APPEAL NO. 980125

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 16, 1997, with hearing officer. The issue at the CCH was whether the first certification of impairment rating (IR) assigned by (Dr. S), D.C., had become final under Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 130.5(e) (Rule 130.5(e)). The hearing officer found that the first IR assigned by Dr. S did not become final under Rule 130.5(e). The appellant (carrier) files a request for review, arguing that the hearing officer erred in finding that the first certification of IR did not become final under Rule 130.5(e) and in "concocting" a new exception to the application of Rule 130.5(e). The respondent (claimant) responds that the hearing officer did not err in her decision.

DECISION

Finding sufficient evidence to support the decision of the hearing officer and no reversible error in the record, we affirm the decision and order of the hearing officer.

The essential facts of this case are not in dispute. The parties stipulated that the claimant sustained a compensable back injury on _____. The claimant testified he injured his back at work on that day. He said he initially sought treatment from (Dr. Sa), D.C., whom the claimant testified treated him conservatively and did not do diagnostic testing other than an x-ray. The claimant testified that Dr. Sa's treatment did alleviate his symptoms to a degree and that Dr. Sa did not release him from work so that he continued to work. The claimant was examined by Dr. S on April 18, 1997. Dr. S's report indicates that he saw the claimant on referral from Dr. Sa. Dr. S diagnosed the claimant as suffering from lumbago, neuritis, and lumbar discopathy. Dr. S certified on a Report of Medical Evaluation (TWCC-69) dated April 21, 1997, that the claimant attained maximum medical improvement (MMI) on April 10, 1997, with zero percent IR. Dr. Sa agreed with this certification in a notation dated May 5, 1997. The parties stipulated that Dr. S's certification was the first certification of MMI and IR, and that the claimant did not dispute it within 90 days of receipt of notice of it. The claimant did file an Employee's Request to Change Treating Doctors (TWCC-52) to (Dr. E), D.C., dated September 15, 1997, which was approved by the Texas Workers' Compensation Commission on October 1, 1997.

Dr. E testified live at the CCH. He testified that he first saw the claimant on September 10, 1997. Dr. E stated that he felt the claimant needed an MRI because he suspected a herniated disc. Dr. E testified that he told the claimant that he needed to get approval to change treating doctors before beginning treatment. An MRI was performed on October 22, 1997. The radiology reports showed disc protrusion at T11-12 and T12-L1 as well as "[m]oderate disc degeneration, L5-S1, with a 10mm. right paracentral disc herniation, impinging the thecal sac and the proximal right S1 nerve root." Dr. E testified that he referred the claimant to (Dr. M), M.D., a neurosurgeon, who recommended a

microdiscectomy. Dr. E testified that the claimant wishes to undergo this surgery. Dr. E testified that he did not believe that the claimant had been properly treated by Dr. Sa, who failed to order an MRI and did not diagnose the disc herniation.

The claimant testified that he was put on an off-work status by Dr. E after the MRI was performed and the claimant testified that only at that point did he stop working. Dr. Sa stated as follows in a letter dated November 26, 1997:

> Since he is unable to work, his benefits need to be started. I am rescending [sic] my agreement of the April 10, 1997 [IR], and I recommend that after surgery another [IR] be done.

The hearing officer's findings of fact and conclusions of law include the following:

**FINDINGS OF FACT**

2. [Dr. S] diagnosed claimant to have lumbago, lumbar neuritis and lumbar discopathy and ordered conservative treatment including electrical stimulation and cold packs.

1. [Dr. Sa] did not order an MRI for use in evaluating Claimant's back pain.

6. [Dr. Sa] failed to render a proper diagnosis and failed to prescribe proper treatment for Claimant's back injury.

7. Prior to the 90 day time for disputing the [MMI] date and [IR], Claimant was not aware of all the facts regarding his injury which could have been known had [Dr. Sa] ordered an MRI of Claimant's lumbar spine.

