APPEAL NO. 950008
FILED FEBRUARY 15, 1995

This appeal arises under the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq*. (1989 Act). A contested case hearing was held on October 20, 1994 to determine whether the respondent's (claimant) Morton's neuromas condition was a result of the compensable injury she sustained on or about _____, whether the certification of maximum medical improvement (MMI) and the six percent impairment rating (IR) assigned by (Dr. K) on October 9, 1993, became final under Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 130.5(e) (Rule 130.5(e)), and whether claimant has reached MMI and, if so, on what date. Finding, among other things, that claimant's Morton's neuromas condition and her Sinus Tarsus syndrome were not caused by her ankle strain of _____, that Dr. K's certifications of MMI and IRs are all invalid since they concern foot conditions unrelated to claimant's compensable left ankle injury, and further finding that no doctor has certified that claimant has reached MMI with an IR for her compensable ankle injury, the hearing officer reached the conclusions that Dr. K's certification of MMI with a six percent IR on October 9, 1993, did not become final pursuant to Rule 130.5(e) and that MMI is not ripe for adjudication. With regard to Dr. K's October 9, 1993, certification that claimant reached MMI on that date with an IR of six percent, the appellant (self insured) contends that that certification was the last certification issued by any doctor, that it was the only one that assigned an IR, the only one that was dated, the only one that was received by the carrier, that it was the only valid certification, that claimant did not dispute it within 90 days as required by Rule 130.5(e), and that the carrier paid impairment income benefits (IIBS) in accordance with the six percent IR. The carrier asks that we reverse the two dispositive conclusions. No response was filed by the claimant.

DECISION

Affirmed.

Claimant testified that she had worked for the self-insured, a hospital, for about five years, that her duties involved cleaning in the surgery and nursery units, that on _____, while pulling on a bag of linens, she slipped and fell injuring her left foot and ankle. She said she worked for two more hours, was scheduled to be off the next two days, and that when she returned to work she experienced swelling and pain in her ankle. She further testified that she began treating with Dr. K, a podiatrist, that she developed contracted toes and Morton's neuromas in both feet, that Dr. K advised her such conditions were caused by the antalgic gait she developed as a result of her left foot and ankle injury of _____, that Dr. K performed surgery on her feet on March 8, 1993, that she returned to work on May 18, 1993, and worked until September 14, 1994, and that Dr. K performed additional surgery on her feet on September 19, 1994. She denied having prior foot problems.

Claimant also stated that the self-insured paid for part of her March 1993 surgery from its worker's compensation insurance and the remainder from its health insurance and

that the self-insured refused to pay for her September 1994 surgery, apparently referring to its workers' compensation insurance. The self-insured workers' compensation coordinator, (Mr. L), testified that the self-insured's health care fund paid for "the bulk of" claimant's March 1993 surgery and that the self-insured does distinguish between its workers' compensation and health insurance payments.

Dr. K's records indicate claimant first saw him on March 4, 1993, complaining of twisting her left ankle while dumping trash on (date). However, there was no disputed issue concerning the injury date being _____. Dr. K 's impressions at that time were: (1) severe left foot pain related to Sinus Tarsus syndrome from the (date) acute inversion ankle pain on the job causing antalgic gait (the tarsal sinus is defined in Dorland's Illustrated Medical Dictionary, 26th edition, as the space between the calcaneus and talus, containing the interosseus ligament); (2) related metatarsalgia of the second, third and fourth left foot digits ("algia" is defined as a word termination indicating a painful condition); (3) painful Heloma Molle (defined as a soft corn) of the left fifth digit related to underlying phalangeal exostosis (defined as a benign bony growth projecting outward from the surface of a bone); and (4) dystrophic onychomycotic toenails (fungal disease) of both great toes and the right fourth digit of the right foot. On March 9, 1993, Dr. K performed surgery on both feet. The preoperative diagnosis was: 1) Painful Heloma Molle on medial aspect of 5th digit, left foot, related to underlying phalangeal exostosis; and (2) dystrophic onychomycotic toenails of both great toes and the right fourth digit. Dr. K's surgery consisted of removing the soft corn and the three infected toenails. Dr. K's May 26, 1993, letter to Mr. L stated that claimant's painful soft corn was aggravated and probably caused by "ambulation at work on hard flooring surfaces," and also that it was related to an underlying exostosis or spur which he removed during the procedure.

