APPEAL NO. 950110
FILED MARCH 8, 1995

Pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq*. (1989 Act), a contested case hearing was held on October 13, 1994. He determined that a March 3, 1994, certification of maximum medical improvement (MMI) and impairment rating (IR) on the respondent (claimant) has not become final under Rule 130.5 (Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 130.5 (Rule 130.5)), that he has not reached MMI, and that he has had disability from January 27, 1994, through the date of the hearing. The appellant (carrier) urges error in several of the hearing officer's finding of fact and argues that the great weight of the evidence establishes that the MMI and IR certification had become final. No response was filed.

DECISION

Affirmed.

The fact that the claimant sustained an umbilical and inguinal hernia in a work-related incident is not in dispute. He worked for a temporary services employer and was injured at a job on _____. He testified that he subsequently underwent surgical repair of the two hernias in December 1994. The umbilical hernia apparently did not heal properly and the claimant continued under treatment with antibiotics. Although the surgical injury was not healed, the treating doctor, (Dr. M), returned the claimant to light duty work effective January 3, 1994. The claimant testified that he continued working until laid off on January 26, 1994, because he was unable to perform the heavy work, that he continued to have problems with his injury and also that there was a slow down in light work he was doing. He stated he has not been able to find employment with his restrictions although he has tried with the temporary services employer, the Employment Commission and the placement office of a college. In applications he filed he noted his injury restrictions when the information was asked for. The claimant continued to see Dr. M for the apparent infection and pain in the surgical area. Dr. M prepared a Report of Medical Evaluation, TWCC Form-69, on March 3, 1994, certifying an MMI date of January 20, 1994, with a zero percent IR. The problems continued and the claimant was told on March 29, 1994, by Dr. M that he would have to have more surgery to correct the original repair of the hernia. The claimant called and reported this to the carrier's adjuster on March 29th. He testified when he mentioned surgery, they stopped talking to him. Dr. M also advised the carrier in a note dated April 6, 1994, that there was a suspected recurrence of the hernia. In any event, the need for surgery was resolved and he had the operation on August 10, 1994. He was still under restriction at the time of the hearing although he speculated that he would be released when he went to the doctor the following week.

In a TWCC Form-69 dated June 6, 1994, Dr. M retracted his earlier TWCC Form-69 and indicated the claimant had not reached MMI because of the recurrence of the hernia condition which required repair. There are also two letters from Dr. M dated June 27,

1994, and August 18, 1994, wherein he explains that this was a continuation of his original injury and stated in the latter letter:

> I issued a zero impairment rating that was dated 3-3-94 on [claimant] under the presumption that he had healed from his umbilical hernia repair; however, he continued to complain of pain and returned to the office on 3-29-94 and indeed had an obvious recurrence. I was under the presumption at the time of issuing this that he had completely healed; however, that turned out to be an inaccurate assessment; therefore I am rescinding the zero impairment and feel that this was done in error. Any consideration you can give [claimant] regarding this would be greatly appreciated.

The fact findings and conclusions with which the carrier urges error are:

FINDINGS OF FACT

7. The doctor verbally retracted his certification of [MMI] and assessment of an [IR] on March 29, 1994

8. The treating doctor's initial certification of [MMI], and certification of an [IR], were based on a misdiagnosis.

11. The treating doctor rescinded the original certification of [MMI] and the assessed [IR] by an amended TWCC-69, dated June 9, 1994, which document was received by the Commission on June 9, 1994.

12. The second surgery for the operative repair or the injuries sustained by the Claimant was necessitated by improper treatment provided by the treating doctor.

CONCLUSIONS OF LAW

3. The certification of [MMI] and assigned [IR] made on March 3, 1994, has not become final under Commission Rule 130.5

4. The Claimant has not reached [MMI].

With the exception of Finding of Fact No. 12, there is sufficient evidence of record to support the determinations and conclusion of the hearing officer. While our review of the evidence convinces us that there was clearly error made in the overall treatment and early diagnosis of the continuing umbilical hernia problem, we do not find any evidence to

support the finding that the second surgery was necessitated by "improper treatment" provided by the treating doctor. However, from the four corners of the evidence, the hearing officer could reasonably infer that the treating doctor's first MMI and IR was erroneous as he himself so states, that he in effect rescinded it verbally on March 29th (and in his April 6, 1994, note and in an amended TWCC Form-69 in June 1994), and that the condition was a substantial change in condition and a delayed or missed diagnosis since improvement did not occur and follow-on surgery was required.

