

APPEAL NO. 980063

On December 4, 1997, a contested case hearing (CCH) was held. The CCH was held under the provisions of the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act). The issues at the CCH were: (1) whether the first certification of maximum medical improvement (MMI) and impairment rating (IR) assigned by (Dr. G) on October 16, 1996, became final under Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 130.5(e) (Rule 130.5(e)); (2) whether the appellant (claimant) has reached MMI, and if so, on what date; (3) the claimant's IR; and (4) whether the claimant has had disability resulting from the injury sustained on _____. The claimant requests review and reversal of the hearing officer's decision that: (1) the first certification of MMI and IR assigned by Dr. G on October 16, 1996, became final under Rule 130.5(e); (2) the claimant reached MMI on September 25, 1996; and (3) the claimant's IR is 12%. The respondent (carrier) requests affirmance of the hearing officer's decision on the appealed issues. There is no appeal of the hearing officer's decision that the claimant had disability from (injury date), and continuing through the date of the CCH, which was based on a stipulation of the parties.

DECISION

Affirmed.

Rule 130.5(e) provides that "[t]he first [IR] assigned to an employee is considered final if the rating is not disputed within 90 days after the rating is assigned." We have held that if the IR becomes final under Rule 130.5(e), then so does the underlying finding of MMI. Texas Workers' Compensation Commission Appeal No. 92670, decided February 1, 1993. In Texas Workers' Compensation Commission Appeal No. 93489, decided July 29, 1993, we observed that MMI does not mean that there will not be a need for some future medical treatment, and that the need for future medical treatment does not mean that MMI was not reached at the time it was certified. With regard to Rule 130.5(e), we stated in Appeal No. 93489, that the application of that rule is not absolute and that, if an MMI certification or IR were determined to be invalid based on compelling medical evidence of some significant error or a clear misdiagnosis, then a situation could result where the passage of 90 days would not be dispositive.

The parties stipulated that on _____, the claimant sustained a compensable injury. According to the October 16, 1996, report of Dr. G, who examined the claimant at the carrier's request, the claimant injured her shoulders when she received a shock from an electrical wire at work and was thrown against a wall. Dr. G also mentions the claimant's stacking of desks at work. In a Report of Medical Evaluation (TWCC-69) dated October 16, 1996, Dr. G certified that the claimant reached MMI on September 25, 1996, with a 12% IR for her injury of May 23, 1996. In his narrative report of October 16, 1996, Dr. G wrote that he examined the claimant on September 25, 1996, and that he reviewed the claimant's

medical records. He diagnosed the claimant as having a cervical strain, biceps tendinitis, and a partial rotator cuff tear. He assigned the claimant six percent impairment for the right upper extremity and six percent impairment for the left upper extremity. The impairment was due to loss of range of motion (ROM) of the right shoulder, left shoulder, left elbow, and left wrist. With regard to the possibility of shoulder surgery, Dr. G wrote "[t]here may be an indication to do a rotator cuff repair if she doesn't regain her strength and mobility in the shoulders. If anything further is done, she will need an MRI scan of the rotator cuffs of both shoulders and will likely need to undergo some physical therapy after the rotator cuff tears are repaired if necessary."

The parties stipulated that the 12% IR Dr. G assigned to the claimant on October 16, 1996, was the first IR assigned to the claimant, and that the claimant received Dr. G's report of October 16, 1996, on October 29, 1996. A radiologist wrote that an MRI of the claimant's left shoulder done on October 30, 1996, showed mild motion artifact present but no evidence of a rotator cuff tear. (Dr. E) wrote on November 22, 1996, that the claimant had bilateral shoulder pain and that, if a cervical MRI was normal, then he would proceed with surgery on the claimant's right shoulder for acromioplasty and inspection of the rotator cuff. A radiologist wrote that an MRI of the claimant's cervical spine done on January 8, 1997, showed a disc protrusion at C3-4 without cord or nerve root impingement. Dr. E wrote on January 13, 1997, that an MRI "of the shoulder" (apparently the right shoulder) showed a partial tear of the rotator cuff, that he did not have surgical options for the claimant, but that the claimant could see another surgeon for evaluation of her problem.