On April 26, 1993, Dr. K prescribed physical therapy (PT) "for sprained left ankle (sinus tarsus syndrome)." A May 7, 1993, PT discharge summary indicates that claimant had been on a course of PT for improving her ankle range of motion and decreasing the swelling and pain, that on that date she was experiencing no pain in her ankle, and that she reported having no ankle pain or swelling for the past three days, attributing the relief from those symptoms to arch supports. The report stated that all goals were achieved and that claimant was discharged from PT to continue home exercises to improve ankle strength.

Claimant introduced six Reports of Medical Evaluation (TWCC-69) signed by Dr. K. The earliest TWCC-69 was not dated but bore the self-insured's risk management date stamp of May 25, 1993. It contained notes of a diagnosis and treatment and stated that "[o]n 5/21/93 [claimant] exhibited satisfactory healing for return to work." While it had the "Yes" block checked in answer to the question whether claimant had reached MMI, it stated no date. The IR was stated as "0%." The self-insured did not take the position that this IR became final under Rule 130.54(e) and Mr. L testified that he interpreted this TWCC-69 as a return to work authorization. Claimant testified that she and Dr. K discussed it and that he said he would not give her "a complete rating until I had this other surgery done." She acknowledged having received this TWCC-69. In any event, we

observe that in Texas Workers' Compensation Commission Appeal No. 941137, decided October 10, 1994, the Appeals Panel stated the following:

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.

Also in evidence was a TWCC-69 dated "4/23/93" which checked the "No" block for MMI, gave the estimated MMI date as "04/23/93," and stated no IR; and a TWCC-69 dated "5/5/93" which checked the "No" block for MMI, gave the estimated MMI date as "05/17/93," and stated no IR. Both these forms contained references to diagnosis and treatment.

Also in evidence was a TWCC-69 dated "07/23/93" which stated that claimant reached MMI on "06/07/93" with an IR of "0%." This form stated the diagnosis as "severe left foot pain related to sinus tarsus syndrome from Feb. 8, 1993, acute inversion ankle pain during housekeeping duties at [self-insured's hospital] causing antalgic gait." It also contained references to treatments. The self-insured did not take the position below nor does it contend on appeal that this IR became final under Rule 130.5(e). This TWCC-69 bore a "received" date stamp of July 23, 1993, at "[(City 1)]" which was crossed out and changed to the 27th. There was no evidence as to whether this stamp was that of the self-insured or the Texas Workers' Compensation Commission (Commission). Claimant acknowledged having received a copy of this TWCC-69 though she was not asked the date she received it.

Another copy of the first TWCC-69 was in evidence with the date of "8/6/93" written in for the MMI date and bearing date stamps showing it was received by "LM" in "[(City 2)]" on August 10 and 13, 1993. Mr. L stated that LM were the initials of the adjuster firm

formerly used by the self-insured. He was unable to say who wrote in the MMI date. Claimant acknowledged having received this document also.

The sixth TWCC-69 in evidence signed by Dr. K stated that claimant reached MMI on "Oct. 9, 1993" with an IR of "6%" for her left foot and lower extremity. It stated that on "10/9/93" claimant still had lateral ankle pain and "metatarsalgia (ball pain) in her left foot" and "limps related to Morton's neuromas and arthritis." The report also mentioned claimant's tight extensor tendons of her left foot as causing flexible hammer toe condition, severe ball pain of her left foot related to Morton's neuroma, and "extremely painful metatarsalgia" of the left foot digits. This report contained no reference to claimant's work-related injury other than stating the date of injury as "2-8-93." Claimant testified that after receiving this form she disagreed with it and called Dr. K's office for an appointment to discuss it, saying it probably took her a week to get the appointment. She stated that she asked Dr. K, "How can you do that," and that he responded that he was told he had to give her "a percentage on it in order for you to go back to work." She also indicated she contacted a lawyer who did not tell her about the 90-day rule (Rule 130.5(e)) but that when she returned to the lawyer at a later date, he advised her the 90-day period to dispute the IR had elapsed. Claimant indicated that she had been unaware of the 90-day rule. The date claimant first disputed this IR was not established at the hearing. The benefit review conference (BRC) report indicates that claimant's position at the BRC held on August 25, 1994, was that she was unaware of the 90-day dispute requirement, that she received the IR on approximately October 15, 1993, and did not dispute it until August 2, 1994, when she contacted the Commission.

