

APPEAL NO. 011745  
FILED AUGUST 29, 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 (CCH) was scheduled for June 20, 2001, but reset to June 28, 2001. The hearing officer determined that the first certification of maximum medical improvement (MMI) and impairment rating (IR) assigned by the appellant's (claimant) treating doctor on August 9, 2000, became final under Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 130.5(e) (Rule 130.5(e)). The claimant has appealed this determination, arguing that the first IR did not include all of his compensable injury, and that the treating doctor notified the adjuster by phone within 90 days of the need for an amendment to the IR. The respondent (self-insured) requests that the hearing officer's decision be affirmed.

DECISION

Affirmed.

The treating doctor in this case certified the date of MMI as August 9, 2000, and certified an IR of five percent on a Report of Medical Evaluation (TWCC-69), based on the diagnostic impression of strain/sprain lumbar phalanx, disc displacement-lumbrosacral, and spondylosis nos w/o myelopathy. The parties stipulated that this was the first certification of MMI and IR. This case involves the application of Rule 130.5(e), which provides:

- (e) The first certification of MMI and [IR] assigned to an employee is final if the certification of MMI and/or the [IR] is not disputed within 90 days after written notification of the MMI and IR is sent by the [Texas Workers' Compensation] Commission to the parties, as evidenced by the date of the letter, unless based on compelling medical evidence the certification is invalid because of:
  - (1) a significant error on the part of the certifying doctor in applying the appropriate [Guides to the Evaluation of Permanent Impairment, third edition, second printing, dated February 1989, published by the American Medical Association] AMA Guides and/or calculating the [IR];
  - (2) a clear mis-diagnosis or a previously undiagnosed medical condition; or
  - (3) prior improper or inadequate treatment of the injury which would render the certification of MMI or [IR] invalid.

In Rodriguez v. Service Lloyds Insurance Company, 997 S.W.2d 248 (Tex. 1999), the Texas Supreme Court held that there were no exceptions to finality of a certification of MMI

or IR that was not disputed within 90 days. Rule 130.5(e) was amended by the Commission after the decision in Rodriguez, with an effective date of March 13, 2000, to provide the exceptions to finality which are listed above. The amended Rule 130.5(e) applies to these proceedings.

The hearing officer found that the Commission sent notice of the first certification of MMI and IR to the claimant on August 17, 2000, and that under Rule 102.5, the claimant received written notice of the certification of MMI and IR on August 22, 2000. Testimony presented at the CCH showed the hearing officer that the claimant and the treating doctor knew on or about October 25, 2000, that the August 9, 2000, TWCC-69 failed to provide an IR for all the compensable body parts; however, neither the claimant nor the treating doctor, on behalf of the claimant, disputed the certification within 90 days. Self-Insured's Exhibit No. 1 contains both a Notification Regarding [MMI] and/or [IR] (TWCC-28) from the self-insured's adjuster and a letter from the Commission which specifically advise the claimant of the need to dispute the certification of MMI or IR within 90 days after receiving notice of MMI or IR. We have had occasion to deal with this issue before, in cases decided before the effective date of the new Rule 130.5(e), but the applicable principles are still valid. The following excerpt from Texas Workers' Compensation Commission Appeal No. 950926, decided July 21, 1995, summarizes our previous holdings:

We next look to see if the claimant is entitled to relief because of an exception to the 90-day provision in Rule 130.5(e). The Commission recognized the need for finality in claims involving IRs and adopted Rule 130.5(e) which provides "[t]he first [IR] assigned to an employee is considered final if the rating is not disputed within 90 days after the rating is assigned." The Appeals Panel has written on the provisions of Rule 130.5(e) numerous times. That Appeals Panel has held that if (1) part of the compensable injury was not included in the first IR, (2) the part of the injury was diagnosed or arose after the expiration of the 90-day period, and (3) the claimant could not have disputed the rating on the basis of the IR's failure to include a rating for all of the permanent impairment related to the compensable injury within 90 days because she or he was unaware of that part of the compensable injury and the impairment associated with that non-rated portion of the compensable injury; the claimant may establish that the first IR has not become final if it is disputed within a reasonable time after the claimant becomes aware of the additional impairment. See Texas Workers' Compensation Commission Appeal No. 93501, decided August 2, 1993; Texas Workers' Compensation Commission Appeal No. 931115, decided January 20, 1994; and Texas Workers' Compensation Commission Appeal No. 941069, decided September 20, 1994. On the other hand, we have held that if the claimant knew that the first IR does not include the full extent of his injury, the claimant is required to dispute timely that rating to preclude it from becoming final under the provisions of Rule 130.5(e). Texas Workers' Compensation Commission Appeal No. 941748, decided February 13, 1995. The claimant also complains that his IR for the specific injury under Table 49 of the AMA Guides should have been higher. Before the Commission may make a determination on whether the IR should be higher, the claimant must

have disputed the IR within the 90-day period established under the provisions of Rule 130.5(e). Texas Workers' Compensation Commission Appeal No. 93330, decided June 10, 1993. That was not done in this case. The hearing officer correctly determined that the first certification of MMI and assignment of IR became final under the provisions of Rule 130.5(e).

Applying our previous case law to the facts of this case, there was evidence from which the hearing officer could find that the claimant and the treating doctor were well aware that the IR did not include all compensable body parts not later than October 25, 2000, well within the 90-day period for making a timely dispute of the IR. The claimant was required to dispute timely that rating to preclude it from becoming final under the provisions of Rule 130.5(e). The hearing officer did not find any of the exceptions to Rule 130.5(e) to apply, and that determination is supported by the evidence. Further, a phone conversation between the treating doctor and the adjuster is not sufficient to dispute, when the Commission's notice to the claimant informs the claimant to "dispute these issues by contacting the Commission within 90 days after you receive notice."

We are satisfied that the evidence is sufficiently supportive of the appealed findings of fact and that those findings sufficiently support the conclusions of law. Cain v. Bain, 709 S.W.2d 175, 176 (Tex. 1986).

We affirm the decision and order of the hearing officer.

The true corporate name of the insurance carrier is **EL PASO COUNTY** and the name and address of its registered agent for service of process is

**EL PASO COUNTY JUDGE DOLORES BRIONES (OR CURRENT JUDGE)  
500 EAST SAN ANTONIO  
ROOM 301  
EL PASO, TEXAS 79901.**

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Michael B. McShane  
Appeals Judge

CONCUR:

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Elaine M. Chaney  
Appeals Judge

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Gary L. Kilgore  
Appeals Judge