APPEAL NO. 950359

This appeal arises pursuant to the Texas Workers' Compensation Act of 1989, TEX. LAB. CODE ANN. § 401.001 *et seq*. (1989 Act). On October 11, 1994, a hearing was held in (city), Texas, with (hearing officer) presiding. She determined that respondent's (claimant) initial impairment rating (IR) did not become final. Appellant (carrier) asserts that the hearing officer erred when she found that the initial IR was based on a prospective determination of maximum medical improvement (MMI) and therefore the IR was invalid. Claimant replies that the hearing officer should be upheld but adds that she could have ruled for claimant also on his theory that in changing treating doctors, he disputed MMI and IR; he also argues that the doctor giving the initial IR later changed his opinion. Remand is also requested to decide the points argued at the hearing.

DECISION

We reverse and render.

Claimant worked for (employer) and while sweeping, fell down landing on his buttocks on (date of injury). He began seeing (Dr. H) in August 1993. Dr. H's records in evidence show that claimant had an MRI on July 15, 1993, and a CT scan, myelogram, and EMG on August 16, 1993. He placed claimant on an exercise program. Dr. H on September 23, 1993, characterized claimant's condition as including a bulging disc at L4-5 with no definite nerve root compression. He also called for a functional capacity evaluation. On October 5, 1993, Dr. H noted that he had asked claimant to have the "center that is carrying out his rehabilitation program" provide a report. On December 23, 1993, Dr. H called for a repeat EMG since claimant's symptoms had continued. He notes at that time that after the repeat EMG he will consider whether an IR can be provided. The EMG was done on December 28, 1993, reporting no abnormal findings; it said, "[t]his EMG is improved over previous and probably represents resolution of a nerve root irritation." Dr. H then signed a Report of Medical Evaluation (TWCC-69) on January 25, 1994, in which he wrote that MMI had been reached on January 25, 1994, with five percent IR.

On September 8 and October 6, 1994, Dr. H reports that he had seen claimant on January 4, 1994; in the October report, he adds that his exam on January 4th was "essentially unchanged" so Dr. H "felt his impairment was 5%". Dr. H said that after claimant had surgery (at L4-5) in June 1994, he felt that claimant was not at MMI "following surgery."

The evidence showed, and claimant agreed, that he received notice of the initial MMI/IR provided by Dr. H no later than February 7, 1994. Claimant disputed the rating to the Texas Workers' Compensation Commission on June 28, 1994. Claimant argued, as he does in his reply to the appeal, that his change of treating doctors constituted a dispute, that his subsequent treating doctor's, (Dr. C), TWCC-69, statement that MMI had not been reached, disputed the initial assignment of IR, and Dr. H himself rescinded his assignment of IR by saying after surgery that MMI had not been reached.

Claimant points out that the TWCC-69 of Dr. H which found MMI and an IR of five percent, indicates on its face that claimant was examined on August 3, 1993. It apparently is this date, entered in a block labeled "date of visit" that compelled the hearing officer to write in the Statement of Evidence, "[o]n August 3, 1993, [Dr. H] evaluated the claimant and completed a Report of Medical Evaluation (TWCC-69 form) which indicated January 25, 1994 as the date the claimant would reach maximum medical improvement and assessed a 5% whole body impairment rating." (emphasis added) The hearing officer then found:

5.On August 3, 1993, [Dr. H] evaluated the claimant and completed a Report of Medical Evaluation [TWCC-69] which indicated January 25, 1994 as the date the claimant would reach [MMI and assessed a 5% whole body [IR].

6.[Dr. H's] certification of [MMI] gives a prospective date of [MMI] and is, therefore, invalid.