The November 29, 1993, report of (Dr. H), who examined claimant, recited her history of injuring her left ankle at work the past February, and "since then" of having bilateral foot pain. Dr. H's impression was plantar fasciitis and with respect to his plan he stated: "Right now, I do not know the etiology of her problems and I do not know how they are related to her accident back in February. I don't hold out much hope on trying to help her where her complaints are too non-specific and generalized at this time." Dr. H's notes of December 22, 1993, noted complaints of increased foot pain and the presence of a violaceous rash. He characterized claimant as "a difficult historian."

Among claimant's medical records was a statement indicting she had been a patient in the self-insured's pain clinic on April 8 and May 6, 1994, presenting with bilateral foot pain due to neuromas and bilateral venous congestion.

Also in evidence was the October 10, 1994, report of (Dr. S) stating that claimant had received conservative chiropractic care from June 1 to June 17, 1994, that her complaints were of low back pain secondary to foot complications, that she responded well and he considered her to have released herself from his care. Dr. S's diagnosis included segmental dysfunctional sacroiliac, segmental dysfunction cervical, unspecified myalgia and myositis, and headache. Dr. S's TWCC-69, dated "8-12-94," stated that claimant had reached MMI on "6-17-94" but did not state an IR. However, Dr. S's October 10th report stated: "I gave her a 0% [IR]."

Mr. L's letter of August 10, 1994, to Dr. K stated that the self-insured had to appear at a Commission hearing on August 24, 1994, and requested from Dr. K a statement of claimant's history and future treatment of her foot problems. This letter also stated: "As you know, we have allowed [claimant's] treatment related and unrelated to an on the job injury in the past. . . ." In an August 24, 1994, letter to the Commission, Dr. K stated that in October 1993 he felt claimant was at MMI for her foot condition, that several weeks ago he examined her feet and changed his opinion "in the sense that she has Morton's neuromas in both feet," that she previously did not want surgical relief but has now scheduled the surgery, and that it will be about two months after the surgery before her MMI can be determined. Dr. K's August 24, 1994, letter responding to Mr. L related that additional bilateral foot surgery for removal of Morton's neuromas was scheduled for September 19th, that claimant will not be at MMI until her painful neuromas are removed, that it will be several months later before MMI can be determined, and that his previous MMI was based on her not having additional foot surgery. Dr. K also stated: "I did not realize that my evaluation would max her out with workers' compensation."

A September 12, 1994, day surgery report contains the diagnosis: "Morton's Neuroma - 2nd & 3rd interspace both feet." Dr. K's operative report of September 19, 1994, contained the preoperative diagnosis of (1) painful Morton's neuromas in both feet, and (2) tight extensor tendons in both feet. His surgery consisted of excision of the neuromas and extensor tenotomies. In a September 30, 1994, letter to the Commission Dr. K stated the following:

> The Morton's neuromas and contracted digits are probably related to her custodial vocation at [self-insured's hospital] since she has worked on these hard surfaced floors for years. The cause of Morton's neuromas are believed to be caused by micro-trauma to the intermetatarsal nerves over time causing scarring and enlargement of these nerves. Hard floors could indeed cause this micro-trauma to occur.

The hearing officer's factual findings that claimant injured her left ankle at work on _____, that Dr. K's March 8, 1993, surgery was for the removal of a soft corn, bone spur and toenails, that she recovered from surgery and returned to work on May 18, 1993, and that her Morton's neuromas condition and her Sinus Tarsus syndrome were not caused by her ankle strain on _____, have not been challenged on appeal. Nor has the conclusion been challenged that her Morton's neuromas condition is not a result of the compensable injury sustained on _____. *See* Texas Workers' Compensation Commission Appeal No. 941048, decided September 16, 1994, where the Appeals Panel stated:

> Clearly, it has been the firm holding of the majority of the Appeals Panels that foot conditions attributed to standing and walking in and of themselves, or without anything more, in the work place are generally ordinary diseases of life and not compensable under the terms of the statute.

