APPEAL NO. 950169

This appeal is brought pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act). A contested case hearing was held on December 30, 1994, in (city), Texas, with (hearing officer) presiding as hearing officer. Addressing the disputed issues, he determined that the first certification of maximum medical improvement (MMI) did not become final; that the respondent's (claimant herein) MMI date and impairment rating (IR) could not be determined from the evidence presented; and that the claimant had disability from (date), through the date of the hearing "[e]xcept for two weeks." The appellant (carrier herein) appeals arguing that the first certification became final as a matter of law; that the claimant's date of MMI should be June 29, 1992, with a zero percent IR; and that the claimant failed to meet his burden of establishing disability. The claimant replies that the decision and order of the hearing officer are correct and should be affirmed.

DECISION

We affirm in part and reverse and remand in part.

The parties stipulated that the claimant sustained a compensable arm injury on (date of injury); that (Dr. E) provided the first certification of MMI; and that (Dr. D) was the designated doctor in this case selected by the Texas Workers' Compensation Commission (Commission).

Dr. E was described by the claimant as the "company doctor." On an undated Report of Medical Evaluation (TWCC-69), Dr. E certified that the claimant reached MMI on June 29, 1992. Though the form was signed, there were no attachments. Other than the identifying data at the top of the form and the entry of a date of MMI, the only other comment on the form is "Symptoms are resolved." The portion of the line for listing a whole body IR is blank. The claimant testified at the hearing that he never received this form and first found out that Dr. E had certified MMI in a letter of October 13, 1992, from the carrier which advised him in pertinent part:

> With regards to the injury to your arm of (date of injury), we have received from your treating physician a TWCC Form 69 that indicates you are at [MMI] as of 6-29-92. Since you are at [MMI], we are unable to pay any additional temporary income benefits. Any impairment income benefits you may be entitled to cannot be determined until [Dr. E] makes an assessment as to the percentage of whole body impairment incurred as a result of the injury.

The claimant contended he disputed this certification in a letter to the Commission dated January 1, 1993, which claimant said he mailed shortly thereafter. The hearing officer found that this dispute was ineffective because the claimant did not mail the letter to the correct address. He, nonetheless, found that Dr. E's certification did not become final under

Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 130.5(e) (Rule 130.5(e)) because in this TWCC-69, Dr. E did not assign an IR and hence the certification was invalid.

Rule 130.5(e) provides that the "first impairment rating assigned to an employee is considered final if the rating is not disputed within 90 days after the rating is assigned." The carrier argues that even if Dr. E's certification is deemed invalid because no rating was given, that certification still had to be disputed pursuant to the rule or it became final at least as to MMI. This is so, according to the carrier, because the Appeals Panel in Texas Workers' Compensation Commission Appeal No. 92670, decided February 1, 1993, considered MMI and IR "inextricably intertwined for the purpose of finality." We disagree. The Appeals Panel has never held that a certification of MMI without an IR can become final unless disputed within 90 days and Appeal No. 92670 does not stand for this proposition. To the contrary, such an interpretation defies the plain language of the rule which speaks in terms of the finality of an IR. From the language of its letter of October 13, 1992, to the claimant and quoted above, the carrier obviously also believed, not that Dr. E was giving a zero percent rating, but that he was not giving a rating at all. One would be hard-pressed to argue that no IR can in any way be a final IR. In Texas Workers' Compensation Commission Appeal No. 941098, decided September 29, 1994, the Appeals Panel recognized that a purported certification of an IR can be invalid on its face and that such invalid certifications do not become final by virtue of Rule 130.5(e). In that case, the rating was invalid because it clearly stated it was only a partial rating. In other cases, a certification may not be valid because of, for example, a "clear misdiagnosis," Texas Workers' Compensation Commission Appeal No. 93489, decided July 29, 1993, or because the certifying doctor has not signed the report. *See, e.g.*, Texas Workers' Compensation Commission Appeal No. 93935, decided November 3, 1993. In the case now appealed, we hold that Dr. E's TWCC-69 IR was not a valid certification of impairment because it contained no numerical IR and that it did not become final under Rule 130.5(e). We are unwilling to interpret Dr. E's brief accompanying remarks as evidence that he in fact gave a zero percent IR on this certification. We thus affirm the decision and order of the hearing officer that this certification did not become final.

