APPEAL NO. 001704

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 July 11, 2000. The hearing officer determined that the zero percent impairment rating (IR) by Dr. S became final under Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 130.5(e) (Rule 130.5(e)). The appellant (claimant) appealed, contending that Dr. S's report was invalid on its face because it did not comply with Rules 130.1 and 130.2 and that the Report of Medical Evaluation (TWCC-69) contained a prospective date of maximum medical improvement (MMI). The claimant also, for the first time on appeal, alleges that he "didn't receive the TWCC [69] from [Dr. S] until May 3, 2000." The claimant requests that we reverse the hearing officer's decision and render a decision in his favor. The respondent (self-insured) responds, urging affirmance.

DECISION

Reversed and rendered.

The medical records indicate that the claimant is a 39-year-old crane operator who was injured on _____, when a cable broke and he was "thrown around." The injury at issue is a cervical spine injury. Dr. S was the claimant's treating doctor. First we will note that the claimant was present at the CCH but did not testify. One of the asserted errors in Dr. S's report is that the claimant is a "well nourished white male in no distress." The ombudsman, in argument at the CCH, said "Well, we see that there was an error on that part as well." Not seeing the claimant, we have no indication what, if any, error is referred to in that statement. The claimant, in what appears to be a separate letter to the Appeals Panel, explains that statement and asserts several other matters not in the record at the CCH. The time to bring out this information was at the CCH, not for the first time on appeal; consequently, we decline to consider information or testimony not in the record of the CCH.

As part of both Claimant's Exhibit No. 1 and Self-Insured's Exhibit No. 1 is an undated TWCC-69 signed by Dr. S certifying MMI on September 11, 1998, with a zero percent IR. Also part of those exhibits is a document entitled "Progress Notes" dated September 1, 1998, with the notation "DOD: 9/01/98, DOT: 9/02/98" which we interpret to mean date of dictation September 1, 1998, date of transcription September 2, 1998. It is not clear to us whether this note was a narrative included with the TWCC-69 or not. In any event, on the second page of that progress note, under "PLAN" is the statement:

> I have asked him to continue his anti-inflammatories, mild heat and relaxation techniques over the next tend [sic, probably means ten] days or so. If he continues to have this subjective tightness he will call me and I will see him on a personal basis to rule out any other medical causes of this.

Fairly clearly on September 1, 1998, Dr. S was contemplating that the claimant continue taking anti-inflammatories, mild heat, etc. for ten days until September 11, 1998, and that the claimant would call him if he continues to have subjective tightness.

In evidence is a return receipt (green) card indicating a Notification Regarding [MMI] and/or [IR] (TWCC-28) form dated October 2, 1998, addressed to the claimant and receipted for by the claimant's wife on "10-7-98." Somewhat confusing about the receipt card is a U.S. Postal Service stamp dated April 21, 2000. The claimant at the CCH did not deny that he received Dr. S's TWCC-69 on October 7, 1998. In the claimant's rebuttal argument, the ombudsman states, in passing, concerning whether or not Dr. S's report became final, "[t]here's no evidence here to show when claimant received this first [IR], nor is there an issue concerning when did he receive this first [IR]." The hearing officer found that the claimant received written notice of Dr. S's rating on October 7, 1998. That finding is supported by the evidence presented at the CCH and will be considered as fact by us.

Rule 130.5(e), the version then in effect, provides that the first IR assigned to an employee is considered final if not disputed within 90 days after the rating is assigned, which has been interpreted to mean 90 days after the parties received written notice of the IR. In Texas Workers' Compensation Commission Appeal No. 000111, decided March 3, 2000, the Appeals Panel held that Rule 130.5(e) "does not require the completion of a medical evaluation done in accordance with Rules 130.1 and 130.2 as a condition precedent to certifying an MMI date and assigning an IR." We adhere to that holding and find that the claimant's argument that Dr. S's report is invalid or void because it did not comply with all the requirements of Rules 130.1 and 130.2 is without merit.

Of greater concern is the claimant's principal argument that Dr. S assigned a prospective date of MMI. Clearly, the TWCC-69 was undated. The hearing officer, in his Statement of the Evidence, comments:

> Although [Dr. S's] certification and assignment of the 0% [IR] occurred after Claimant's visit with the doctor on September 1, 1998, it does not necessarily follow that [Dr. S] executed the TWCC-69 on September 1, 1998, assigning a future date as the date of MMI. The Hearing Officer finds that another explanation, as reasonable as that set forth by Claimant if not more so, is that on September 11, 1998, [Dr. S] filled out the TWCC-69, put the date he executed the document as the date of MMI, and then simply failed to date the document after signing it. The execution of the TWCC-69 on September 11, 1998 is also indicated by the date Carrier sent notice of the certification of MMI and IR to Claimant in early October, 1998. The Hearing Officer so finds and, therefore, further finds that the date of MMI set forth on the TWCC-69 was not a prospective date of MMI.

In the absence of any other evidence, the hearing officer's rationale might be persuasive; however, in this case both the claimant's and the self-insured's exhibits containing Dr. S's TWCC-69, have the "Progress Note" dated September 1, 1998, attached. Clearly, the

examination occurred on September 1, 1998, and equally clearly on September 1, 1998, Dr. S was saying the claimant would reach MMI in ten days (on September 11, 1998), unless the claimant contacted him further, which he apparently did not. The note was dictated on September 1, 1998, and was transcribed on September 2, 1998. It appears unlikely that the doctor would complete the TWCC-69 ten days after he dictated the note. In any event, there is simply no evidence, one way or the other, regarding when Dr. S signed the TWCC-69 certifying MMI. The hearing officer's theory that the claimant was examined on September 1, 1998, and then on September 11, 1998, Dr. S filled out the TWCC-69 using that date as the MMI date is not supported by the evidence and is little more than gossamer speculation unsupported by evidence in the record. The progress note explains how the September 11, 1998, MMI date was reached. The hearing officer's finding that the MMI date on the TWCC-69 was not a prospective date is not supported by the evidence.

Accordingly, because it is the overall scheme of the 1989 Act to appoint a designated doctor whenever there is a dispute of MMI and/or IR, we reverse the hearing officer's decision and render a new decision that the first certification of MMI and IR by Dr. S did not become final pursuant to Rule 130.5(e).

Thomas A. Knapp
Appeals Judge

CONCUR:

Elaine M. Chaney
Appeals Judge

Alan C. Ernst
Appeals Judge