APPEAL NO. 980052

This appeal arises pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act). A contested case hearing (CCH) was held on November 20, 1997, with the record closing on December 16, 1997. He (hearing officer) determined that the respondent's (claimant) compensable injury of _____, extended to his right carpal tunnel syndrome (CTS); that he had disability for various periods of time; and that the first certification of a date of maximum medical improvement (MMI) and an impairment rating (IR) by (Dr. M) on April 2, 1996, 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 these determinations, contending that they are incorrect and not supported by sufficient evidence. The appeals file contains no response from the claimant.

DECISION

Affirmed.

The claimant worked as a machinist. On _____, as he was pulling on a wrench, the bolt broke and he struck his right thumb on a grease fitting. The employer referred the claimant to Dr. M, who noted tenderness, swelling, and pain radiating up into the forearm. He diagnosed a contusion and prescribed physical therapy. On November 3, 1995, Dr. M referred the claimant to (Dr. J). In a report of a visit on November 10, 1995, Dr. J reviewed prior x-rays and noted a possible fracture, but that surgery was not indicated. His impressions were contusion and possible flexor tenosynovitis. Office notes of a visit on December 11, 1995, report that the claimant "states that he is doing fine" with regard to his right thumb, but noted that his strength was still "somewhat down." He released the claimant to return to work. Notes of an office visit on April 2, 1996, also reflect that the claimant was "doing fine" and he was released from Dr. M's care.

On April 2, 1996, Dr. M completed a Report of Medical Evaluation (TWCC-69) in which he certified that the claimant reached MMI on that date and assigned a zero percent impairment rating (IR). His diagnosis remained "thumb contusion sprain."

The claimant returned to work. On April 7, 1997, he sustained a puncture wound to his right thumb in the course and scope of employment. (Dr. H) initially treated the claimant for this injury. He noted that x-rays showed no fracture, but there were complaints of numbness, swelling and tenderness over the area. His diagnosis was a laceration of the right thumb. The claimant was then referred to (Dr. D) because of continued symptoms since the 1995 injury. At his first visit on June 10, 1997, Dr. D reviewed the 1995 x-rays and concluded that they suggested "a probable fracture in the radial sesamoid." According to Dr. D, current x-rays suggested the fracture had healed with evidence of exostosis formation about the metacarpal head of the thumb. His diagnoses was post-traumatic arthritis and residual parathesias from an old neuropraxia "versus remote possibility of

[CTS]." EMG studies on June 13, 1997, were reported normal. On July 10, 1997, Dr. D diagnosed right CTS based on his clinical examination. On July 25, 1997, Dr. D performed a fusion of the metacarpophalangeal joint with pinning and a carpal tunnel release. On September 11, 1997, Dr. D wrote at the request of the claimant a letter in which he stated that the initial crush injury "evolved to a post-traumatic arthritis of the MCP joint as well as appreciation of neurologic dysfunction from [CTS]." He further concluded that "the thumb joint difficulties as well as the carpal tunnel phenomenon are as a result of the on the job crush injury of October, 1995." The claimant testified that Dr. D told him he should not have gone to physical therapy before the fracture healed.

Section 401.011(26) defines injury as "damage or harm to the physical structure of the body and a disease or infection naturally resulting from the damage or harm." The claimant had the burden of proving a compensable injury. Johnson v. Employers Reinsurance Corporation, 351 S.W.2d 936 (Tex. Civ. App.-Texarkana 1961, no writ). In this case, the hearing officer, according to his extensive discussion of the evidence, concluded that Dr. M failed to diagnose a fracture and that his prescription of physical therapy before the fracture healed over time caused the arthritis and right CTS. The carrier appeals this determination arguing essentially that the diagnostic testing did not establish nerve damage at the time of the original injury and that Dr. D's opinion about causation of the right CTS was too conclusory in nature, given the lapse of time between the initial injury and Dr. D's diagnoses, to be persuasive. The medical evidence was obviously in conflict. Dr. D recognized that objective medical testing did not establish right CTS, but he did so in the course of the fusion operation. He described the CTS as an evolving condition from the post-trauma arthritis and extensively explained the basis for this conclusion in his operative report. The hearing officer, as fact finder, was the sole judge of the weight and credibility to be given this evidence. Section 410.165(a). It was for him to determine whether it was too conclusive to be persuasive on the issue of the cause of the CTS. He found Dr. D credible in his explanation of causation. We will reverse a factual determination of a hearing officer only if it is so against the great weight and preponderance of the evidence as to be clearly erroneous and unjust. Cain v. Bain, 709 S.W.2d 175, 176 (Tex. 1986); Pool v. Ford Motor Company, 715 S.W.2d 629, 635 (Tex. 1986). Under this standard of review, we find the evidence sufficient to support the finding that the claimant's compensable injury included right CTS.

