APPEAL NO. 980235
FILED MARCH 23, 1998

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 January 13, 1998, in (City), Texas, with (hearing officer) presiding as hearing officer. With regard to the issue at the CCH, he determined that the August 12, 1996, certification of maximum medical improvement (MMI), with a five percent impairment rating (IR), by the appellant (self-insured)-selected required medical examination doctor, Dr. SI, did not become final by operation of Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 130.5(e) (Rule 130.5(e)). The self-insured appeals, seeks a reversal of the decision and argues that Dr. SI's certification became final because the respondent (claimant) did not dispute it within 30 days of her first receipt of it. The claimant does not respond.

DECISION

We affirm.

The parties stipulated that on _____, the claimant sustained a compensable injury while working for the self-insured, that Dr. SI's certification was the first certification of the date of MMI and the IR and that the claimant first received notice of Dr. SI's certification on August 22, 1996. The claimant argued at the CCH that she timely disputed Dr. SI's certification by informing, via telephone conference, the self-insured's third-party administrator's adjuster, Ms. B, and the Texas Workers' Compensation Commission's (Commission) customer assistant, Ms. S. She also argued that her treating doctor, Dr. B, disputed Dr. SI's certification on her behalf when he expressed his disagreement with it on a copy of Dr. SI's Report of Medical Evaluation (TWCC-69). The claimant argued, in the alternative, that Dr. SI's certification did not become final because of a clear misdiagnosis of her condition.

The claimant testified at the CCH, in response to questions concerning her communications with Dr. B, regarding Dr. SI's certification as follows:

> I asked him–to on my behalf would he disagree with it–did he agree with it or disagree with it. He told me he would disagree–he would have to disagree with it because of my condition on my behalf.

There is no dispute that the self-insured received the copy of Dr. SI's TWCC-69 with Dr. B's disagreement on September 18, 1996, and that the Commission did not receive a copy of it within 90 days after August 22, 1996. On January 31, 1997, the claimant filed a Notice of Maximum Medical Improvement/Impairment Rating Dispute (TWCC-32) and on February 11, 1997, in response thereto, the Commission field office sent her a letter informing her that her request to dispute Dr. SI's certification was denied per Rule 130.5(e).

The following finding of fact is not appealed and, therefore, became final by operation of law, under Section 410.169 and Rule 142.16(f):

FINDING OF FACT

6. Claimant did not dispute the first certification of [MMI] and [IR] assigned by [Dr. SI] during telephone calls to [Ms. B] on August 22, 1996, September 23, 1996, October 7, 1996, October 23, 1996, October 24, 1996, or October 25, 1996, or during telephone calls with [Ms. S] on November 14, 1996.

The hearing officer also made the following findings of fact, which the self-insured appeals:

FINDINGS OF FACT

7. Claimant disputed the first certification of [MMI] and [IR] when [Dr. B] disputed with the [Commission] and with the [self-insured] on her behalf by mailing the form TWCC-69 with a notation indicating his disagreement to [self-insured].

9. Claimant has ratified the action of [Dr. B] in disputing the first certification of [MMI] and [IR] with [self-insured] within 90 days.

11. Claimant's undiagnosed knee condition constitutes an undiagnosed medical condition, significant error, clear misdiagnosis, or similar circumstance which prevents Rule 130.5(e) from being dispositive.

The self-insured argues on appeal that there is no evidence to indicate that Dr. B acted on the claimant's behalf in disputing Dr. SI's certification. It argues Dr. B merely complied with Rule 130.3(b)(2), which requires a treating doctor to mail to the Commission a TWCC-69 indicating his disagreement with another doctor's certification of MMI or IR. The self-insured also cites portions of the TWCC-69 checked by Dr. B:

✓ I DISAGREE with the above doctor's certification of [MMI].

☐ I DISAGREE with the above doctor's assigned [IR].

The self-insured stresses that the portions of the form completed by Dr. B reflected his own disagreement with Dr. SI's certification, not the claimant's own dispute of it. The self-insured argues that even if Dr. B acted on the claimant's behalf, he did not communicate the claimant's dispute to Ms. B and the self-insured when he sent it the TWCC-69.

