeal No. 941521, decided December 23, 1994. A carrier may waive the right to dispute extent of injury if it does not activate this dispute prior to a proceeding where IR is in issue and the designated doctor has included a disputed region as part of his IR. Texas Workers' Compensation Commission Appeal No. 941333, decided November 21, 1994. Although the carrier argues that the Appeals Panel has not addressed whether the first IR may be asserted when there has been no dispute about the appointment of a designated doctor, we have opined that waiver can be applied in such a situation where several years have passed and the first IR is asserted as a defensive matter to SIBs. Texas Workers' Compensation Commission Appeal No. 981497, decided August 19, 1998.

Further, in Texas Workers' Compensation Commission Appeal No. 94797, decided August 5, 1994, the Appeals Panel noted that if a hearing officer allowed the 90-day rule to be asserted only after the undisputed examination by a designated doctor, finality of the first IR would arguably violate the presumptive weight provision set out in Section 408.125(e). While the Appeals Panel subsequently held in Texas Workers' Compensation Commission Appeal No. 960166, decided March 8, 1996, that dispute of the appointment of the designated doctor when made by the Commission was not an absolute prerequisite to asserting a 90-day rule after his/her examination, that Appeals Panel did so in the factual context that the carrier, prior to the appointment of the designated doctor, had already made known its disagreement with any IR above that assessed in the first IR. We note that the attempt by the claimant in that case to reopen his IR was made years after the first IR was assessed. However, Appeal No. 960166, *supra*, also cited Texas Workers' Compensation Commission Appeal No. 950794, decided June 30, 1995, in which it was held, when the claimant asserted finality of his first IR although he had acquiesced in a designated doctor exam, that the claimant was not required to have first objected to the appointment of the designated doctor.

A review of these cases indicates that the Appeals Panel is concerned about the effect that “13th hour" disputes will have on the orderly payment of income benefits and that disputes will generally be found to have been waived where the case has progressed for some time based upon actions earlier taken and there has been some reliance on this by the parties or third parties (such as designated doctors for extent of injury). Obviously, cases where equitable doctrines are applied are case and fact specific.

Consequently, we are not prepared to say, under the facts of this case, that a waiver must be imposed that will preclude the carrier in this case from asserting the finality of Dr. X's report, although the carrier initiated payment of IIBs based upon the designated doctor's report and no overt dispute to that appointment at the time was proven. The dispute was raised in this case before more than a very few percentage points of the IR had been paid. No actions were proven to have occurred in reliance on the designated doctor's IR. There were no facts indicating that the carrier "lay behind the log" until after the results of the designated doctor examination were known; the carrier was not gambling that a designated doctor report could be lower than the first IR, since there can be no lower IR than a "zero."

Finally, there is little getting around the fact that a claimant bears the primary supervision for his or her claim and should act with reasonable prudence in following the progress of that claim; to receive documents which one admits were ambiguous and yet to fail to seek a clarification, from the Commission or one's own attorney, is indicative of a want of reasonable prudence. We would further note that parties can avail themselves of the provision for settlements and agreements in Section 408.005 to avoid future disputes over IR.

That having been said, we caution against citation of this case as *carte blanche* that a carrier may allow the designated doctor examination to happen without protest and then jump up to assert finality of the first IR. The decision in Appeal No. 94797, *supra*, has not been overruled and a carrier that does not "preserve" its right to assert finality of the first IR at the time the designated doctor is appointed will more likely than not have a waiver imposed.

Finding the decision of the hearing officer not against the great weight and preponderance of the evidence, we affirm the hearing officer's decision and order.

Susan M. Kelley
Appeals Judge

CONCUR:

Tommy W. Lueders
Appeals Judge

Philip F. O'Neill
Appeals Judge