APPEAL NO. 950120
FILED MARCH 10, 1995

This appeal is considered in accordance with the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act). On October 27, 1994, a contested case hearing (CCH) was held. The issues at the hearing were whether claimant's first certification of maximum medical improvement (MMI) and a 12% impairment rating (IR) became final in accordance with Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 130.5 (e) (Rule 130.5(e)); whether claimant reached MMI and if so, on what date; and whether claimant had disability and, if so, for what dates. The appellant the claimant herein, had sustained a back injury on _____, while employed by the (Employer), a self-insured governmental entity (hereinafter called carrier or employer, depending upon the context).

The hearing officer determined that claimant had not disputed his treating doctor's IR and MMI status within 90 days and his report therefore became final in accordance with Tex. W.C. Comm'n Rules, 28 TEX. ADMIN. CODE § 130.5(e) (Rule 130.5(e)). He determined that claimant reached MMI on July 13, 1993, with a 12% IR, in accordance with this final rating. On the disability issue, the matter was somewhat confused because, although there was no express issue as to whether claimant sustained a new injury, the hearing officer determined that claimant sustained another injury on (subsequent date of injury), and that his inability to work from May 27, 1994, through the date of the CCH were solely due to this "reinjury." The hearing officer found that claimant had disability from his 1992 compensable injury from December 10 through December 12, 1992, and from December 24, 1992 through July 13, 1993.

The claimant appeals this decision, arguing that findings relating to the finality of the 12% IR are against the great weight of the evidence and factually insufficient to support the decision. The claimant disagrees with the hearing officer's determination that he did not timely contest the 12% IR assigned by his treating doctor. While claimant argues that his back condition was "aggravated" by a subsequent incident, he notes that his condition was part of his _____, injury. The claimant argues that the treating doctor rescinded his opinion, and that if he could not prove inadequate treatment or a misdiagnosis, it was because the treating doctor would not give any information to "incriminate" himself. The carrier responds that the decision should be affirmed because there was no evidence of a misdiagnosis or inadequate treatment. Neither party appealed the findings on disability.

DECISION

After reviewing the record, we affirm the decision.

The claimant worked in the roads and grounds department for the employer for about 4-5 years before his injury. He stated that on _____, as he was using an air hammer, it jerked or caught on the pavement, and he jerked with it. Claimant said that back pain began in earnest as he cooled down. Claimant had lower back pain radiating

down his right leg. He reported his injury the next day. Claimant's treating doctor was (Dr. L), a neurological surgeon, to whom he was referred by (Dr. D). Records in evidence indicate that his post-surgical therapy was managed by (Dr. P), an occupational medicine specialist. Claimant had back surgery on January 22, 1993, for a herniated disc and nerve compression.

Medical records from before his surgery indicate that claimant was diagnosed with a significant L4-5 disc herniation. Dr. L documented that claimant had "no" left sided leg pain, but considerable right leg pain. An MRI of December 1992 reported that claimant had a herniated disc at L4-5 (and problems also at L5-S1). A January 12, 1993 myelogram showed "central and bilateral herniated discs at L4-5 *with the main problem being compression of the right L5 nerve root*" (emphasis added). Dr. L's surgical notes indicate his operative diagnosis of right L5 and S1 discopathy and radiculopathy, and the procedure performed was a right laminectomy with excision of the herniated disc and nerve root decompression. Claimant thereafter embarked upon a course of work hardening therapy under Dr. P's supervision.

Claimant said he returned to work on July 13, 1993. Claimant stated that he was aware (the date was never specified) that Dr. L had certified him to be at MMI on that date with a 12% IR. Claimant said he did not dispute this because he was essentially pain-free for four months and his surgery and therapy seemed successful. It was stipulated by the parties, when the record was briefly reopened, that claimant did not dispute this rating within 90 days. A TWCC-69 from Dr. L on that date, shown as received by the carrier on July 22, 1993, certified MMI on July 13, 1992, and a 12% IR, and simply described the basis as "lumbar spine", with no narrative included.

The medical records submitted by the carrier indicated that Dr. P, on July 6, 1993, in a letter date-stamped by the adjuster as received on July 16, 1993, evaluated claimant under the Guides to the Evaluation of Permanent Impairment, third edition, second printing, dated February 1989, published by the American Medical Association (AMA Guides) and determined that he had a 14% IR. This was derived from a 10% rating from Table 49, Specific Disorders of the Spine, combined with an additional four percent for loss of range of motion. Dr. P observed that claimant's clinical condition was stabilized, that he would not benefit from further surgery or treatment, and he recommended that claimant should return to the care of Dr. L, and be returned to full duty with no restrictions, and a 14% IR. Although the copy in evidence was date-stamped by the carrier, there is no evidence as to whether it was also submitted to the Texas Workers' Compensation Commission (Commission) or to the claimant. The BRC report underlying the hearing reflects that carrier paid impairment income benefits (IIBS) based upon 12%. (No issue was joined or argument by the parties as to whether the letter from Dr. P would constitute the first IR assigned to the claimant, as opposed to Dr. P's recommendation to Dr. L for consideration as part of Dr. L's assessment of IR.)