The carrier appeals the hearing officer's finding of disability on the basis that the compensable injury does not include CTS and the associated operations. Having affirmed the findings of the hearing officer on the extent of injury question, we also affirm the findings of disability and note that while the payment of temporary income benefits (TIBS) depends in part on whether a claimant has reached MMI, the concept of disability does not. *See* Sections 401.011(16) and 408.101.

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 the rating is assigned." If the IR becomes final by virtue of this rule, the underlying date of MMI also becomes final. Texas Workers'

Compensation Commission Appeal No. 92670, decided February 1, 1993. The parties agreed that the first (and in this case only) IR assigned to the claimant was Dr. M's zero percent IR discussed above. The claimant also testified that he did not dispute it within 90 days of receiving written notice of it, presumably because he was unaware of the provisions of this rule.

In Texas Workers' Compensation Commission Appeal No. 93489, decided July 29, 1993, the Appeals Panel observed that if an MMI or IR certification were determined, based on compelling medical or other evidence, to be invalid because of some significant error or because of a clear misdiagnosis, then a situation could result where the passage of 90 days under Rule 130.5(e) would not be dispositive. In that case, we found that there was no compelling evidence of a new, previously undiagnosed, medical condition or prior improper or inadequate treatment of the claimed injury which would render the first certification of MMI and an IR invalid. In this case, the hearing officer found that Dr. M's certification did not become final "because of the missed diagnosis." According to his discussion of the evidence, the so-called "misdiagnosis" was the failure to diagnose a fracture, which the hearing officer considered significant because it led to premature physical therapy before the fracture had resolved and consequent further injury and the need for surgery. Whether there was compelling evidence of a misdiagnosis in Dr. M's initial certification was essentially a question of fact for the hearing officer to decide. Texas Workers' Compensation Commission Appeal No. 960402, decided April 12, 1996. We have also noted in the past that the a later, different diagnosis by another doctor does not necessarily render Rule 130.5(e) inapplicable. *See* Texas Workers' Compensation Commission Appeal No. 951493, decided October 18, 1995. In the case now under review, the evidence established two different diagnoses. Dr. M found a contusion and based his certification on this diagnosis. Dr. D diagnosed a fracture. We are satisfied that these diagnoses are substantially distinct and provide sufficient evidentiary support for the decision of the hearing officer that the first certification was invalid.

In Texas Workers' Compensation Commission Appeal No. 971703, decided October 15, 1997, we discussed at length the proposition that what a claimant knows at the time of the first certification which is inconsistent with that certification and which should provide a reason for timely disputing that certification must be considered when the applicability of Rule 130.5(3) is challenged. In this case, the claimant did not seek medical treatment for approximately the one year after he stopped treating with Dr. M until he sustained the puncture injury. During this time, he said, he continued in pain. Thus, on the one hand, his failure to timely dispute the first certification did not occur in the face of contrary medical opinion, but, on the other hand, he failed to timely dispute despite more or less continual pain. The hearing officer resolved these contradictions in favor of the claimant and we decline to reverse that determination on a legal error or factual insufficiency basis.

Finally, the carrier, relying on Texas Workers' Compensation Commission Appeal No. 950443, decided April 27, 1995, argues on appeal that the claimant faced a changed condition approximately a year after the first certification and this situation does not justify invalidating the finality provisions of Rule 130.5(e). In that case, the claimant sustained a foot fracture and gradually developed arthrosis. The hearing officer found that the first certification did not become valid because the arthritis was not diagnosed even though it appeared only over the succeeding year and a half. We reversed and rendered a decision that the finality provisions applied because at the time of the first certification the diagnosis was correct and that the follow-on development of arthritis did not render Rule 130.5(e) inapplicable. We believe this case is significantly distinguishable because the underlying fracture was not discovered by Dr. M and for this reason was not considered in his course of treatment or determination of a date of MMI and IR.

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

Alan C. Ernst
Appeals Judge

CONCUR:

Elaine M. Chaney
Appeals Judge

Judy L. Stephens
Appeals Judge