**CONCLUSION OF LAW**

3. The first certification of [IR] of 0% on April 21, 1997, assigned by [Dr. Sa] did not become final under Rule 130.5(e).

The carrier argues that the hearing officer erred in not applying Rule 130.5(e). The carrier argues that Rule 130.5(e) will not be applied due to a clear misdiagnosis in rare and unusual cases and cites Texas Workers' Compensation Commission Appeal No. 950928, decided July 21, 1995; Texas Workers' Compensation Commission Appeal No. 950443, decided April 27, 1995; and Texas Workers' Compensation Commission Appeal No. 970020, decided February 7, 1997, as cases in which we reversed and rendered that the first certification of IR had become final under Rule 130.5(e) when the hearing officer had found that the rule did not apply due to misdiagnosis. The carrier cites Appeal No. 950928, *supra,* for the proposition that later diagnostic testing indicating a problem with the injured

body part does not constitute a clear misdiagnosis. The carrier also cites Texas Workers' Compensation Commission Appeal No. 961249, decided August 12, 1996, as a case in which we reversed and rendered that the first certification had become final when the hearing officer had found that it had not because of a clear misdiagnosis. Finally, the carrier contends that in making Finding of Fact No. 7, quoted above, the hearing officer had without any precedent "concocted" a new exception to Rule 130.5(e).

We initially stated in Texas Workers' Compensation Commission Appeal No. 93489, decided July 29, 1993, "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" that Rule 130.5(e) might not be dispositive. *See* Appeal No. 950443, *supr*a. We in fact affirmed the hearing officer in finding Rule 130.5(e) dispositive under the facts of Appeal No. 93489, *supra,* and in a number of cases since, including those cited by the carrier; we have reversed a number of hearing officers who found Rule 130.5(e) did not apply due to clear misdiagnosis in the cases before them. We have also stated that failure to apply Rule 130.5(e) due to misdiagnosis is only proper in rare and unusual cases. *See* Appeal No. 950928, *supra*. However, we have also affirmed a number cases where the hearing officer found that Rule 130.5(e) did not apply due to clear misdiagnosis or inadequate treatment. These include: Texas Workers' Compensation Commission Appeal No. 980052, decided February 23, 1998 (Unpublished); Texas Workers' Compensation Commission Appeal No. 962408, decided January 3, 1997; Texas Workers' Compensation Commission Appeal No. 962385, decided January 6, 1997; Texas Workers' Compensation Commission Appeal No. 972246, decided December 17, 1997 (Unpublished); Texas Workers' Compensation Commission Appeal No. 960951, decided July 3, 1996; Texas Workers' Compensation Commission Appeal No. 960943, decided July 2, 1996; Texas Workers' Compensation Commission Appeal No. 960831, decided June 17, 1996; Texas Workers' Compensation Commission Appeal No. 960007, decided February 15, 1996; Texas Workers' Compensation Commission Appeal No. 952166, decided February 1, 1996; Texas Workers' Compensation Commission Appeal No. 950572, decided May 23, 1995; Texas Workers' Compensation Commission Appeal No. 950078, decided March 20, 1995; Texas Workers' Compensation Commission Appeal No. 94932, decided August 23, 1994; Texas Workers' Compensation Commission Appeal No. 94677, decided July 11, 1994; Texas Workers' Compensation Commission Appeal No. 94352, decided May 11, 1994; Texas Workers' Compensation Commission Appeal No. 94268, decided April 19, 1994; Texas Workers' Compensation Commission Appeal No. 931115, decided January 20, 1994; and Texas Workers' Compensation Commission Appeal No. 93501, decided August 2, 1993.

Review of these cases, as well as those cited by the carrier, reveal a number of doctrines that apply to clear misdiagnosis cases. For instance, the determination of whether or not there was a clear misdiagnosis is a question of fact for the hearing officer to determine as the finder of fact. Appeal No. 960007, *supra*. The 1989 Act provides that the hearing officer is the sole judge of the weight and credibility of the evidence. Section 410.165(a). Where there are conflicts in the evidence, the hearing officer resolves the

conflicts and determines what facts the evidence has established. As an appeals body, we will not substitute our judgment for that of the hearing officer when the determination is not so against the great weight and preponderance of the evidence as to be clearly wrong or manifestly unjust. Cain v. Bain, 709 S.W.2d 175, 176 (Tex. 1986); Texas Workers' Compensation Commission Appeal No. 950456, decided May 9, 1995.