The carrier also alleges error in the refusal of the hearing officer to find, regardless of the nonfinality of Dr. E's certification, that the claimant reached MMI on June 29, 1993, with a zero percent IR. In a TWCC-69 and accompanying report of June 13, 1994, Dr. D stated that the claimant had no permanent impairment. He also found that the claimant had not yet reached MMI, but would do so on the statutory date of MMI pursuant to Section 401.011(30)(B). The carrier suggests that the only evidence on the issues of MMI and IR comes from Dr. E as to date of MMI and from both Dr. E and Dr. D as to a zero percent IR. We have already determined that Dr. E's TWCC-69 in this case cannot be read to have certified a zero percent IR. It is also clear that a prospective date of MMI is not a determination of MMI and that an IR cannot be assessed until a date of MMI has been reached. Appeal No. 941098, *supra*, and cases cited therein. We are therefore unwilling to conclude that Dr. D's TWCC-69 is probative evidence of either a date of MMI or an IR. The only other evidence of a certification of an IR is a statement from a (Dr. VH) of December

19, 1994, which makes no mention of a date of MMI, but states that a five percent IR for the lumbar spine and a six percent IR for the cervical spine is appropriate. Neither of these body parts, however, involve the compensable injuries which are the basis for the dispute in this proceeding. Thus, we cannot agree with the carrier that, with the failure of Dr. E's certification, the hearing officer should have chosen a date of MMI and an IR from the remaining evidence. The designated doctor process has been initiated in this case. It should be allowed to run its course and another report requested from the designated doctor. *See* Texas Workers' Compensation Commission Appeal No. 950147, decided February 1, 1995.

Finally, the carrier appeals the determination of the hearing officer that the claimant had disability from (date) (the day after the date of injury), through December 30, 1994 (the date of the contested case hearing), "[e]xcept for two weeks" (which were not further specified). Disability is defined by the 1989 Act as the "inability because of a compensable injury to obtain and retain employment at wages equivalent to the preinjury wage." Section 401.011(16). Disability need not be a continuing status and a claimant may go into and out of disability at various times. Texas Workers' Compensation Commission Appeal No. 93953, decided December 7, 1993. Disability may be established by the testimony of the claimant alone if found credible. Texas Workers' Compensation Commission Appeal No. 93901, decided November 19, 1993. The evidence of disability in this case rested primarily on the testimony and a written statement of the claimant. He testified in essence that he returned to work after his (date of injury), injury on July 1 or 2, 1992, and worked until he had a second injury (not germane to these proceedings) on July 9, 1992. He said he remained off work because of his second injury from July 14, 1992, until August 8, 1992. He continued working, he said, until about the end of August 1992, when he quit because he felt he was unable to do even the light work he was given by his employer. Since then, he testified he had intermittent employment as a truck driver until the end of 1993. The claimant stated that when he worked he was paid less per hour than his preinjury hourly wage rate, but there was no evidence of actual wages earned. He said that he made about 100 "maybe" applications for employment as a salesman, but was unsuccessful. Apparently he did some work after 1993, because he said he has not worked at all since July 1994. He also testified that during "a couple weeks" he earned as much as he did before his injury and that he was willing to work seven days a week if the work was available and he could do it. The claimant also introduced into evidence a copy of his handwritten statement prepared for his previous attorney in which he lists on a monthly basis the number of days (not specific dates) he worked and the number of days he was off beginning in June 1992 until July 1994. Medical evidence tending to support disability included a light duty excuse given by a (Dr. G) on January 3, 1994, and a total duty excuse from Dr. G signed on February 3, 1994, and renewed on February 21, 1994.

Whether disability exists as claimed is a question of fact and the claimant has the burden of proving what period or periods of disability exist. Texas Workers' Compensation Commission Appeal No. 93560, decided August 19, 1993. We will reverse a hearing officer's factual determination only if it is so contrary to the overwhelming weight of the

evidence as to be clearly wrong and unjust. Cain v. Bain, 709 S.W.2d 175, 176 (Tex. 1986); Pool v. Ford Motor Company, 715 S.W.2d 629 (Tex. 1986). In this case, the claimant's testimony was often unresponsive, characterized by "I don't remember," to even the most basic questions about the circumstances of his disability. The reaction of the hearing officer to this pervasive vagueness was simply to find disability from the day after the injury through the date of the hearing except for the unspecified two weeks. In doing so, the hearing officer largely ignored the testimony and evidence of the claimant that he worked, for undetermined wages, a substantial portion of that time thereby finding significantly more disability than the testimony and evidence supported. The hearing officer effectively determined by default that the claimant had the maximum disability conceivable rather than holding the claimant to his burden of proof. We reverse the decision and order of the hearing officer on the disability issue and remand the case to the hearing officer for the further development of evidence and findings of fact and conclusions of law as to the specific period or periods of disability established by the claimant. The remaining portions of the decision and order of the hearing officer are affirmed.

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 Texas Workers' Compensation Commission's division of hearings, pursuant to Section 410.202. *See* Texas Workers' Compensation Commission Appeal No. 92642, decided January 20, 1993.

Alan C. Ernst
Appeals Judge

CONCUR:

Thomas A. Knapp
Appeals Judge

Tommy W. Lueders
Appeals Judge