

APPEAL NO. 011899
FILED SEPTEMBER 26, 2001

This appeal arises pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act). In Texas Workers' Compensation Commission Appeal No. 011139, decided July 5, 2001, the Appeals Panel reversed and remanded the Decision and Order rendered by the hearing officer on May 10, 2001, following a contested case hearing held on May 9, 2001, because a complete record of that hearing was not available for our review. Following the remand, the hearing officer took no additional evidence and reissued his original Decision and Order on August 2, 2001, and included in the record a transcript of the May 9, 2001, hearing. The hearing officer resolved the sole disputed issue by concluding that the first certification of maximum medical improvement (MMI) and impairment rating (IR) assigned by Dr. B on June 17, 1999, became final under Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 130.5(e) (Rule 130.5(e)). The appellant (claimant) has appealed this conclusion, and the underlying findings of fact, on evidentiary sufficiency grounds. The claimant also urges error by the hearing officer in reopening the record during closing arguments to allow the respondent (carrier) to introduce additional evidence. The appeals file does not contain a response by the carrier.

DECISION

Reversed and a new decision rendered.

We note at the outset that the hearing officer failed to include in his Decision and Order the parties' stipulations that Dr. B certified the claimant with an MMI date of June 17, 1999, and an IR of zero percent, and that on July 19, 1999, Dr. B certified the claimant with an MMI date of July 19, 1999, and an IR of zero percent.

The claimant testified that he was injured lifting boxes at work on _____; that he was first treated for about a week by Dr. C; that Dr. C then referred him to Dr. B for therapy; that he first saw Dr. B on June 17, 1999, who examined him and sent him to a sports therapy facility for therapy; that he had a follow-up visit with Dr. B in July 1999; and that he thereafter changed treating doctors to Dr. G, who provided him with chiropractic treatment and referred him to three other doctors for testing and an injection. According to his Employee's Request to Change Treating Doctors (TWCC-53), the claimant requested the change to Dr. G on July 29, 1999.

In evidence is a Report of Medical Evaluation (TWCC-69) signed by Dr. B on June 17, 1999, the date of the claimant's visit to Dr. B. Dr. B certified on this form that the claimant reached MMI on "6-17-00" with an IR of "0%." The TWCC-69 also bears the undated signature of Dr. C. In his narrative report dictated on June 21, 1999, Dr. B detailed the results of his clinical examination and stated his clinical impression as "cervical and trapezial strain with no objective clinical findings today." Dr. B recommended treating the neck and shoulder pain with Ibuprofen and with manual therapy and exercise at a physical therapy clinic for six visits. He also wrote to recheck the claimant in three weeks

on "07/07/99" and that the "[e]stimated date to MMI is 07/15/99." The claimant testified that he does not recall receiving the zero percent IR assigned by Dr. B on June 17, 1999, before getting it at a Texas Workers' Compensation Commission (Commission) hearing (apparently referring to a benefit review conference (BRC)) and the parties represented that the Commission did not send out an "EES-19" letter referencing this TWCC-69 certification. The hearing officer commented that, apparently based on date stamps, the Commission received the TWCC-69 on January 30, 2000, and the carrier on November 20, 2000.

The claimant further testified that he does recall receiving, in August 1999, a zero percent IR assigned by Dr. B on July 19, 1999. He said he did nothing about it because he had to change treating doctors and "thought they took care of everything." There is no TWCC-69 signed by Dr. B in August 1999 in evidence. However, there is in evidence an August 13, 1999, letter from the Commission addressed to the carrier and reflecting that a copy was sent to the claimant which states that the Commission received a report from Dr. B stating that the claimant reached MMI on July 19, 1999, with an IR of "0%" and advising that the recipients had 90 days in which to dispute the MMI date or IR. Also in evidence is a Commission letter dated December 13, 1999, advising the parties that a dispute of the MMI date or IR was filed and that a designated doctor has been appointed and a Commission letter dated December 23, 1999, advising the claimant that his appointment with the designated doctor has been canceled because the "dispute was not filed in a timely manner."

During the closing arguments, the hearing officer, over the claimant's objection, reopened the evidence to admit a July 6, 2000, letter from Dr. G to the claimant's representative which was mentioned by the carrier during a discussion with the hearing officer and the claimant. This letter states that, among other things, the claimant was given a zero percent IR on June 17, 1999, by a carrier-selected doctor; that the claimant "then changed Doctor's to myself via TWCC-53, which was approved on 08/12/99"; that "[u]nfortunately, [the claimant] was unaware of his right to dispute the 0% [IR] and in my several discussions with him, obviously he did not understand the future repercussions [sic] that this would have"; that "[t]he point of this letter is to try to have an exception made by the TWCC to overturn the 90 day rule for disputing an [IR] given by a carrier selected doctor"; that he believes the claimant was misdiagnosed by his original treating doctor and not given correct treatment; and that had he been correctly diagnosed, he would have received proper treatment and "not find himself 1 year later with his symptoms worsening and no one able to help him because he was wrongly stuck with a 0% [IR]."

