

APPEAL NO. 020467
FILED APRIL 9, 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 January 29, 2002. With respect to the single issue before him, 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 became final under Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 130.5(e) (Rule 130.5(e)). The claimant asserts error in the determination that the March 13, 2001, MMI date and the seven percent IR became final pursuant to Rule 130.5(e). In its response, the respondent (carrier) urges affirmance.

DECISION

Reversed and rendered.

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 [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 AMA Guides [Guides to the Evaluation of Permanent Impairment, third edition, second printing, dated February 1989, published by the American Medical Association] 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The amended Rule 130.5(e) was repealed effective January 2, 2002.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 Indem. Corp., 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 that 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 applicable to the case under consideration. In Texas Workers' Compensation Commission Appeal No. 020014-s, decided February 26, 2002, we held that the reasons stated in the Fulton decision which held the original Rule 130.5(e) invalid also applied to the amended Rule 130.5(e). Accordingly, we reverse the hearing officer's decision that the first certification of MMI/IR became final under Rule 130.5(e), and we render a new decision that the first certification of MMI/IR did not become final.

We find no merit in the carrier's assertion that the claimant waived the Fulton argument by not raising it at the hearing. The Fulton decision and our interpretation that the reasoning in that case also applies to the amended rule in Appeal No. 020014-s are determinative of the issue before us. That is, they provide the law which resolves the issue and the law is not subject to waiver.

The hearing officer's decision and order that the first certification of MMI and IR became final pursuant to Rule 130.5(e) is reversed and a new decision rendered that the first certification of MMI and IR did not become final.

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

**CORPORATION SERVICE COMPANY
800 BRAZOS
AUSTIN, TEXAS 78701.**

Elaine M. Chaney
Appeals Judge

CONCUR:

Susan M. Kelley
Appeals Judge

Philip F. O'Neill
Appeals Judge