APPEAL NO. 950339

On January 17, 1995, a contested case hearing was held in (city), Texas, with (hearing officer) presiding as the hearing officer. The hearing was held under the provisions of the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq*. (1989 Act). The appellant (carrier) appeals the hearing officer's decision that the first certification of maximum medical improvement (MMI) and assignment of an impairment rating (IR) did not become final under Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 130.5(e). No response was received from the respondent (claimant).

DECISION

Affirmed.

The parties stipulated that the claimant suffered an injury to his right knee in the course and scope of his employment on (date of injury). He has had three surgeries performed on his knee with the third surgery being performed in 1994 which was after all the IRs discussed in this decision were issued.

(Dr. S) performed the second surgery and he saw the claimant on June 23, 1993, for a follow-up evaluation at which time he issued a Report of Medical Evaluation (TWCC-69) in which he reported that the claimant would reach MMI on August 1, 1993, with a six percent IR. This report was received by the Texas Workers' Compensation Commission (Commission) on July 27, 1993. In a TWCC-69 dated July 28, 1993, (Dr. G), who was a "medical examination order" doctor requested by the carrier, reported that the claimant reached MMI on July 19, 1993, with a six percent IR. In a TWCC-69 dated July 30, 1993, (Dr. P), who was a treating doctor, reported that the claimant reached MMI on July 30, 1993, with a six percent IR. The Commission sent a letter to the claimant on August 19, 1993, advising him of Dr. S's TWCC-69. The claimant denied receiving that letter or any TWCC-69s, although he said his attorney had told him on some unspecified date that he had a six percent IR. After these reports were issued, (Dr. GA) had more diagnostic tests done and the third surgery was performed on May 18, 1994, to alleviate locking of the right knee. On January 19, 1995, the claimant advised the Commission that he wanted to dispute Dr. S's report of MMI and IR.

The parties agreed that the issue at the hearing was whether the first certification of MMI and IR became final under Rule 130.5(e). Rule 130.5(e) provides that "[t]he first [IR] assigned to an employee is considered final if the rating is not disputed within 90 days after the rating is assigned." The evidence establishes that Dr. S's six percent IR was the first IR assigned to the claimant. However, Dr. S gave a prospective date of MMI. Under the 1989 Act, an IR is assigned after there is a certification that MMI has been reached. *See* Sections 401.011(23) and 408.123(a). *See also* Texas Workers' Compensation Commission Appeal No. 93259, decided May 17, 1993. We have held that an anticipated date of MMI is not a statement or certification that MMI has been reached. Appeal No. 93259, *supra*. When there is no valid date of MMI due to a prospective date of MMI, there

is no valid IR, and there is nothing to become final at the expiration of the 90-day period provided for in Rule 130.5(e). Appeal No. 93259, *supra*. Consequently, there is nothing for the claimant to dispute. Appeal No. 93259, *supra*. The hearing officer determined that Dr. S provided a prospective date of MMI and therefore his report was invalid. Since this determination is supported by sufficient evidence and is not so contrary to the overwhelming weight of the evidence as to be clearly wrong and unjust, there is no basis to disturb it on appeal. *See* Texas Workers' Compensation Commission Appeal No. 950084, decided February 28, 1995.

The hearing officer also determined that the IR assigned by Dr. G and the IR assigned by Dr. P did not become final under Rule 130.5(e). He made a number of findings of fact regarding notice of those IRs, validity of the IRs, and the dispute of the rating assigned by Dr. P. We simply note here that the IRs assigned by Drs. G and P were subsequent to the IR assigned by Dr. S and thus the 90-day dispute provision in Rule 130.5(e) would not apply to them. In Texas Workers' Compensation Commission Appeal No. 941137, decided October 10, 1994, the first IR assigned to the employee was based on a conditional determination of MMI and the hearing officer found it invalid and proceeded to apply the provisions of Rule 130.5(e) to the next IR assigned to the employee. We reversed and remanded the hearing officer's decision and in doing so stated as follows:

> However, the effect of the validity or invalidity of a certification (by means of a TWCC-69 or otherwise) of MMI and IR on the application of Rule 130.5(e) is, we believe, a separate and distinct issue, from questions about the continuing applicability of the rule to later attempts to certify MMI and IR after the first failed attempt. We conclude that Rule 130.5(e) applies only to the chronologically first, written certification of MMI or IR. Whether that certification is ultimately found valid or invalid is important for considerations of finality under the rule. A determination that it is valid, obviously brings the rule into play. A contrary determination--that it is invalid--serves only to make the rule inapplicable to that certification. It does not preserve the rule for possible reapplication to a later "first valid" rating. To hold otherwise would expose parties to numerous possible "final" ratings, each succeeding the other, without any confidence as to which is "first" until all prior ratings in due course are determined invalid. This would force a party to dispute each rating as he or she received written documentation of it. We do not consider this to have been the intention of the Commission when this rule was promulgated and do not so interpret the rule. We caution that it is incumbent on the parties to expeditiously dispute or call into question flaws in an otherwise apparently valid certification.

The hearing officer's decision and order are affirmed.

Robert W. Potts
Appeals Judge

CONCUR:

Stark O. Sanders, Jr.
Chief Appeals Judge

Philip F. O'Neill
Appeals Judge