There is no evidence that Dr. H prepared a TWCC-69 on August 3, 1993, and gave a prospective date of MMI. The TWCC-69 shows on its face that it was signed on January 25, 1994. (There is no explanation as to why this entry was not considered to be controlling in regard to whether a prospective date of MMI had been given.) No evidence was provided that Dr. H stated an incorrect date of signature at the time he prepared the document. The only indication in the record that August 3, 1993, has anything to do with the TWCC-69 in question is the entry of this date in the "date of visit" block. All the related medical records of Dr. H, in evidence, clearly show that he did not find MMI and IR until January 1994 after calling for another EMG in December 1993. Those records do show, however, that August 3, 1993, was the first time Dr. H saw claimant for this injury. Even if the records were not so clear, Texas Workers' Compensation Commission Appeal No. 94846, decided August 16, 1994, reversed a decision that said the initial assignment of IR was invalid because the date of MMI set forth was after the date of the evaluation listed in item 15 of the TWCC-69. In that case the evaluation was listed as occurring on August 18, 1993; the doctor signed the TWCC-69 on November 7, 1993; the form showed October 1, 1993, as the date MMI was reached. In the case under review, claimant also testified that many tests were done before Dr. H found MMI/IR, including the last EMG "between Christmas and New Year's". Claimant also indicated that he did see Dr. H in January 1994.

Claimant recognized the lack of evidence supporting the hearing officer's decision in asking for a remand. The evidence does not warrant remand, however.

Texas Workers' Compensation Commission Appeal No. 931115, decided January 20, 1994, states that one doctor cannot rescind another's certification of MMI. Texas Workers' Compensation Commission Appeal No. 94747, decided July 25, 1994, states that a doctor who disagrees with a determination of MMI does not act for claimant to dispute the other doctor's MMI/IR opinion unless he acted with involvement of the claimant. Claimant

testified that he did not discuss with Dr. C that a report indicating that MMI had not been reached should be filed.

A doctor who attempts to rescind his MMI/IR after the passage of 90 days from notice to the party who now disputes the rating will have no effect on the finality of the initial IR unless the initial assignment is shown to be invalid. *See* Texas Workers' Compensation Commission Appeal No. 93987, decided December 14, 1993. *Also see* Texas Workers' Compensation Commission Appeal No. 93489, decided July 29, 1993, and Texas Workers' Compensation Commission Appeal No. 94011, decided February 16, 1994. There is no good cause provision to the 90-day rule. *See* Texas Workers' Compensation Commission Appeal No. 93423, decided July 12, 1993. The Appeals Panel has read into the rule a requirement of notice to a party to start the 90-day period under Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 130.5(e) (Rule 130.5(e)) (*See* Texas Workers' Compensation Commission Appeal No. 93501, decided August 2, 1993), and later added a requirement for written notice (*see* Texas Workers' Compensation Commission Appeal No. 94354, decided May 10, 1994), but good cause is not included in the decision as to whether the initial assignment of IR became final. Finally, the hearing officer herself in the Statement of Evidence described claimant's change of treating doctors from Dr. H to Dr. C as "a request to change treating doctors"; she did not ascribe any other motive to it, such as to dispute Dr. H's MMI/IR, nor did she make any finding of fact that claimant indicated in the change of treating doctors that he was disputing MMI/IR. Indeed, claimant testified that at the time he changed treating doctors, he did not know the meaning of MMI/IR.

There was no argument at hearing that the initial MMI/IR of Dr. H was invalid at inception. Claimant testified that he had no new symptoms between the time of the initial IR and the time of surgery and that the surgery was "in the same area."

While the hearing officer did not address several points argued by the parties at this hearing, choosing to decide the finality of the initial IR on the basis of whether MMI was prospective, sufficient evidence is not in the record to support a finding for claimant on the points made by claimant so a remand to make findings of fact thereto would have no effect. These points raised by claimant include that claimant disputed the initial IR by asking to change treating doctors, when he testified he did not know the meaning of MMI at the time he made the change; that Dr. C disputed the initial MMI/IR for claimant by filing a different opinion as to MMI, when claimant testified that he and Dr. C never discussed disputing MMI for him; and that Dr. H rescinded his initial MMI/IR, when there was no evidence that the initial MMI/IR was invalid and the change of opinion by Dr. H occurred more than 90 days after claimant received notice of the initial MMI/IR.

The decision and order are reversed and a decision is rendered that the January 25, 1994, assignment of MMI on January 25, 1994, with five percent IR, was the initial IR, under Rule 130.5(e), and that MMI/IR became final.

Joe Sebesta
Appeals Judge

CONCUR:

Philip F. O'Neill
Appeals Judge

Thomas A. Knapp
Appeals Judge