The parties stipulated that the claimant had right shoulder rotator cuff surgery on March 20, 1997. Apparently that surgery was done by (Dr. R). The parties stipulated that the IR assigned by Dr. G on October 16, 1996, was first disputed on June 16, 1997, when the claimant filed a request for a benefit review conference, and that the claimant did not dispute Dr. G's certification of MMI and IR within 90 days of having received it. Dr. G reexamined the claimant on July 16, 1997, at the carrier's request and he wrote on July 21, 1997, that he examined the claimant's shoulders and reviewed her medical records. Dr. G diagnosed the claimant as having bilateral rotator cuff tears and wrote that he believes that the rotator cuff tears are related to the on-the-job injury. He noted that the right rotator cuff had been recently surgically repaired, that the left rotator cuff was to be operated on soon, and that the right shoulder had improved a great deal. Dr. G also wrote that the claimant's MMI date and IR remained the same, but that the claimant's IR may be decreased because of improvement from surgeries. He anticipated that the claimant could return to work four months after surgery.

The parties stipulated that the claimant had left shoulder surgery on July 24, 1997. An operative report of July 24, 1997, reflects that Dr. R was the surgeon and that the claimant underwent a decompression and arthroscopic acromioplasty, and an arthroscopic debridement of a partial rotator cuff tear. Dr. R wrote in December 1997 that the claimant's right shoulder was doing reasonably well, that the claimant's left shoulder was not doing well, that the claimant's left shoulder had developed post-traumatic acromioclavicular

arthropathy and joint pain, that the claimant needed to have a left shoulder clavicle resection to relieve her pain, and that the claimant had not reached MMI. The claimant states in her appeal that she had the clavicle surgery done in January 1998.

The hearing officer is the judge of the weight and credibility of the evidence. Section 410.165(a). The hearing officer found that Dr. G's October 16, 1996, certification of MMI as of September 25, 1996, with a 12% IR was not disputed by either party within 90 days of having received written notice, and that the claimant did not establish inadequate treatment or a clear misdiagnosis as a basis for relieving her of the effects of the finality of the 90-day rule under Rule 130.5(e). The hearing officer concluded that the first certification of MMI and IR assigned by Dr. G on October 16, 1996, became final under Rule 130.5(e); that the claimant reached MMI on September 25, 1996, and that the claimant has a 12% IR. The claimant contends that she underwent a substantial change of condition after being rated by Dr. G, that her shoulder surgeries show that she was not at MMI when Dr. G rated her, and that she has decreased shoulder ROM following her surgeries. The claimant requests that we reverse the hearing officer's decision and render a decision in her favor on the Rule 130.5(e) issue.

In Texas Workers' Compensation Commission Appeal No. 960854, decided June 13, 1996, we noted that simply because a claimant has a substantial change of condition after the first IR has been assigned, is not, in and of itself, reason for determining that the first IR did not become final under Rule 130.5(e), especially where the change in condition is not tied to a clear misdiagnosis at the time the initial IR was assigned. Dr. G's report of October 16, 1996, mentions the claimant's rotator cuff tears and the possibility of future surgery. We have previously held that the need for more aggressive treatment or surgery as a result of a condition that has been diagnosed does not constitute and is not the equivalent of a clear misdiagnosis. Texas Workers' Compensation Commission Appeal No. 970020, decided February 7, 1997. We conclude that the hearing officer's findings and conclusions are supported by sufficient evidence and are not so contrary to the overwhelming weight of the evidence as to be clearly wrong and unjust. Cain v. Bain, 709 S.W.2d 175 (Tex. 1986). As noted by the hearing officer, although the claimant had disability after September 25, 1996, she would not be entitled to temporary income benefits after having reached MMI on September 25, 1996. See Section 408.101(a).

The hearing officer's decision and order are affirmed.

Robert W. Potts
Appeals Judge

CONCUR:

Gary L. Kilgore
Appeals Judge

Judy L. Stephens
Appeals Judge