APPEAL NO. 950358

Following a contested case hearing held in (city), Texas, on February 6, 1995, the hearing officer, (hearing officer), resolved the two disputed issues by determining that the respondent (claimant) sustained a compensable back injury on (date of injury), and 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) (Rule 130.5(e)) because it was invalid. Pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 410.202(a) (1989 Act), the appellant (carrier) has requested our review of the hearing officer's decision and, in essence, challenges the sufficiency of the evidence to support the dispositive findings and conclusions. The claimant's response seeks our affirmance.

DECISION

Affirmed.

Claimant, the sole witness, testified and the evidence indicated that he had sustained a back injury in (month year) which was treated by (Dr. C); that in the July-August 1992 period he underwent certain diagnostic tests on his back; that in August 1992 he had back surgery by (Dr. D); that he returned to work about two months after this surgery; and that he had post-surgery periodic follow-up visits with both Dr. C and Dr. D. He said that on (date of injury), he stumbled over some boxes at work and fell injuring his left knee and reinjuring his back. He first saw a doctor to whom he was directed by the employer. That doctor referred him to (Dr. H) who treated only his knee injury and he returned to Dr. C for treatment of his reinjured back. Claimant further testified that he received a letter from the carrier informing him that Dr. H had certified that claimant had reached MMI on January 1, 1994, with a two percent IR for his knee, and that in May 1994 Dr. H rescinded that certification. Claimant also stated that Dr. H performed surgery on his knee on June 22, 1994, and that Dr. D operated on his back on June 25, 1994. Claimant maintained that when he fell on (date of injury), he not only sustained an injury to his left knee, which was not disputed by the carrier, but also aggravated and reinjured his prior back injury. He pointed to diagnostic tests indicating that in July 1992 he had a mild bulging disc at the L2-3 level whereas a December 1993 test showed a herniation at that level. He also asserted he sustained an aggravation injury to his prior injury at the L5-S1 level. Lumbar spine MRI and CT scan reports of July 7, 1992, and CT scan and discogram reports of August 3, 1992, revealed multiple level lumbar disc space narrowing, bulging and degenerative disease without mention of herniations. An MRI report of December 16, 1993, revealed a moderate to large disc herniation at L2-3, disc bulges at L3-4, L4-5 and L5-S1, and a probable disc herniation at L5-S1.

Dr. H's report of November 29, 1993, indicates that during a recent physical therapy session claimant refractured the patella he fractured on (date of injury), and that Dr. H put him back in the knee immobilizer for one month. In an undated Report of Medical Evaluation (TWCC-69) which showed the date of injury as "4/14/93," Dr. H stated that

claimant reached MMI on "1/1/94" with an IR of "2%." This form refers to "attached office notes." The document attached to the TWCC-69 in evidence was an April 18, 1994, report of an IR evaluation on Physical Therapy Services (PT clinic) letterhead, signed by a physical therapist and by Dr. H, indicating "the test" was performed by the therapist and reviewed by Dr. H. This report, which we presume was the document referenced in the TWCC-69, bears an unidentified date received stamp of "Apr 28 1994." In his response claimant asserts this date stamp to be that of the Texas Workers' Compensation Commission (Commission) but there was no evidence of such in the record. This report stated that claimant was initially injured "on April 10, 1992," when he fell over several boxes at work, that he sustained a left patella fracture and was immobilized for one month, that he refractured the patella performing home exercises and was immobilized for another month, that he presently complains of pain over the patella with full knee extension, and that he "reports he is also being followed presently by [Dr. D] for HNP of the lumbar spine." The report states the diagnosis as "S/P fracture left patella" and goes into the details of the "Impairment Evaluation According to the AMA Guides - Fracture of patella," concluding that the impairment is "5% Lower extremity = 2% whole person." The report also stated that "the degree of impairment is not likely to change by more than 3% in the next year" Despite the apparent conditional or qualifying nature of this verbiage, claimant did not raise an issue concerning the validity of the report on such grounds. Impairment is defined as any anatomic or functional abnormality or loss existing after MMI that results from a compensable injury and that "is reasonably presumed to be permanent." Section 401.011(23).

On May 1, 1994, Dr. H wrote that claimant continued to have problems with his knee, that he had pain and effusion, that he may have some chondral step-off on the undersurface of the patella and may require future arthroscopic inspection "because of his significant patellar fracture." On May 18, 1994, a date well within 90 days of the April 18th report attached to the TWCC-69 in evidence, Dr. H wrote that he wanted to "rescind" his TWCC-69 giving claimant two percent because claimant "has not reached [MMI]" and that he wanted to see claimant on June 8th "for reevaluation to determine whether or not [MMI] has been reached." On June 8, 1994, Dr. H reported that he did not feel it unreasonable to proceed with a diagnostic arthroscopy and shave the undersurface of the patella. Claimant testified that he underwent knee surgery on June 22, 1994. Dr. H reported on August 4, 1994, that claimant was doing very well after the knee surgery, that he had reached MMI, and that Dr. H was going to obtain "a PPI" from the PT clinic. On September 28th Dr. H reported again on claimant's knee and stated that "his PPI shows a 2 percent whole body disability." Dr. H also wrote on September 29, 1994, that he agreed that claimant's "back injury occurred when fell on [date]" and that to his knowledge claimant did not have a second fall.