Further, we have found that the discovery of a herniated disc after testing is ordered can be a basis for a finding of clear misdiagnosis. Appeal No. 960831, *supra*. Finding of additional problems after testing can be the basis for finding misdiagnosis even in cases where there had been indications of disc problems prior to testing. Appeal No. 94677, *supra*. A change of treating doctors can also be a factor the hearing officer may consider in determining whether there was a clear misdiagnosis. Appeal No. 962408, *supra*; Appeal No. 960831, *supra*. Evidence of inadequate treatment may also be a factor. Appeal No. 952166, *supra*; Appeal No. 950572, *supra*. Applying these doctrines and applicable case law to the facts of the present case we find sufficient evidence to support the hearing officer's determination that there was a clear misdiagnosis and inadequate treatment of the claimant's injury to support not applying Rule 130.5(e) to make the first certification of MMI and IR final in this case.

We also reject the carrier's argument that the hearing officer is "concocting" a new exception to Rule 130.5(e) in her Finding of Fact No. 7. In Texas Workers' Compensation Commission Appeal No. 971703, decided October 15, 1997, we stated as follows:

> In several "90-day rule" cases, the Appeals Panel has stressed the importance of analyzing whether the claimant had or acquired important information during the 90-day period relevant to the decision to dispute the first certification. [Citations omitted.]

The hearing officer in Finding of Fact No. 7 was making such an analysis and this was perfectly proper.

The decision and order of the hearing officer are affirmed.

Gary L. Kilgore
Appeals Judge

CONCUR:

Robert W. Potts
Appeals Judge

DISSENTING OPINION:

I dissent. I would apply Rule 130.5(e) to the undisputed facts and reverse and render a decision that the Dr. S's certification of MMI on April 10, 1997, with a zero percent IR, became final by operation of law. Rule 130.5(e) provides that the first IR assigned to an injured worker will become final if not disputed within 90 days after the doctor assigned it, which we have interpreted to be the date the employee first became aware of the certification. There is no dispute in the case under review that the claimant failed to dispute Dr. S's certification within 90 days of his receipt of it.

Where an employee asserts a certification of MMI and IR should not be final under Rule 130.5(e) because of a clear misdiagnosis, the claimant has the burden to prove the misdiagnosis. Texas Workers' Compensation Commission Appeal No. 950724, decided June 12, 1996. There can be no previously undiagnosed medical condition when the condition in question was diagnosed, present and documented when the first certification was given. Texas Workers' Compensation Commission Appeal No. 951987, decided January 6, 1996. The claimant challenged the certification for one reason: his new doctor, Dr. E, thought his injury was more severe than Dr. S did. There was no "clear misdiagnosis" or "new, previously undiagnosed medical condition." On April 18, 1997, Dr. S diagnosed lumbago, neuritis and lumbar discopathy. The fact that Dr. E opined the claimant's condition included a herniated disc, as opposed Dr. S's diagnosis, does not equate to a misdiagnosis.

I also disagree with the majority's attempt to engraft a new, unfounded Rule 130.5(e) requirement that an employee know about a reason to dispute the first certification. There is no such requirement in the rule. This new requirement runs afoul of the purpose of Rule 130.5(e), that is finality. There could be a myriad of events occurring after the 90-day window to dispute has lapsed. Since the future is uncertain, anything that happens after the 90 days is something the employee was unaware of during the 90 days. Just because the claimant did not know during the 90-day period that he would be able to one day find a doctor who would diagnose his condition as a herniated disc is no reason to ignore Rule 130.5(e).

Christopher L. Rhodes
Appeals Judge