APPEAL NO. 950443
FILED APRIL 27, 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 November 28, 1994, with the record left open to obtain medical records. He (hearing officer) determined that the first certification of maximum medical improvement (MMI) and impairment rating (IR) assigned on August 23, 1993, did not become final under Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 130.5(e) (Rule 130.5(e)). The appellant (carrier) appeals urging there is no evidence or insufficient evidence to support certain findings and conclusions of the hearing officer and asks that the decision be reversed. The claimant feels the decision is correct.

DECISION

Finding error, we reverse and render a new decision.

Not in dispute was the fact that the claimant sustained a compensable injury to his left foot when he jumped off a drilling rig on _____ . His treating doctor was Dr. S, apparently an orthopedic surgeon although not specifically so described in the record, who treated the claimant for a fractured left foot. Inexplicably, none of the initial medical records from Dr. S are in evidence and, although not clear from the record, it appears that the claimant was returned to work in a light duty capacity prior to qualifying for any income benefits. Some later medical records indicate that x-rays were taken and that the claimant was in therapy for a couple of weeks and was treated for a fracture. An August 2, 1993, report of Dr. S states:

> [Claimant] was seen in my office on 8-2-93. He is almost 6 months post fracture of the left os calcis and still has a tendency to drag his leg. He is not toeing off when he walks. The fracture is well healed. There is some minimal changes of disuse osteoporosis. He is walking without any help though.
>
> Today, he has 25° of dorsiflexion, 15° of plantar flexion, 10° of AD duction and abduction. He has no tenderness. Gets minimal swelling after walking.
> I placed him on some knee-high suppopse [sic] and encouraged him to walk all he can and to try to toe-off when he walks.
>
> I will see him in 3 weeks at which time I anticipate he will have reached MMI and I will send in an [IR].

On August 23, 1993, Dr. S certified MMI and an eight percent IR. Although the claimant acknowledged he received a copy of the rating he did not dispute it. As

indicated, the claimant apparently was placed on light duty before any income benefits accrued and he continued to work until May 6, 1994, when a general layoff occurred, allegedly as a result of economic conditions. In any event, the claimant indicated he did not see Dr. S after August 1993 and that the next doctor he saw was Dr. C in September 1994, with complaints of problems with his left foot. In his initial impression Dr. C states that "I think what we are seeing here is arthritic pain from this foot that is coming primarily from his previous injury." Dr. C suggested three modes of treatment: oral anti-inflammatory medication, an air suspension shoe, and a biomechanical orthotic prepared by a podiatrist. In a report dated October 19, 1994, Dr. C indicates that the appropriate thing he thinks he should do is to refer the claimant to a well known foot surgeon in (city). This was done and the claimant saw Dr. G who subsequently performed surgery on October 31, 1994. His operative report was in evidence and the report describes the "technique and findings" and gives a preoperative and postoperative diagnosis as "traumatic arthritis, left subtalar joint, calcaneocuboid joint and talonavicular joint." The discharge summary dated November 11, 1994, states in part:

> This 55-year-old, white male was admitted with traumatic arthritis of his left subtalar joint. He had injured his calcaneus on a jump from a rig when he broke the calcaneus several years ago, and he recuperated from the fracture but developed traumatic arthritis in the subtalar joint. This was disabling and he had difficulty walking and getting around. He also had a good amount of arthritis in the calcaneocuboid joint and the talonavicular joint.

The findings and conclusions appealed by the carrier are:

FINDINGS OF FACT

4. Claimant developed an arthritic process due to the injury of _____, which was not diagnosed nor treated.

5. The failure to diagnose and treat Claimant's arthritis was a clear misdiagnosis.

6. The development of arthritis was a material change in medical condition.

7. Claimant exploded the lateral side of the calcaneus on the initial injury producing pressure on the peroneal tendons and this condition was never diagnosed until surgery was performed by [Dr. C.]

9. The certification of [MMI] on August 1993, was premature.

CONCLUSIONS OF LAW

3. The [IR] assigned on August 23, 1993, was invalid due to a clear misdiagnosis of the extent of claimant's injury and therefore did not require dispute.

4. The claimant's arthritis constitutes a material change in medical condition which was not and could not have been taken into account at the time his [IR] was assigned.

