APPEAL NO. 011427
FILED AUGUST 6,2001

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 6, 2001. The hearing officer resolved the disputed issue by deciding that the first certification of maximum medical improvement (MMI) and impairment rating (IR) assigned by Dr. D on December 16, 1996, became final under Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 130.5(e) (Rule 130.5(e)). The appellant (claimant) appealed and the respondent (self-insured) responded. With regard to the self-insured's assertions regarding adequacy and timeliness of the claimant's appeal, we find that the claimant's letter received by the Texas Workers' Compensation Commission (Commission) on June 25, 2001, is an adequate and timely appeal under Section 410.202.

DECISION

The hearing officer's decision is affirmed.

The hearing officer did not err in determining that the first certification of MMI and IR assigned by Dr. D on December 16, 1996, became final under Rule 130.5(e).

The claimant sustained a compensable injury on _____, and Dr. D is his treating doctor. In a Report of Medical Evaluation (TWCC-69) dated December 16, 1996, Dr. D certified that the claimant reached MMI on December 16, 1996, with a 0% IR. It is undisputed that Dr. D's TWCC-69 of December 16, 1996, was the first certification of MMI and assignment of an IR. It is also undisputed that the claimant received a copy of Dr. D's TWCC-69 of December 16, 1996, not later than December 31, 1996, and that the claimant first disputed Dr. D's certification of MMI and IR in August 1998. In August 1998, the claimant underwent a cervical spine MRI. Based on that study, Dr. D completed an amended TWCC-69 in October 1998 in which he stated that he was rescinding the prior MMI date and IR and reported that the claimant had reached statutory MMI on September 20, 1998, and that an IR could not be determined. In a TWCC-69 dated February 2, 1999, Dr. D certified that the claimant reached statutory MMI on September 20, 1998, with a 27% IR.

The claimant contends that Dr. D was unaware of his cervical condition until August 1998 and that Dr. D rescinded the initial IR. We note that Dr. D's rescission was after 90 days from the date the claimant received written notice of Dr. D's initial certification of MMI and IR and thus the certification of MMI and IR would have been final prior to the rescission. *See* Texas Workers' Compensation Commission Appeal No. 001951, decided September 27, 2000. *Compare* Texas Workers' Compensation Commission Appeal No. 000065, decided February 24, 2000, where the doctor rescinded the IR within 90 days and it was held not to be final. The Appeals Panel has held that if the IR becomes final under Rule 130.5(e), then so does the underlying finding of MMI. Texas Workers' Compensation Commission Appeal No. 92670, decided February 1, 1993. The hearing officer found that the claimant's condition had

been misdiagnosed until August 1998 but decided that the first certification of MMI and IR assigned by Dr. D on December 16, 1996, became final under Rule 130.5(e).

The version of Rule 130.5(e) which is applicable to the time period under consideration, and which was effective January 25, 1991, provided:

> The first [IR] assigned to an employee is considered final if the rating is not disputed within 90 days after the rating is assigned.

In Rodriguez v. Service Lloyds Insurance Company, 997 S.W.2d 248, 254 (Tex. 1999), the Supreme Court of Texas held that the above-cited version of Rule 130.5(e) "has no exceptions and that an [IR] is final if not disputed within ninety days." Consequently, under the undisputed facts of the instant case, the hearing officer did not err in determining that the first certification of MMI and IR assigned by Dr. D became final under Rule 130.5(e).

We note that the above-cited version of Rule 130.5(e) was declared invalid by the Third Court of Appeals in Fulton v. Associated Indemnity Corporation, 2001 WL 359622 (Tex. App.-Austin, April 12, 2001). On April 23, 2001, the Acting Executive Director of the Commission issued Advisory 2001-05, which states that the Fulton decision "should not be considered as precedent at least until it becomes final upon completion of the judicial process." At this time, we understand that the judicial process in that case has not been completed.

We further note that Rule 130.5(e) was amended effective March 13, 2000, and as amended contains certain exceptions; however, Rule 130.5(f) provides: "This rule applies to certifications of MMI and [IRs] that have not become final prior to the effective date of this rule." Since the first certification of MMI and IR in this case did become final prior to the effective date of amended Rule 130.5(e), the amended rule would not apply.

The hearing officer's decision and order are affirmed.

Robert W. Potts
Appeals Judge

CONCUR:

Susan M. Kelley
Appeals Judge

Michael B. McShane
Appeals Judge