The record contains an MRI report from February 21, 1994 (with no explanation as to why this was performed at this time). The report indicated that claimant had an

asymmetrical disc bulge on the left at L4-5. When comparing this MRI to the December 1992 MRI, the reporting doctor noted that the differences were the post-surgical changes noted on the right of the L4-5 and L5-S1, and immediate signal intensity material present that was not there previously. The report stated that the asymmetrical left bulge was similar to the earlier MRI, as were protrusions at both L4-5 and L5-S1.

Claimant stated that four months after he returned to work, he began to have back problems again and had pain on his left, rather than right, side. He stated that he continued to work until (subsequent date of injury), when he experienced pain similar to what he'd had prior to his last surgery, only radiating down his left leg.

According to claimant, he consulted with Dr. L on May 9th and was taken off work effective May 10, 1994. Dr. L wrote on May 19, 1994, to an employee of the Commission, that claimant had been injured cutting shrubbery in December 1993 and the present problem was secondary to that injury. A memo dated May 10, 1994, from a secretary for the employer indicated that this same Commission employee told her that claimant had been injured around December 4, 1993, and that the employer should file a report of injury using that date. This secretary's memo indicated that claimant told her that he had not sustained a new injury and that he had had some back pain since his surgery.

At the hearing, the carrier stated (and the claimant acknowledged in his testimony) that the parties had agreed that there was no new injury, but that claimant's current back condition was causally linked to his _____, back injury. A copy of a BRC agreement executed on June 15, 1994, is in the record; as resolution of an articulated issue "Was there a new injury on (date)?", the agreement states: "All parties agree that all problems this claimant has with his back are a result of the injury suffered on _____. There has not been a new injury." The parties at the hearing clarified for the hearing officer that this reflected their agreement that all of claimant's back problems stemmed from his _____, injury (notwithstanding that the agreement was silent on the matter of a contended (date) injury).

On June 1, 1994, a "second opinion" back surgery doctor, (Dr. H), concurred with the need for a second laminectomy surgery, stating "there is evidence of a previous disc excised at 5-1 to the right side while this is to the left yet another level, 4-5 left."

Dr. L wrote in a June 20, 1994, letter that he was certain that claimant's prior injury played a part in his current condition. Dr. L noted that claimant's previous surgery was to alleviate right discopathies, and that he "now has left leg pain with a left L4-5 herniated disc. He told me that he had an exacerbation while cutting shrubbery in early December 1993 . . . his MMI of 13 July 1993 is therefore rescinded and he has not reached a new MMI because he needs a left L4-5 microdiskectomy." Answers to a deposition on written questions propounded by the carrier consist of "yes" to a series of questions from the carrier that inquire as to whether claimant had received adequate treatment for his lumbar condition at the time he was found to be at MMI by Dr. L, and whether that assessment was accurate at that time. While Dr. L answered "yes" to a question as to whether his

current left leg pain was "related" to his previously diagnosed condition, no questions were posed to Dr. L concerning whether the left-sided condition existed at the time Dr. L certified MMI, or was taken into consideration at that time.

Claimant had surgery for his left-sided herniation on September 7, 1994. At the time of the hearing, he was still off work. He testified that the second surgery had not been as effective as the first in relieving as his pain.

Regarding whether the 12% IR became final, we affirm the hearing officer's decision, noting that it is a factual determination of the hearing officer to make as to whether the exceptions to the 90 day rule set out in Appeals Panel decisions apply. In Texas Workers' Compensation Commission Appeal No. 93501, decided August 2, 1993, we stated that a finder of fact could determine that a first certification did not become final if there was compelling medical evidence "based upon the lack of knowledge of a material change in the claimant's medical condition." There was no evidence that the claimant in Appeal No. 93501 sustained a new injury or a reinjury.

The fact that a doctor may rescind or amend a previous assessment does not, in and of itself, require a finding that the 90 day rule should not apply. Texas Workers' Compensation Commission Appeal No. 94049, decided February 18, 1994; Appeal No. 94475, decided June 3, 1994. Of greater importance is the reason for any modification or rescission. In this case, Dr. L has determined, not that his first rating was wrong, but that a need for further surgery compelled him to reinstate claimant to a "no-MMI" status.

The evidence in this case further indicated a similarity between two MRIs, and inadequate treatment for the December 1992 injury is not indicated. It does not appear that the claimant's condition was misdiagnosed. The evidence is such that the hearing officer's constraint at applying any exception to Rule 130.5 (e) cannot be set aside.

We note that the hearing officer's assessment that the July 1993 IR was final could have resulted from the strong suggestion in this record that claimant's left-sided herniation and second surgery resulted because of a second injury, and not because of an undetected extension of his prior injury. Indeed, the hearing officer found as fact that claimant was reinjured on (subsequent date of injury). The hearing officer further found (and neither party appealed) that this second injury was the sole cause of claimant's inability to work between May 27 and the date of the hearing. Because no issue was framed as to whether there was a second injury, whether the BRC agreement included a disposition of a contended (subsequent date of injury), injury, or whether good cause would exist for an unrepresented claimant to set aside the BRC agreement, we will not review those matters directly. We do note that the effect of the hearing officer's decision that the July 13, 1993 IR became final would only finalize the IR for the December 1992 injury, and not any that could be assigned for a subsequent reinjury by aggravation.

For these reasons, we affirm the decision and order of the hearing officer.

Susan M. Kelley
Appeals Judge

CONCUR:

Stark O. Sanders, Jr.
Chief Appeals Judge

Tommy W. Lueders
Appeals Judge