Dr. C reported on December 10, 1993, that claimant was in for a follow-up visit and reported his fall resulting in the fractured patella and "an increase in leg pain and some back pain" so Dr. C ordered an MRI. Dr. C wrote Dr. D on January 5, 1994, advising of claimant's fall and that the MRI demonstrated a significant L2-3 disk herniation. Dr. C also reported

on February 4, 1994, that the MRI showed a lateral recess stenosis at L5-S1. Dr. C reported on May 5, 1994, that claimant had recently been assigned a two percent IR for only his left knee, that Dr. C felt this was incorrect since he understood that claimant had also injured his back at the same time, and that "it seemed logical" that his back should also be included in the rating.

Dr. D reported on June 23, 1994, that claimant had arthroscopic surgery on June 21st and that he was admitted on June 23rd "for a redo exploration of L5-S1." On June 23rd Dr. D performed lumbar spine surgery at the L2-3 level, which he said had not had previous surgery, and also operated on the herniated disc at the L5-S1 level.

Dr. C wrote on September 28, 1994, to correct misinformation he had previously written on January 5, 1994, concerning the chronology of claimant's injury. Dr. C stated that on (date of injury), claimant fell and sustained a left patellar fracture "as well as a significant lumbar spine injury," that he was not aware of any subsequent fall or reinjury of claimant's back, and that claimant's "present problems involving his low back are the result of his work-related injury of (date of injury)."

Regarding the extent of injury issue, the hearing officer found that when claimant fell at work on (date of injury), he not only injured his left knee but also aggravated his prior back injury. The hearing officer concluded that claimant proved that he sustained a compensable back injury on (date of injury). In its appeal the carrier asserts that reports of Dr. C, (Dr. A) and (Dr. B) establish that claimant had another fall after his (date of injury), fall at work, that it was during this later fall that claimant reinjured his back, and that Dr. C's subsequent letter correcting misinformation in his prior report of the chronology of claimant's back injury was "disingenuous." The carrier has reference to a "12-10-93" record of Dr. C which states that claimant fell and fractured his left patella "this week" and has had an increase in leg and back pain, and to a January 5, 1994, report in which Dr. C stated that claimant "fell the first week of December" fracturing his left patella and experiencing significant increase in back pain. As noted, Dr. C wrote on September 28, 1994, apologizing for the misinformation in his January 5, 1994, letter and stating that claimant's injury occurred on (date of injury). As for the two other doctors mentioned by the carrier we think it is the carrier who is being disingenuous here. The only report of Dr. A in evidence was the MRI report of December 16, 1993, which contained no mention of the date of claimant's fall; and the only report of Dr. B in evidence was a "12-17-93" report which similarly contained no mention of the date of claimant's fall. We are satisfied the evidence sufficiently supports the hearing officer's findings and conclusion concerning the compensability of claimant's back injury. The issue was one of fact for the hearing officer, as the fact finder, to resolve. The hearing officer is the sole judge of the weight and credibility to be given the evidence (Section 410.165(a)) and it is for the hearing officer to resolve the conflicts and inconsistencies in the evidence, including the medical evidence. Texas Employers Insurance Association v. Campos, 666 S.W.2d 286 (Tex. App.-Houston [14th Dist.] 1984, no writ).

Regarding the issue concerning the finality of Dr. H's two percent IR under Rule 130.5(e), the hearing officer made the following factual findings and legal conclusion:

FINDINGS OF FACT

8.[Dr. H], the Claimant's treating doctor, prepared a Report of Medical Evaluation and certified that the Claimant reached [MMI] on January 1, 1994, with a 2 percent [IR].

9.[Dr. H] did not consider or include the Claimant's back injury when certifying [MMI]. The attempted certification did not include all the Claimant's injuries.

CONCLUSION OF LAW

4. There is no valid certification of [MMI], no [IR] and nothing to dispute pursuant to Rule 130.5(e). The first certification did not become final.

The carrier's position on appeal is, in essence, that the hearing officer's determination of the invalidity of Dr. H's first assigned IR is against the great weight of the evidence. Rule 130.5(e) provides that the first IR assigned to an employee is considered final if not disputed within 90 days of its being assigned.

Before discussing the correctness of the hearing officer's findings and conclusion concerning the validity of Dr. H's IR for failure to include the back injury, we observe that the evidence failed to establish the date claimant had actual written knowledge of Dr. H's IR nor was any finding of fact made on this matter. The Appeals Panel has held that the 90-day period begins to run from the time the parties have actual knowledge of the IR, Texas Workers' Compensation Commission Appeal No. 93423, decided July 12, 1993, and further that some written communication to the parties is required, Texas Workers' Compensation Commission Appeal No. 94354, decided May 10, 1994. While claimant acknowledged having received a letter from the carrier advising him of Dr. H's two percent IR, there was no evidence as to when claimant received such letter. There was also no evidence as to when, if ever, claimant disputed Dr. H's IR. Accordingly, the record contains neither evidence nor findings that claimant failed to timely dispute Dr. H's IR. The Appeals Panel has previously stressed the importance in Rule 130.5(e) cases of making findings on both the date an employee became aware of the first assigned IR as well as the date, if any, that the employee disputed it. Texas Workers' Compensation Commission Appeal No. 94654, decided July 6, 1994. Since the TWCC-69 in evidence had attached to it the April 18, 1994, impairment report on the left knee, we can infer that the TWCC-69 was not issued before that date. It is clear that Dr. H reported his rescission of the MMI date and IR on May 18, 1994, a date well before claimant's 90-day period to dispute the IR would have expired.

