APPEAL NO. 022835
FILED DECEMBER 23, 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 October 3, 2002. The hearing officer determined that (1) the first certification of maximum medical improvement (MMI) and impairment rating (IR) became final; and (2) the appellant's (claimant) IR is 13%, consistent with the first certification. The claimant appeals these determinations. The claimant asserts legal error in the hearing officer's determination that the first certification became final and requests adoption of the designated doctor's amended report assigning a 19% IR. The respondent (carrier) urges affirmance, essentially asserting that the facts of this case do not bring it within the ambit of Fulton v. Associated Indemnity Corporation, 46 S.W.3d 364 (Tex. App.-Austin 2001, pet. denied) and the claimant's first certification, therefore, became final.

DECISION

Reversed and rendered in part, reversed and remanded in part.

It is undisputed that the claimant sustained compensable injuries on _____, when he was involved in a motor vehicle accident while working for the employer. The claimant testified that he sustained injuries to his low back, neck, left shoulder, and left tibia. Spinal surgery was recommended for an injury to the claimant's lumbar spine at L5-S1. The claimant initially declined surgery and underwent conservative treatment.

The parties stipulated that the claimant reached statutory MMI on July 28, 1999. On July 29, 1999, the claimant was evaluated for MMI/IR by referral from his treating doctor. The claimant was assigned a 13% IR, comprised of 3% for loss of cervical range of motion (ROM), 3% for loss of lumbar ROM, and 7% under Table 49, IIC of the Guides to the Evaluation of Permanent Impairment, third edition, second printing, dated February 1989, published by the American Medical Association (AMA Guides). The claimant did not dispute this certification.

On June 16, 2000, the claimant underwent an intradiscal electrode thermal treatment procedure for a herniated disc at L5-S1. The procedure was unsuccessful in resolving the claimant's pain, and he later underwent spinal surgery with fusion at that level, on August 24, 2001.

On November 20, 2001, the claimant had an MRI which revealed a mild diffuse disc bulge at C6-7 with no cord compression and straightening of the cervical spine probably related to muscle spasm. In view of the MRI, the claimant's referral doctor amended his initial IR certification to 16%, adding 4% under Table 49, IIB of the AMA Guides. On March 20, 2002, the claimant disputed the certification and requested the Texas Workers' Compensation Commission (Commission) to appoint a designated

doctor. One was appointed over the carrier's objection. The designated doctor examined the claimant on April 18, 2002, and assigned a 15% IR. The designated doctor's rating, however, was based on the wrong edition of AMA Guides. On July 24, 2002, the designated doctor reevaluated the claimant under the correct edition of the AMA Guides and assigned a 19% IR, comprised of 4% for loss of cervical ROM, 2% for loss of lumbar ROM, and 14% under Table 49.

The hearing officer erred, as a matter of law, in determining that the claimant's first MMI/IR certification became final. The hearing officer's determination appears to be based on the carrier's argument that this case falls outside the ambit of Fulton, *supra*. In Fulton, the court held that Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE Section 130.5(e) (Rule 130.5(e)) (90-day Rule), which restricted the time period for disputing an IR, was invalid because it also implicitly restricted the statutory time period for assessing a final date of MMI.[1] Notwithstanding, the carrier asserted that Fulton did not invalidate the 90-day rule under circumstances where the claimant's first IR certification occurred after the date of statutory MMI, as in this case. The carrier cited the following language in Commission Advisory 2002-04, dated March 4, 2002, in support of its assertion:

> After consultation with the Office of the Attorney General, the Commission understands that the 90-day provision, as it existed in the previous versions of Rule 130.5(e), cannot be utilized as a basis for asserting the finality of a MMI certification or an impairment rating made **before** the statutory MMI defined periods as specified in Texas Labor Code section 401.011(30). [Emphasis in original.]

Thus, the carrier argued that the claimant's initial IR certification became final in the absence of a timely dispute.

While we recognize the need for finality in MMI and IR determinations, we find no authority to support the hearing officer's determination limiting the claimant's time for disputing the initial IR certification. Contrary to the carrier's assertion, the court in Fulton, *supra* does not limit its holding to only those instances in which the statutory MMI period would be shortened. Rather, the court held that because the 90-day rule impermissibly shortens the statutory MMI period, at least in some instances, the Commission exceeded its authority in enacting it and the rule is invalid. Following the decision in Fulton, the Commission repealed the 90-day rule, effective January 2, 2002. The Commission has not since adopted a new rule which would limit the time for disputing IR in the manner proposed here. Commission Advisory 2002-04, in our view, does not provide a basis for the hearing officer's determination, but intends to inform interested persons that the 90-day rule is no longer applicable. In the absence of express authority limiting the time for disputing an initial IR certification, we reverse the

[1] Fulton invalidated the original version of Rule 130.5(e) in effect January 25, 1991. The rule was subsequently amended, effective March 13, 2000. The Appeals Panel later applied the holding in Fulton to amended Rule 130.5(e) in Texas Workers' Compensation Commission Appeal No. 020014-s, decided February 26, 2002.

hearing officer's decision and render a new decision that the claimant's first IR certification did not become final.

The hearing officer erred in determining that the appointment of a designated doctor by the Commission was unnecessary and invalid. This determination is premised upon the conclusion that the claimant's first IR certification became final. In view of our decision above, we reverse the hearing officer's determination on this issue and render a decision that the Commission did not abuse its discretion in appointing a designated doctor.

The hearing officer erred in determining that the claimant's IR is 13%, as assigned by the claimant's referral doctor. Section 408.125(e) and Rule 130.6(a)(2) provide that the report of the designated doctor shall have presumptive weight and that the Commission shall base its determinations on such report unless it is contrary to the great weight of the other medical evidence. Pursuant to Rule 130.6(i), a designated doctor's response to a Commission request for clarification is also considered to have presumptive weight as it is part of the designated doctor's opinion. As indicated above the hearing officer failed to consider the designated doctor's amended report and give it the weight accorded it under the law. Accordingly, we reverse and remand the hearing officer's IR determination for further consideration.

Pending resolution of the remand, a final decision has not been made in this case. However, since reversal and remand necessitate the issuance of a new decision and order by the hearing officer, a party who wishes to appeal from such new decision must file a request for review not later than 15 days after the date on which such new decision is received from the Commission's Division of Hearings, pursuant to Section 410.202, which was amended June 17, 2001, to exclude Saturdays and Sundays and holidays listed in Section 662.003 of the Texas Government Code in the computation of the 15-day appeal and response periods.

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

MR. RON DODD
STATE FARM FIRE AND CASUALTY COMPANY
8900 AMBERGLEN BOULEVARD
AUSTIN, TEXAS 78729-1110.

_____
Edward Vilano
Appeals Judge

CONCUR:

_____
Chris Cowan
Appeals Judge

_____
Gary L. Kilgore
Appeals Judge