

APPEAL NO. 980073

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 December 17, 1997.. She (hearing officer) determined that respondent's first certification of an impairment rating (IR) and a date of maximum medical improvement (MMI) did not become final by virtue of Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 130.5(e) (Rule 130.5(e)). The appellant (carrier) appeals this determination, arguing that it is incorrect as a matter of law and not supported by sufficient evidence. The claimant replies that the decision is correct, supported by sufficient evidence, and should be affirmed.

DECISION

Reversed and a new decision rendered.

The claimant worked as a welder. On _____, he sustained a compensable back injury while lifting a metal plate. He first sought medical care from (Dr. E), D.C., on February 19, 1996. In an Initial Medical Report (TWCC-61) of this visit, Dr. E diagnosed subluxation of cervical and thoracic vertebrae and brachial neuralgia. He noted restricted range of motion (ROM) of the cervical spine with radiating pain and muscle spasms and began a course of chiropractic therapy. In a report of a visit on April 30, 1996, Dr. E noted continued restricted cervical ROM "cause unknown, possibly from using welding helmet. Pain is much more pronounced in the cervical region rather than thoracic." X-rays of the cervical spine were taken on May 7, 1996. On June 24, 1996, Dr. E completed a Report of Medical Evaluation (TWCC-69) of a June 16, 1996, visit at which he certified that the claimant reached MMI on June 16, 1996, and assigned a zero percent IR. In an attachment to this report, Dr. E wrote that the claimant "was not experiencing any pain, muscle spasms and had achieved full [ROM] of the cervical and thoracic area."

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 Dr. E provided the first certification of a date of MMI and an IR for purposes of Rule 130.5(e) and that the claimant did not dispute this certification within 90 days of receiving written notice of it. The claimant said he did not do so because the treatment provided by Dr. E made him feel "pretty good" and Dr. E told him he was mostly recovered and had nothing to worry about.

The claimant thereafter worked at various jobs and said that his back injury continued to bother him. Toward the end of 1996, he moved to (City name). After about a month, he said, the pain got very bad and was of the same type and location as before. He then sought treatment from (Dr. B), who prescribed anti-inflammatory medication and

physical therapy. According to the claimant, the physical therapy made the pain worse. He missed some appointments (because, he said, his car was repossessed) and was released from Dr. B's medical care on May 6, 1997. The claimant then changed treating doctors to (Dr. ED), who, according to the claimant, continued the anti-inflammatory medication and ordered MRI testing of the cervical and thoracic spine. The thoracic spine was apparently normal. An MRI of the cervical spine was reported to show a large central and right paracentral protruding disc at C4-5 effacing the thecal sac and slightly distorting the spinal cord and protruding discs at C5-6 and C6-7 effacing the thecal sac and causing moderate spinal canal stenosis. The claimant said he went to the Texas Workers' Compensation Commission (Commission) on August 15, 1997, to dispute Dr. E's first certification in June 1996 based on the results of the MRI test. On September 11, 1997, Dr. ED wrote that the claimant "has been diagnosed with cervical stenosis due to a disk at the C4-5 and C5-6 level . . . After we have found the cervical problem, he was previously misdiagnosed."

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 IR invalid. We later commented that this decision was not intended to create broad new categories of exceptions to the dispute provisions of Rule 130.5(e). See Texas Workers' Compensation Commission Appeal No. 94045, decided February 17, 1994. The hearing officer made the following pertinent findings of fact, which have been appealed by the carrier, to support her conclusion of law that Dr. E's certification did not become final:

FINDINGS OF FACT

2. [Dr. E's] MMI/IR certification was based on a diagnosis of subluxation of cervical and thoracic vertebrae and brachial neuralgia.
3. This was a significant error because a later MRI and correct diagnosis was that [Claimant's] injury was protruding disks at C4-5, C-5-6 and C6-7 resulting in spinal stenosis.

The hearing officer further explained these findings in her decision and order:

Clearly, claimant's cervical spine condition was misdiagnosed by [Dr. E] in February of 1996. Claimant continued to experience the same kind of pain in the same place for several months after his first certification in MMI/R, which is explained by the fact that the cervical spine condition was misdiagnosed as

misalignment of the vertebrae when in fact he was suffering from spinal stenosis caused by protruding disks at C4-5, C5-6, and C6-7.

Whether there was compelling evidence of a misdiagnosis in Dr. E's certification was essentially a question of fact for the hearing officer to decide. Texas Workers' Compensation Commission Appeal No. 960402, decided April 12, 1996.

In Texas Workers' Compensation Commission Appeal No. 951493, decided October 18, 1995, wherein we rendered a decision that the first certification of an IR became final contrary to the decision of the hearing officer, we observed that "[j]ust because another doctor . . . subsequently has a different diagnosis of the same condition, does not give rise to a reason for invalidating" the application of Rule 130.5(e). Both Dr. E and Dr. ED addressed pathology of the cervical spine. The initial question thus presented is whether the diagnoses of subluxation and stenosis are mutually exclusive and whether the former is so significantly incorrect that it rendered the finality provisions of Rule 130.5(e) inapplicable. Dr. ED provided the only medical evidence on this question and simply stated in one sentence that the claimant "was previously misdiagnosed", without identifying the previous misdiagnosis or explaining why it was wrong. See Texas Workers' Compensation Commission Appeal No. 971703, decided October 15, 1997. Mindful that 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, see Cain v. Bain, 709 S.W.2d 175, 176 (Tex. 1986) and Pool v. Ford Motor Company, 715 S.W.2d 629, 635 (Tex. 1986), we conclude that this simple statement of Dr. ED does not constitute compelling evidence of a misdiagnosis that would prevent Dr. E's certification from becoming final. See Texas Workers' Compensation Commission Appeal No. 961249, decided August 12, 1996.

An additional important factor in this case that compels a reversal of the decision of the hearing officer is that the claimant admitted, with the possible exception of some temporary relief from pain for an unspecified period of time, that he was in more or less constant and intensifying pain. As quoted above, the hearing officer specifically commented that the claimant continued to experience cervical pain for several months after Dr. E's certification even though, according to the claimant, Dr. E told him the pain would go away with time. In Texas Workers' Compensation Commission Appeal No. 962427, decided January 8, 1997, the Appeals Panel reversed a decision of the hearing officer that the first certification did not become final and rendered a decision that it did. There we commented that the "claimant was aware, well within the 90-day period, that his [back] condition might be more than a strain/sprain and that the earlier [zero percent] IR might be wrong" and that he could have timely disputed the IR "through the exercise of minimal diligence." It is this knowledge of continuing pain, not formal MRI results or the prediction of Dr. E, that should have impelled the claimant to dispute the zero percent IR if he was not satisfied with it.

For the foregoing reasons, we reverse the decision and order of the hearing officer and render a decision that the first certification of a date of MMI and an IR by Dr. E became final by virtue of Rule 130.5(e).

Alan C. Ernst
Appeals Judge

CONCUR:

Elaine M. Chaney
Appeals Judge

Judy L. Stephens
Appeals Judge