APPEAL NO. 950078
FILED MARCH 20, 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 January 9, 1995. With regard to the single issue before her, the hearing officer held that the finding of maximum medical improvement (MMI) and the impairment rating (IR) of 13% assigned by (Dr. W) on or about January 20, 1994, should not be considered final under Rule 130.5(e) [Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE §§ 130.5(e)]. The carrier takes this appeal, contending that the evidence shows that the hearing officer's decision is against the great weight of the evidence. The claimant responds that the hearing officer did not err in her decision, pointing out that Dr. W overlooked her symptoms of bilateral cubital tunnel syndrome.

DECISION

We affirm.

The claimant, who had been employed as a sheet metal mechanic for (employer), suffered a compensable injury on _____. She first saw an emergency room doctor, and a month or so later saw (Dr. F), a hand specialist. On June 17th, claimant quit her job and moved to (state), where she began treating with (Dr. W), a plastic and reconstructive surgeon.

According to the claimant's testimony and to a letter from Dr. F, the latter first saw claimant on May 1, 1992, at which time he said the claimant had symptoms of cubital tunnel syndrome as well as ulnar nerve neuritis; the claimant said he also diagnosed carpal tunnel syndrome. Dr. F stated that he made a definitive diagnosis of cubital tunnel syndrome on June 3, 1992, even though her nerve studies were normal at the time.

The claimant said that Dr. W performed new nerve conduction studies and diagnosed carpal tunnel syndrome; she said he did not mention cubital tunnel syndrome to her even though she told him she had elbow pain. According to medical records in evidence, Dr. W performed carpal tunnel releases on October 16, 1992, and on March 19, 1993. In addition, on October 18, 1993, Dr. W performed a left Guyon's canal release.

On December 28, 1993, Dr. W released the claimant to return to work, stating that she had "benefited maximally from her surgery, occupational therapy and work hardening program," but predicting that returning to work with a rivet gun would cause further problems with her hands and wrists. On the same day Dr. W found that the claimant had reached MMI with a 13% IR. According to the stipulations of the parties, the claimant became aware of Dr. W's certification of MMI and IR on January 7, 1994, and received written notification on January 28, 1994; 90 days from January 28, 1994, is April 27, 1994.

Claimant testified at the hearing that she was not aware that she had 90 days to dispute this IR, although she said that in late February of 1994 she contacted the carrier's adjuster and asked to be placed on temporary income benefits (TIBS) because she had learned she needed a second Guyon's canal release; she said that the adjuster told her that her doctor would have to be involved before TIBS could be reinstated. According to computer records, claimant contacted the Texas Workers' Compensation Commission (Commission) in March of 1994 seeking lump sum payment of benefits, but did not mention Dr. W's IR.

Claimant had the second Guyon's canal release on June 14, 1994, in (state). She testified that she again called the adjuster two days later, seeking TIBS, and this time was told she had reached MMI because of the elapse of the 90-day period. Following recuperation, she returned to Texas on July 8th, and shortly thereafter went to a Commission field office where she learned of the 90-day rule for the first time. Also in July, she returned to Dr. W, who originally wrote that claimant "now comes with the complaint of pain in both elbows and the ulnar distribution of both hands;" he diagnosed bilateral cubital tunnel syndrome. Although he originally indicated that claimant had not been troubled with these symptoms previously, on November 16th Dr. W corrected that statement as follows: "Upon close review of this patient's history and records you will find enclosed copies of specific clinic notes which do reveal evidence that the patient on her first visit to this office (7/14/92), and subsequent visits, was troubled with pain in both of her elbows . . . The patient's pain in the elbows has progressed from the beginning of her case and is not a new diagnosis." On October 10, 1994, Dr. W notified the Commission that he was rescinding the 13% IR and assessing a 15% IR, and he filed a new Report of Medical Examination (Form TWCC-69) reflecting this change.

The hearing officer found that the claimant's contact with carrier's adjuster on or about February 21, 1994, put the carrier on notice that the claimant was disputing the determinations of Dr. W; she also found that claimant's cubital tunnel syndrome was diagnosed by her first treating doctor, was misdiagnosed by her second treating doctor, was not considered by the second treating doctor when he certified MMI and assessed an IR, was subsequently diagnosed by her second treating doctor, and resulted in the need for further surgery. The hearing officer accordingly concluded that Dr. W's certification of MMI and IR of 13% should not be considered final under Rule 130.5(e).

In its appeal the carrier basically contended, citing opinions of the Appeals Panel, that there is no good cause exception to the 90-day rule, which begins to run when the parties have actual knowledge of the IR, and that ignorance of the requirement does not toll the time limit. It also cited Appeals Panel decisions for the propositions that compelling medical or other evidence that the certification was invalid at the time it was rendered, may dispense with the requirement to dispute within 90 days, but that surgery performed after the 90-day period has expired does not necessarily mean that the initial MMI or IR was invalid. Noting that the Appeals Panel has ruled that, absent a clear misdiagnosis or substantial change in the claimant's medical condition, the 90-day rule will not be nullified,

the carrier contends that the hearing officer's decision is so against the great weight of the evidence as to be manifestly unjust.