We have held that a doctor can change his certification of MMI and IR for proper reason within a reasonable time. Texas Workers' Compensation Commission Appeal No. 93827, decided November 5, 1993; Texas Workers' Compensation Commission Appeal No. 94365, decided May 11, 1994. While subsequent surgery does not necessarily invalidate a prior finding of MMI and IR particularly when the rendering doctor adheres to his finding (Texas Workers' Compensation Commission Appeal No. 94421, decided May 25, 1994), subsequent surgery may well be a valid basis for amending a certification. Texas Workers' Compensation Commission Appeal No. 931107, decided January 21, 1994. In Texas Workers' Compensation Commission Appeal No. 94475, decided June 3, 1994, we cited a number of cases and discussed the limited circumstances in which the finality provisions of Rule 130.5(e) would not apply to the first certification of MMI and IR. *See also* Texas Workers' Compensation Commission Appeal No. 94588, decided June 20, 1994. In Appeal 94475, in upholding the hearing officer's determination that the initial IR was final under the 90-day rule even though it was subsequently amended or modified to include other range of motion and nervous system ratings, we stated the change or amendment of the doctor's certification was not based upon "a clear misdiagnosis or improper or inadequate medical treatment." *See* Texas Workers' Compensation Commission Appeal No. 93501, decided August 2, 1993. *Compare* Texas Workers' Compensation Commission Appeal No. 94011, decided February 16, 1994. The situation in Appeal No. 94475 is not the situation in this case as found by the hearing officer and as finds support in the evidence of record. We believe the claimant's testimony together with the doctor's statements indicating potential medical error and unsuccessful treatment resulting in the need for follow-on surgery is a proper basis to conclude that the initial MMI and IR had not become final. This determination makes it unnecessary to address the matter whether the claimant's call to the adjuster on March 29, 1994, indicating that additional surgery was required, together with Dr. M's note to the carrier dated April 7, 1994, was a sufficient notice of dispute of the initial MMI and IR to stop the 90-day clock. *See* Texas Workers' Compensation Commission Appeal No. 93200, decided April 14, 1993.

Regarding the issue of disability, the claimant testified that he worked light duty until January 26, 1994, that he was laid off because he was not able to perform the work (apparently the work he was initially hired to perform) and that because there was a slow down there was a lack of light duty he had been performing since his return on January 3,

1994. He also testified that he had been unable to find any employment consistent with his ability to work and that he had made attempts to find employment. The medical evidence is not inconsistent with the claimant's testimony regarding disability and is somewhat supportive of his position that he had disability after January 27th. While it is possible that different inferences might have been drawn from the evidence than those deemed most reasonable by the hearing office, this is not a sound basis to disturb the finding and conclusion regarding disability. National Union Fire Insurance Company of Pittsburgh, Pennsylvania v. Soto, 819 S.W.2d 619, 620 (Tex. App.-El Paso 1991, writ denied); Garza v. Commercial Insurance Co. of Newark, New Jersey, 508 S.W.2d 701 (Tex. Civ. App.-Amarillo 1974, no writ). We have previously observed that a claimant's testimony alone, if believed, can establish disability. Texas Workers' Compensation Commission Appeal No. 941566, decided January 4, 1995. We conclude there was sufficient evidence from which the hearing officer could find and conclude the claimant suffered disability for the time period set out.

Finding the evidence sufficient to support the hearing officer's essential findings and conclusions, the decision and order are affirmed.

Stark O. Sanders, Jr.
Chief Appeals Judge

CONCUR:

Thomas A. Knapp
Appeals Judge

Alan C. Ernst
Appeals Judge