The self-insured asks that we "review" the following three findings and that we "reverse" the following two legal conclusions and the hearing officer's order to the extent it requires the self-insured "to pay Claimant any benefits, if any." It is not entirely clear whether the self-insured disputes these findings. We would note that the 1989 Act, Section 408.021, provides that "[a]n employee who sustains a compensable injury is entitled to all health care reasonably required by the nature of the injury as and when needed."

FINDINGS OF FACT

7.[Dr. K] issued an undated TWCC 69 received by the [Self-Insured] on May 25, 1993, concluding that Claimant has reached [MMI] with an [IR] of 0%. This report is the first certification of [MMI] and [IR] issued by [Dr. K.].

9.[Dr.K's] certifications of [MMI] and impairment are all invalid in that the certification deals with Claimant's foot conditions that are unrelated to her compensable injury.

10.No doctor has certified that Claimant has reached [MMI] or an [IR] for Claimant's compensable ankle injury.

CONCLUSIONS OF LAW

3.The certification of [MMI] and [IR] assigned by [Dr. K] on October 9, 1993, did not become final in accordance with Commission Rule 130.5(e).

4.[MMI] is not ripe for adjudication.

Claimant had the burden to prove by a preponderance of the evidence that her Morton's neuromas condition was a result of her compensable injury of _____. In Texas Workers' Compensation Commission Appeal No. 93577, decided August 18, 1993, the Appeals Panel spoke of the need for expert medical evidence to establish the causal connection in a case involving Morton's neuroma and causalgia. The hearing officer was obviously persuaded by the evidence that claimant's compensable injury of _____, was limited to her ankle, that the two operations performed by Dr. K were for the relief of various bilateral foot conditions not part of her compensable ankle injury, and that there has not yet been a certification by any doctor that she has reached MMI for ankle injury. The hearing officer could consider that only approximately three weeks after her injury at work Dr. K performed his first operation consisting of the removal of a soft corn and three infected toenails and that the physical therapist in May 1993 reported claimant's ankle to be free of pain and swelling and discharged her for continuing home exercises to rebuild the strength of her ankle. Further, Dr. H stated he was unable to discern the etiology of claimant's bilateral foot complaint and how they related to her February 1993 accident. We note there was no evidence adduced of claimant's having been examined by a doctor

at the request of the self-insured or upon the order of the Commission. *See* Section 408.004. The hearing officer is the sole judge of the relevance, materiality, weight and credibility of the evidence. Section 410.165(a). It is for the hearing officer, as the fact finder, to resolve 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). Though not challenged, we are satisfied that the evidence sufficiently supports the hearing officer's determination that claimant's Morton's neuromas condition was not the result of her compensable injury.

We further view the evidence as sufficient to support the hearing officer's findings that Dr. K's reports of MMI and impairment did not pertain to claimant's compensable injury, namely, her left ankle, and that no doctor has certified she has reached MMI nor assigned an IR for the ankle injury, and the conclusions that Dr. K's October 9, 1993, certification did not become final under Rule 130.5(e) and that MMI is not ripe for adjudication. We understand the plight of the self-insured who has paid claimant IIBS based on the six percent IR and simply wants this two-year-old ankle claim to be put to rest. However, we cannot say that the hearing officer's dispositive findings are so against the great weight and preponderance of the evidence as to be manifestly unjust and reverse the challenged conclusions, as the self-insured requests. *See* Pool v. Ford Motor Co., 715 S.W.2d 629, 635 (Tex. 1986); In re King's Estate, 150 Tex. 632, 244 S.W.2d 660 (1951).

The decision and order of the hearing officer are affirmed.

Philip F. O'Neill
Appeals Judge

CONCUR:

Susan M. Kelley
Appeals Judge

Gary L. Kilgore
Appeals Judge