Rule 130.5(e) provides that the first IR assigned to an employee is considered final if the rating is not disputed within 90 days after it is assigned. If the IR becomes final by virtue of this rule, so does the underlying certification of MMI. Texas Workers' Compensation Commission Appeal No. 92670, decided February 1, 1993. We have previously observed that MMI does not mean that there will not be a need for some future medical treatment, and the need for additional or future medical treatment does not mean that MMI was not reached at the time it was certified. Texas Workers' Compensation Commission Appeal No. 94269, decided April 20, 1994. The same is true in situations where a doctor rescinds his or her finding of MMI and IR after the expiration of the 90-day dispute period, or where surgery is performed some time after that period. Texas Workers' Compensation Commission Appeal No. 94011, decided February 16, 1993; Texas Workers' Compensation Commission Appeal No. 93987, decided December 14, 1993. However, this panel has acknowledged that a different result could obtain depending upon the facts of the particular case. As we said in Texas Workers' Compensation Commission Appeal No. 93489, decided July 29, 1993, the passage of 90 days would not be dispositive where there was "compelling medical or other evidence" showing that the original MMI and IR were "invalid because of some significant error or because of a clear misdiagnosis" or where there is "compelling evidence of a new, previously undiagnosed medical condition or prior improper or inadequate treatment of the claimant's injury which would render the certification of MMI invalid."

The evidence in this case shows that Dr. F originally diagnosed claimant with cubital tunnel syndrome but that Dr. W did not identify or treat this condition until several months after he had determined the claimant to have reached MMI and assigned an IR which presumably did not account for impairment due to this condition. The evidence also shows that Dr. W acknowledged that claimant had voiced complaints regarding these symptoms from her first visit. With the evidence in this posture, we are unwilling to state that the hearing officer erred as a matter of law in making her determination, and the carrier has pointed us to no specific error of law that would require reversal. Further, we are satisfied that the evidence sufficiently supports the hearing officer's determination that Dr. W's MMI and IR did not become final due to that doctor's misdiagnosis. *See e.g.,* Texas Workers' Compensation Commission Appeal No. 94352, decided May 11, 1994 (where, although the carrier did not challenge findings that the first doctor to certify MMI and render an IR had inadequately treated the claimant, the Appeals Panel observed that doctor rendered his opinion based on the claimant's medial meniscus tear despite the fact that the claimant was later shown to also have a tear of the lateral meniscus); Texas Workers' Compensation Commission Appeal No. 94677, decided July 11, 1994 (doctor's first IR and MMI held not final where doctor originally assigned an IR based upon lumbar degeneration and herniation but later rescinded his report when subsequent studies showed spondylolisthesis and subluxation). Because we find no error in the hearing officer's

determination based on these grounds, we need not address whether the hearing officer's additional finding, that the claimant timely disputed Dr. W's IR, is supported by the evidence. The judgment of a fact finder will be affirmed if it can be sustained on any reasonable basis supported by the evidence, Texas Workers' Compensation Commission Appeal No. 93502, decided August 4, 1993, and under these circumstances even a contrary finding as to timely dispute would not affect the ultimate decision that Dr. W's report did not become final.

Upon review of the evidence we do not find the hearing officer's decision to be so against the great weight and preponderance of the evidence as to be manifestly unfair and unjust. In re King's Estate, 150 Tex. 662, 244 S.W.2d 660 (1951). The hearing officer's decision and order are accordingly affirmed.

Lynda H. Nesenholtz
Appeals Judge

CONCUR:

Tommy W. Lueders
Appeals Judge

CONCURRING OPINION:

I concur with the majority affirming the hearing officer's decision and ultimate conclusion because the hearing officer could, and in part did, find that claimant disputed the first IR when she contacted the carrier's adjuster in February 1994 and asked for TIBS to be reinstated. However, I object to the hearing officer's apparently categorizing exceptions to Rule 130.5(e) when the hearing officer, as a finding of fact, stated:

21. The Appeals Panel has determined that:

a. the 90 day rule does not apply to situations in which the Claimant's condition is undiagnosed;

b. the 90 day rule does not apply to situations involving a clear misdiagnosis of the Claimant's condition or to the Claimant's receipt of inadequate treatment;

c. that the 90 day rule does not apply to situations in which surgery occurs subsequent to certification or surgery in [sic] needed or recommended; and

d. the 90 day rule does not apply to certifications not including all of the Claimant's injuries.

In Texas Workers' Compensation Commission Appeal No. 94049, decided February 18, 1994, this Appeals Panel judge specifically stated that the Appeals Panel does not read a specific case "as carving out broad new general categories of exceptions to rule 130.5(e)." This appears to be exactly what the hearing officer seems to be doing in her Finding of Fact No. 21. The Appeals Panel has, on occasion, based on the specific facts of a case, such as the instant case, held that there may be circumstances where the passage of 90 days under Rule 130.5(e) might not be dispositive. I specifically reject the notion that there are four (or any number) of exceptions where "the 90 day rule does not apply." There are no regulatory exceptions nor is there a good cause exception to Rule 130.5(e). To indicate otherwise, even by inference based on certain Appeals Panel decisions, is in my opinion error. I would have specifically reversed the hearing officer's determinations in Finding of Fact No. 21 and found that determination not to be an appropriate finding of fact.

Thomas A. Knapp
Appeals Judge