The hearing officer stated that he would admit the letter "in the interests of justice" because the claimant had testified that he did not know about the IR certified to by Dr. B on June 17, 1999, and never received it before the BRC and that this letter appears to show that he did. The record is not clear as to how the carrier came by a copy of this letter and why it was not offered as impeachment evidence before the evidence was closed. However, we do not find that the hearing officer abused his discretion in reopening the evidence and admitting this document once its existence was made known to him. See,

generally, Morrow v. H.E.B., Inc., 714 S.W.2d 297 (Tex. 1986). Section 410.163(b) provides in part that the hearing officer “shall ensure the preservation of the rights of the parties and the full development of facts for the determinations to be made.”

In addition to the dispositive conclusion, the claimant disputes findings that he knew that Dr. B had given him the certification no later than July 29, 1999; that Dr. G told the claimant that he needed to dispute Dr. B’s certification within the 90-day window for disputing the certification; and that the claimant failed to dispute the certification within 90 days of July 29, 1999. In his discussion, the hearing officer reasons that the claimant testified to the effect that he had no knowledge of Dr. B’s June 17, 1999, IR before learning of it at a BRC but that Dr. G’s letter is strongly contradictory; that the claimant was aware of this IR by the time he filed the TWCC-53 on July 29, 1999; that Dr. G told the claimant within 90 days of the issuance of Dr. B’s June 17, 1999, IR to dispute it; and that the claimant can rely on neither his ignorance of the requirements of Rule 130.5(e) nor the requirement of the amended Rule 130.5(e) to prevent the finality of the June 17, 1999, IR.

The version of Rule 130.5(e) in effect at the time of Dr. B’s June 17, 1999, certification of the zero percent IR provides that the first IR assigned to an employee is considered final if the rating is not disputed within 90 days after the rating is assigned. This rule was amended effective March 13, 2000, to provide for, among other things, a written notification of the MMI and IR from the Commission to the parties in order to start the 90-day period to dispute.

The Appeals Panel has held that the 90-day period to dispute the first assigned IR begins to run from the date the party seeking to dispute the determination receives notice of the IR. Texas Workers’ Compensation Commission Appeal No. 93729, decided September 29, 1993. Further, the Appeals Panel has held that an employee must have written notice of the first IR assigned. Texas Workers’ Compensation Commission Appeal No. 94354, decided May 10, 1994; Texas Workers’ Compensation Commission Appeal No. 972244, decided December 17, 1997; Texas Workers’ Compensation Commission Appeal No. 972383, decided January 2, 1998 (Unpublished). In Texas Workers’ Compensation Commission Appeal No. 950982, decided July 28, 1995, the Appeals Panel reversed and rendered a new decision that the first assigned IR did not become final under Rule 130.5(e) because the record contained no proof of the carrier’s having mailed the written notice of the IR to the employee. Our decision stated that “[w]hile the burden of proof was stated to be on claimant to establish that the IR did not become final because of the provisions of Rule 130.5(e), to start the 90-day clock, the claimant must have received a written copy of the first [IR]. [Citation omitted.]” The employee in that case, as did the claimant in the case we here consider, testified that she did not recall receiving any letter with a form from the doctor who assigned the IR and did not learn of the IR until much later. The Appeals Panel stated that “[u]nder these circumstances, with no evidence that a written notice was mailed or sent to her, there is no evidentiary basis for the hearing officer’s finding that it was mailed to the claimant or for the conclusion that Dr. T’s certification became final.” *And see*, Texas Workers’ Compensation Commission Appeal No. 982486, decided November 30, 1998.

While the hearing officer inferred from the claimant's TWCC-53 and Dr. G's July 6, 2000, letter that the claimant had notice by July 29, 1999, of Dr. B's IR assigned on June 17, 1999, he did not nor could he fairly infer that the claimant then had written notice of that IR. Accordingly, finding the hearing officer's determination of the finality of Dr. B's June 17, 1999, IR under Rule 130.5(e) to be against the great weight and preponderance of the evidence (In re King's Estate, 150 Tex. 662, 244 S.W.2d 660 (1951)), we reverse the hearing officer's decision and order and render a new decision that the June 17, 1999, MMI date and zero percent IR did not become final under Rule 130.5(e).

Philip F. O'Neill
Appeals Judge

CONCUR:

Thomas A. Knapp
Appeals Judge

Robert E. Lang
Appeals Panel
Manager/Judge