The hearing officer resolved the Rule 130.5(e) issue on the basis that Dr. H's IR was invalid for failing to consider claimant's compensable back injury in the context of whether

he had reached MMI and his IR. In Texas Workers' Compensation Commission Appeal No. 941748, decided February 13, 1995, the hearing officer determined that the IR did not become final because it failed to include the entire injury (back injury included and shoulder injury omitted). On appeal by the carrier, who maintained that the IR became final because it was not disputed by the employee within 90 days, the majority of the Appeals Panel reversed and rendered a decision that the IR had become final noting that, as in the case we consider, both the certifying doctor and the employee were aware that the IR did not include the entire injury when it was issued. That decision pointed to the cautionary language used in certain Appeals Panel decisions involving determinations, based on compelling medical or other evidence, of the invalidity of an MMI certification or an IR assignment due to some significant error or clear misdiagnosis and further stated:

> Despite the prudence urged by these decisions when invited not to apply finality to a first certification of MMI or IR or both, the Appeals Panel has sometimes used language that could be interpreted to suggest a per se rule that whenever a certifying doctor fails to rate the entire compensable injury, that rating does not become final under Rule 130.5(e). . . . We believe that a per se approach to `exceptions' or non-application of the finality provisions of Rule 130.5(e) was never intended by, nor is it arguably justified by, our decisions.

The majority in Appeal No. 941748, *supra*, considered the decision in Texas Workers' Compensation Commission Appeal No. 93979, decided December 14, 1993, as dispositive. Appeal No. 93979 was another case involving the failure of the first certifying doctor to rate the entire compensable injury notwithstanding that both the treating doctor and the employee knew of the entire extent of the injury. The Appeals Panel reversed and rendered a decision that Rule 130.5(e) did indeed apply. That decision was also followed in Texas Workers' Compensation Commission Appeal No. 941619, decided January 20, 1995. Commenting on certain cases where the Appeals Panel found the first assigned IR not to have become final, the majority decision in Appeal No. 941748 stated:

> The common thread in Appeal Nos. 93501, 931115, and 941069 is that the element of the compensable injury that was not included in the initial IR was diagnosed or arose after the expiration of the 90-day period. Therefore, the claimant was unaware of its existence, and, more significantly, the attendant impairment associated with that non-rated portion of the compensable injury during the relevant period. Accordingly, claimant could not have disputed the rating on the basis of its failure to include a rating for all of the permanent impairment related to the compensable injury within 90 days.

The decisions in Appeal No. 941748 and Appeal No. 941619, *supra*, distinguished Texas Workers' Compensation Commission Appeal No. 94219, decided April 7, 1994, where the first assigned IR included the wrist injury but not the head injury, because the parties had agreed that the first certifying doctor in that case amended his initial certification.

In the case we here consider, the evidence shows that Dr. H was clearly aware that his MMI date and two percent IR applied only to the left knee and not to the back injury and suggests that the claimant likewise was aware of this limitation. However, we do not believe our resolution of the appealed issue must necessarily result in a reversal of the hearing officer's decision based on the precedents of Appeal No. 941748 and Appeal 941619, *supra*, because the Appeals Panel has also held that it can affirm a hearing officer's decision on any theory reasonably supported by the evidence. Texas Workers' Compensation Commission Appeal No. 93502, decided August 4, 1993. Dr. H rescinded his initial determinations of MMI and the IR, presumably a month after making them, because two follow-up visits apparently persuaded him that claimant's knee may require surgery and that he had not reached MMI. Indeed, claimant underwent surgery on the knee on June 21, 1994. The evidence thus shows that Dr. H rescinded the first certification of MMI and IR before they could become final, the 90-day dispute period not having expired. The Appeals Panel has previously recognized that "in certain circumstances both a treating doctor and a designated doctor may amend a previous determination of a date of MMI and the assignment of an IR [citations omitted]." Texas Workers' Compensation Commission Appeal No. 94124, decided March 15, 1994. In our view, Dr. H's rescission was both timely and appropriate and thus operated to prevent his IR from becoming final under Rule 130.5(e).

Accordingly, we do not find the challenged findings and conclusions to be so against the great weight of the evidence as to be manifestly unjust. In re King's Estate, 150 Tex. 662, 244 S.W.2d 660 (1951).

The decision and order of the hearing officer are affirmed.

Philip F. O'Neill
Appeals Judge

CONCUR:

Robert W. Potts
Appeals Judge

Thomas A. Knapp
Appeals Judge