

APPEAL NO. 020014-s  
FILED FEBRUARY 26, 2002

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 November 12, 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. B on January 3, 2001, became final under Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 130.5(e) (Rule 130.5(e)). The appellant/cross-respondent (claimant) appealed, contending that the first certification did not become final. The respondent/cross-appellant (carrier) appealed certain fact findings.

DECISION

The hearing officer's decision is reversed and a new decision is rendered that the first certification of MMI and IR did not become final.

On \_\_\_\_\_, the claimant sustained a compensable injury. Dr. B, who initially treated the claimant, certified on January 3, 2001, that the claimant reached MMI on December 21, 2000, and assigned the claimant a zero percent IR. With regard to the disputed issue, the hearing officer determined that the first certification of MMI and IR assigned by Dr. B on January 3, 2001, became final under Rule 130.5(e). The hearing officer's decision is based on his determination that the claimant did not dispute the first certification of MMI and IR within 90 days after written notification of the MMI and IR certification was sent by the Texas Workers' Compensation Commission (Commission) to the claimant.

The original version of Rule 130.5(e), 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.

The amended version of Rule 130.5(e), effective March 13, 2000, provided:

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 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 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.

The amended Rule 130.5(e) was repealed effective January 2, 2002.

In Fulton v. Associated Indemnity Corporation, 46 S.W.3d 364 (Tex. App.-Austin 2001, pet. denied), the court determined that the original version of Rule 130.5(e), the 90-day rule, which restricted the time period for disputing an IR, implicitly limited a claimant's time period for revisiting the assessment of MMI, because when the IR became final, so did the determination of MMI. With respect to the original version of Rule 130.5(e), the court held that: (1) because Rule 130.5(e) severely restricts the statutory time period for assessing a final MMI, the Commission exceeded its authority in enacting the rule; (2) the rule is arbitrary and invalid because it impermissibly shortens the statutory time period allotted to an injured worker to achieve MMI; (3) Section 401.011(30) establishes a 104-week deadline for a worker to achieve MMI, and the Commission may not, by rule, shorten this statutory period because to do so would impose restrictions in excess of those imposed by the 1989 Act; (4) Rule 130.5(e) is invalid to the extent it prevents a reassessment of MMI because the IR or MMI was not disputed within 90 days; and (5) Rule 130.5(e) imposed on Fulton a restriction in excess of that found in the plain language of the 1989 Act and that Fulton's MMI certification, and therefore, his IR, did not become final.

The amended Rule 130.5(e) is the version of Rule 130.5(e) that is applicable to the case under consideration. As noted in footnote 9 on page 371 of the Fulton decision, the original Rule 130.5(e) *implicitly* limited MMI disputes whereas the amended Rule 130.5(e) *explicitly* limits the time for disputing MMI certification as well as IRs. In our opinion, the reasons stated in the Fulton decision for holding the original Rule 130.5(e) invalid also apply to the amended Rule 130.5(e). Accordingly, we reverse the hearing officer's decision that the first certification of MMI and IR assigned by Dr. B on January 3, 2001, became final under Rule 130.5(e), and we render a new decision that the first certification of MMI and IR assigned by Dr. B on January 3, 2001, did not become final.

The true corporate name of the insurance carrier is **TEXAS MUTUAL INSURANCE COMPANY** and the name and address of its registered agent for service of process is

**MR. RUSSELL R. OLIVER, PRESIDENT  
221 WEST 6TH STREET  
AUSTIN, TEXAS 78701.**

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Robert W. Potts  
Appeals Judge

CONCUR:

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Chris Cowan  
Appeals Judge

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Gary L. Kilgore  
Appeals Judge