We agree that the evidence in this case does not support the key findings and conclusions set out above. Consequently, we render a new decision that the certification of MMI and IR rendered by Dr. S became final under Rule 130.5(e). The hearing officer states in his discussion that there are two exceptions where an initial IR is invalid and does not require dispute: when a clear misdiagnosis has occurred, and when inadequate medical treatment for the condition has been received. Apparently, this notion finds its source in the language of an Appeals Panel decision that has been very narrowly applied in limited factual settings. In Texas Workers' Compensation Commission Appeal No. 93489, decided July 29, 1993, in affirming a determination that the finality provision of Rule 130.5(e) applied, we indicated that the application of Rule 130.5(e) is not absolute. We observed that "if an MMI certification or [IR] were determined, based on compelling medical or other evidence, to be invalid because of some significant error or because of a clear misdiagnosis" the rule might not be dispositive. In that case, we held that the rule applied (and the first IR assigned to the claimant had become final) where the claimant suffered a compensable knee injury, subsequently underwent arthroscopic surgery and therapy, was certified MMI and given an IR, did not dispute the MMI or IR within 90 days, continued to have some swelling and pain in her leg, was informed that was to be expected, subsequently went to another doctor, later had further surgery (arthroscopic examination and patellar shaving) which abated her symptoms, and was found by the second doctor not to be at MMI. We further noted in Appeal 93489, *supra*, that MMI does not mean there will not be a need for some further or future medical treatment, that the need for additional or future medical treatment does not mean that MMI was not reached at the time it was certified, and that pain, in and of itself, does not mean MMI has not been reached at the time. In Texas Workers' Compensation Commission Appeal No. 94049, decided February 18, 1994, we stated that we do not read Appeal No. 93489 as carving out broad new general categories of exceptions to Rule 130.5(e) and that we viewed that decision as saying that there were, under some circumstances, "such egregious medical conditions" that finality would not occur.

As we review the evidence of record, it does not support a "clear misdiagnosis," rather, it shows that an arthritic condition apparently developed over a period of approximately a year and a half following the injury to the left foot. We find no evidentiary support for findings that the failure to diagnose and treat claimant's arthritis was a "clear misdiagnosis." If, as the hearing officer also found, the claimant developed an arthritic process at some time following the injury, there is no evidence that this happened before or during the treatment and diagnosis by Dr. S. Dr. S did indicate that the claimant may not be exercising the ankle enough or properly and that there was some minimal changes of disuse osteoporosis and advised the claimant about this. The claimant stated he last saw Dr. S in August 1993 and next saw Dr. C in September 1994. Up to May 1994, the claimant continued to work light duty. In sum, the evidence does not support a finding or conclusion of a "clear misdiagnosis." Appeal No. 93489, *supra*. *See* Texas Workers' Compensation Commission Appeal No. 94269, decided April 20, 1994; Texas Workers' Compensation Commission Appeal No. 941063, decided September 21, 1994; Texas Workers' Compensation Commission Appeal No. 941748, decided February 13, 1995.

Similarly, we do not find support in the record for the hearing officer's determination from an entry in the "technique and finding" section of the operation report that "claimant exploded the lateral side of the calcaneus on the initial injury producing pressure on the peroneal tendons and this condition was never diagnosed until surgery was performed by Dr. G." Dr. G's diagnosis, both pre and post-operative, was traumatic arthritis. We are left to speculate whether a specific condition existed that went undiagnosed or whether it was a part of the diagnosis stated by Dr. G. That is not a sufficient basis, particularly involving a medical issue, to sustain a factual finding.

The evidence establishes that there was a follow-on development in the claimant's physical condition and he apparently developed an arthritic process from the injury to his left foot. This resulted in surgery for the arthritic condition some year and nine months after the injury. Although not developed in the evidence, the medical records in evidence from Dr. S, Dr. C and Dr. G tend to suggest that this process was not unnatural given the circumstances. However, this change in physical condition is not a basis for discarding the application of Rule 130.5(e). As we have previously stated, that rule provides for finality. In Texas Workers' Compensation Commission Appeal No. 92670, decided February 1, 1993, we pointed out Rule 130.5(e) affords a method by which the parties may rely that an assessment of impairment and MMI may safely be used to pay applicable benefits and allows a liberal time frame to dispute a rating. The fact that some future treatment or even surgery will be necessary does not cancel out the application of the rule; rather, it is the very limited circumstance where the rating or certification is based on essentially a false premise, that is, a clear misdiagnosis or significant error in the diagnosis or treatment. We have not found and find no authority to cancel out and hold inapplicable Rule 130.5(e) in a situation such as

is present here: an arthritic or other degenerative type process that occurs over a lengthy period of time following a specific injury. That is not to say such conditions are not covered under lifetime medical benefits or other benefits, only that such circumstance does not invalidate a rating that has not been disputed in accordance with the requirements of Rule 130.5(e). Appeal No. 93489, *supra*, cannot be read to cancel out the application of the rule to conditions that may flow from an injury at some time in the future. Appeal No. 94269, *supra*. We also note that no evidence was presented of any other IR or that the rating rendered by Dr. S was wrong in any way. *See* Texas Workers' Compensation Commission Appeal No. 92670, decided February 1, 1993; Texas Workers' Compensation Commission Appeal No. 941748, decided February 13, 1995.

Finding insufficient evidence to sustain the determination that a clear misdiagnosis occurred or that other conditions warranting the invalidating of the certification of MMI and IR by Dr. S, we reverse the decision of the hearing officer and render a new decision that the first certification of MMI and IR assigned by Dr. S on August 23, 1993, became final under Rule 130.5(e).

Stark O. Sanders, Jr.
Chief Appeals Judge

CONCUR:

Robert W. Potts
Appeals Judge

Tommy W. Lueders
Appeals Judge