APPEAL NO. 012067
FILED OCTOBER 24, 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 held on August 8, 2001. With regard to the issues before him, the hearing officer determined the following:

1. The first purported certification of maximum medical improvement (MMI) and impairment rating (IR) by Dr. B on July 19, 1999, did not become final under Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 130.5(e) (Rule 130.5(e));

2. The determination of MMI is not ripe for adjudication at this time;

3. The determination of IR is not ripe for adjudication at this time;

4. The respondent (claimant) had disability from May 17, 2000, through August 8, 2000, and disability recurred on February 6, 2001, and continued through the date of this hearing; and

5. The average weekly wage (AWW) is $342.00.

The appellant (carrier) appeals the hearing officer's decision on the issues of finality of the first certification of MMI and IR, MMI, IR, and disability. No response was received from the claimant. There is no appeal of the decision on AWW, which was based on a stipulation.

DECISION

As reformed herein, the hearing officer's decision is affirmed.

RULE 130.5(e)

We reform the hearing officer's decision to reflect that the date of the first purported certification of MMI and IR by Dr. B was July 29, 1999, and not July 19, 1999, or July 28, 1999. July 19, 1999, was the date of MMI in the disputed report.

The hearing officer did not err in determining that the first purported certification of MMI and IR by Dr. B on July 29, 1999, did not become final under Rule 130.5(e).

Section 408.123(a) provides, in part, that after an employee has been certified by a doctor as having reached MMI, the certifying doctor shall evaluate the condition of the employee and assign an IR using the IR guidelines described in Section 408.124.

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."

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 then Acting Executive Director of the Texas Workers' Compensation 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. 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."

The claimant sustained a compensable injury on _____. The claimant testified that she injured her back on that day when she fell on stairs at work. Dr. B, a chiropractor, was the claimant's initial treating doctor. The claimant testified that she began treating with Dr. B around June 22, 1999; that she treated with Dr. B for "about two months"; and that Dr. B "popped" her neck, shoulder and back. The Report of Medical Evaluation (TWCC-69) in dispute, which was the first report of MMI and IR, is dated July 29, 1999, and provides an MMI date of July 19, 1999, and assigns a zero percent IR. There is no appeal of the hearing officer's findings that the claimant received a copy of the TWCC-69 on August 9, 1999, and that she did not dispute it until May 2000, a period of more than 90 days. Based on a sworn affidavit of Dr. B's administrative assistant, the hearing officer determined that the TWCC-69 dated July 29, 1999, is not based on an actual examination by Dr. B, but is premised on the claimant's abandonment of treatment. The hearing officer further found that the IR assigned in that TWCC-69 did not become final under Rule 130.5(e) because it is not a valid certification.

Texas Workers' Compensation Commission Advisory 93-04, issued March 9, 1993, regarding evaluation of MMI and impairment by doctors, states, in part, that "[a]n evaluation or certification under the 'Guides' and the Act must include a physical examination and evaluation by the doctor," and that "a doctor must conduct a physical evaluation and is responsible for the integrity of the evaluation process."

In Texas Workers' Compensation Commission Appeal No. 992419, decided

December 16, 1999, the Appeals Panel stated:

> We have held that an IR must be "derived from" an actual examination. Texas Workers' Compensation Commission Appeal No. 982463, decided December 3, 1998; *see also* Texas Workers' Compensation Commission Appeal No. 972320, decided December 19, 1997. Thus, a certification premised on a claimant's noncompliance with or abandonment of treatment is invalid. Texas Workers' Compensation Commission Appeal No. 981990, decided October 7, 1998 (Unpublished); Texas Workers' Compensation Commission Appeal No. 980912, decided June 18, 1998. We have also held that a certification of MMI and IR is not invalid just because the examination was done before the TWCC-69 was completed. Texas Workers' Compensation Commission Appeal No. 980526, decided April 29, 1998 (Unpublished); Texas Workers' Compensation Commission Appeal No. 961334, decided August 23, 1996.

