APPEAL NO. 962591

This appeal arises pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act). A contested case hearing (CCH) was held on September 26, 1996, in (city), Texas, with (hearing officer) presiding as hearing officer. With regard to the issues at the CCH, the hearing officer determined that (Dr. B) July 18, 1994, certification of the respondent's (claimant) maximum medical improvement (MMI) and a 14% impairment rating (IR) did not become final by operation of Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 130.5(e) (Rule 130.5(e)), and that the claimant's MMI and IR have not yet been determined. The appellant (carrier) argues that the certification did become final.

DECISION

We reverse and render a new decision.

The claimant's attorney at the CCH, (Ms. L), argued, and the hearing officer determined, that Dr. B's certification of MMI and IR was "so flawed as to be essentially invalid." Although the hearing officer did not make a specific finding of fact as to when the claimant received written notice of Dr. B's certification, the claimant testified at the CCH that he received a copy of Dr. B's July 20, 1994, Report of Medical Evaluation (TWCC-69) and accompanying report "sometime in 1994." Regardless of when the claimant received the certification, he also testified that he never disputed it. He said that when he received the certification, he took it to his first attorney, (Ms. W), that he discussed it with her, that she advised he should not dispute it and that he followed her advice. Neither party challenged the determination that Dr. B's certification is the first certification of MMI and IR.

Rule 130.5(e) provides that the first IR assigned to an injured worker will become final if not disputed within 90 days after the doctor assigned it. The 90 days runs from the date the parties become aware of the rating. Texas Workers' Compensation Commission Appeal No. 92693, decided February 8, 1993. The notice must be in writing. Texas Workers' Compensation Commission Appeal No. 960220, decided March 20, 1996.

We are left with reviewing whether Dr. B's certification was valid. If it is valid, given that the claimant received written notice and did not dispute it within 90 days of receipt, then it became final. The hearing officer, in a finding of fact, determined that "[Dr. B] made his certification without conducting an examination of the Claimant, without the Claimant being present, and partly based on another doctor's range of motion (ROM) tests."

The first portion of the finding, that Dr. B certified MMI and IR without examining the claimant, is not supported by the evidence. The claimant testified that he had seen Dr. B as his first treating doctor, and that he saw him until he changed treating doctors. The claimant stated he was examined and treated by Dr. B for his shoulder pain and Dr. B's report accompanying the certification reflects that he did examine the claimant. He also

stated that Dr. B referred him to (physical rehabilitation clinic) and that they did testing on him. Dr. B's report reflects that he relied on the physical rehabilitation clinic's test results.

The next portion of the finding of fact, with regard to the claimant's presence when the certification was assigned, is apparently based on the claimant's testimony as to a missed examination with Dr. B. The claimant testified that he was unable to attend the July 18, 1994, appointment with Dr. B due to his wife's admittance to a hospital. However, the finding of fact is of no consequence. There is no requirement for a claimant to be present when a certifying doctor assigns the certification of MMI and IR.

Lastly, we consider Dr. B's reliance on the test results from ROM testing conducted by the physical rehabilitation clinic. We have held that a certifying doctor may rely on the findings or recommendations of other medical providers to assign MMI and IR. Texas Workers' Compensation Commission Appeal No. 92627, decided January 7, 1993. A certifying doctor is not required, absent demonstrated medical necessity, to physically touch an employee or personally manipulate the ROM and other IR testing devices. Texas Workers' Compensation Commission Appeal No. 93870, decided November 10, 1993.

Therefore, we reject the reasons cited by the hearing officer for finding Dr. B's certification invalid. We hold the determination as to the invalidity of the certification is not supported by the evidence. We will reverse a hearing officer's determination if we find that it is so weak or against the overwhelming weight of the evidence as to be clearly wrong or manifestly unjust. Atlantic Mutual Insurance Co. v. Middleman, 661 S.W.2d 182 (Tex. App.-San Antonio 1983, writ ref'd n.r.e.).

We find the hearing officer's determination that Dr. B's certification of MMI and IR is invalid is so weak or against the overwhelming weight of the evidence as to be clearly wrong or manifestly unjust. Since the certification was the first certification and since the claimant received notice of it and did not dispute it, we reverse and render a new decision that Dr. B's July 20, 1994, certification of MMI and 14% IR became final by operation of Rule 130.5(e).

Christopher L. Rhodes
Appeals Judge

CONCUR:

Robert W. Potts
Appeals Judge

Philip F. O'Neill
Appeals Judge