The hearing officer's determination that the first purported certification of MMI and IR by Dr. B did not become final under Rule 130.5(e) is not premised on any "exception" addressed by the court in Rodriguez, *supra*. Instead, the hearing officer's determination is based on the invalidity of the first IR because it was not based on an actual examination, but instead was premised on the claimant's abandonment of treatment. This case can be distinguished from other Appeals Panel decisions cited by the carrier based on the affidavit of Dr. B's administrative assistant, which reflects that since the claimant had not been seen for a long period of time, there was no way of knowing that the claimant needed further care and was having major problems, and that the TWCC-69 was completed only because the carrier pressured her to have the form taken care of. None of Dr. B's medical reports, other than the TWCC-69, were in evidence. Although the TWCC-69 states a "Date of This Visit" as July 19, 1999, and the claimant stated she was seen by Dr. B for about two months, Dr. B's administrative assistant provided contrary evidence in her statement in the affidavit that the claimant had not been seen for a long period of time. In addition, the TWCC-69 in issue has written on it a reference to two negative chiropractic signs and a reference to dismissal in asymptomatic condition. However, the hearing officer could consider the statements in the affidavit of Dr. B's administrative assistant that it was not known whether the claimant was still having major problems or needed further care because the claimant had not been seen for a long period of time.

The affidavit also reflects that the administrative assistant completed the TWCC-69 after consulting Dr. B, and that she signed Dr. B's name to it. It also has Dr. B's rubber-stamp signature on it. While we do not reach the question of whether Dr. B authorized the administrative assistant to sign the form on his behalf, because the hearing officer made no specific finding that Dr. B did not authorize his assistant to sign his name to the TWCC-69, the hearing officer did find that "[t]here is no record that [Dr. B] approved, ratified or has ever seen the TWCC-69 dated July 29, 1999."

The hearing officer is the sole judge of the weight and credibility of the evidence.

Section 410.165(a). As the finder of fact, the hearing officer resolves the conflicts and inconsistencies in the evidence and determines what facts have been established. Although there is conflicting evidence in this case, we conclude that the hearing officer's determination that the first purported certification of MMI and IR by Dr. B did not become final under Rule 130.5(e), is supported by sufficient evidence and is not so against the great weight and preponderance of the evidence as to be clearly wrong and unjust. Cain v. Bain, 709 S.W.2d 175 (Tex. 1986). We also conclude that the hearing officer's determination is affirmable under the amended Rule 130.5(e).

MMI and IR

Since we are affirming the hearing officer's determination that the first purported certification of MMI and IR by Dr. B on July 29, 1999, did not become final under Rule 130.5(e), and since that is the only report of MMI and IR in evidence, we conclude that the hearing officer did not err in determining that the determinations of MMI and IR were not ripe for adjudication at the time of the CCH.

DISABILITY

The hearing officer did not err in determining that the claimant had disability, as defined by Section 401.011(16), from May 17, 2000, through August 8, 2000, and from February 6, 2001, through the date of the CCH. The claimant underwent an MRI on May 15, 2000, which showed a herniated lumbar disc, for which the claimant underwent surgery in April 2001. The periods of disability found by the hearing officer are supported by the claimant's testimony and by the reports of Dr. C. The hearing officer's determination on the disability issue is supported by sufficient evidence and is not so against the great weight and preponderance of the evidence as to be clearly wrong and unjust. Cain, *supra*.

The hearing officer's decision and order, as reformed herein, are affirmed.

The true corporate name of the insurance carrier is **CONTINENTAL CASUALTY COMPANY** and the name and address of its registered agent for service of process is

CT CORPORATION SYSTEM
350 NORTH ST. PAUL STREET
DALLAS, TEXAS 75201.

Robert W. Potts
Appeals Judge

CONCUR:

Gary L. Kilgore
Appeals Judge

Michael B. McShane
Appeals Judge