The first date of MMI and IR assigned to an injured worker will become final if not disputed within 90 days after the doctor assigned it. Rule 130.5(e). The 90 days runs from the date the parties become aware of the rating. Texas Workers' Compensation Commission Appeal No. 960220, decided March 20, 1996. An employee's treating doctor may effect a dispute if his action in disputing the certification is as the employee's agent or at the employee's behest. Texas Workers' Compensation Commission Appeal No. 94519, decided June 14, 1994. There must be some level of involvement by the employee for an effective dispute and a treating doctor's own actions do not effect a dispute. Texas Workers' Compensation Commission Appeal No. 952151, decided February 5, 1996. We agree with the self-insured that Dr. B's mailing of a copy of Dr. SI's TWCC-69 containing his disagreement with Dr. SI's certification does not, in and of itself, constitute a dispute on the claimant's behalf. However, his disagreement and the claimant's testimony that he disagreed to effect a dispute on her behalf supports the hearing officer's finding of a timely dispute. Texas Workers' Compensation Commission Appeal No. 961569, decided September 23, 1996. We reject the hearing officer's rationale that an employee can "ratify" a treating doctor's disagreement, thus making the disagreement an effective dispute. Therefore, we regard Finding of Fact No. 9 as surplusage.

With regard to the claimant's argument that Dr. SI misdiagnosed her condition, the hearing officer, in the "Statement of the Evidence" portion of the decision, quotes the following passage from Dr. B's October 27, 1997, report:

> Initially, the injuries were described as the neck, lumbar spine, and right ankle. We diagnosed cervical sprain, lumbosacral sprain, and right ankle sprain. . . .
>
> [The claimant] later developed symptoms of pain and swelling of both knees. These knee complaints were related to the original injury of _____. We had not specifically addressed the knees at the time that she had an appointment with [Dr. SI] in August, 1996. [Dr. SI] based his finding of [MMI] and impairment based on the symptoms of neck, back, and right ankle.
>
> Subsequent to her visit with [Dr. SI], we referred [the claimant] to [Dr. SD] for evaluation of her knees. He saw her in November 1996. At that time, he instituted some diagnostic testing and determined that surgical intervention was indicated for her knees. He performed the surgical procedures on the knees on two occasions. This information was not present and not available to [Dr. SI] when he did his [MMI] certification in August 1996.

The medical records reflect that an orthopedic surgeon, Dr. D, performed arthroscopic surgery on the claimant's right knee on April 15, 1997. On July 15, 1997, Dr. B stated

that "[h]er left knee is indeed a part of the original injuries. . . ." The medical records reflect that Dr. D performed arthroscopic surgery on her left knee on August 25, 1997.

The self-insured argues that the condition of the claimant's knees was not misdiagnosed and that the treatment she received subsequent to Dr. SI's evaluation was merely an alternative means of treatment. The claimant testified at the CCH that Dr. SI examined her knees. Dr. SI's August 13, 1996, impairment evaluation report stated:

> She has constant right leg pain. The right leg gets numb, and she points to the side of her leg where the numbness occurs.
>
> Reflexes, knee jerks 2+, bilaterally; ankle jerks trace, bilaterally. There is no evidence of pathological reflexes.
>
> Examination of right leg: There is no evidence of atrophy. There is no evidence of swelling. There is no evidence of inflammatory reaction. The calf is soft.

In certain limited and rare situations, compelling medical evidence of a new, previously undiagnosed medical condition or improper or inadequate treatment of an injury could mean that an initial MMI and IR determination is invalid. Texas Workers' Compensation Commission Appeal No. 93489, decided July 29, 1993. Where an employee asserts a certification of MMI and IR should not be final under Rule 130.5(e) because of a clear misdiagnosis, he has the burden to prove this misdiagnosis. Texas Workers' Compensation Commission Appeal No. 950724, decided June 12, 1996. There is not a 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 9, 1996. A certifying doctor's failure to consider an employee's entire injury in an IR does not necessarily invalidate a first certification. Texas Workers' Compensation Commission Appeal No. 970001, decided February 18, 1997, *citing* Texas Workers' Compensation Commission Appeal No. 941748, decided February 13, 1995. The need for more aggressive medical treatment of a condition, including surgery, is not, in and of itself, the equivalent of a clear misdiagnosis. Texas Workers' Compensation Commission Appeal No. 970020, decided February 7, 1997.

Whether a misdiagnosis occurred is a factual determination for the hearing officer. Texas Workers' Compensation Commission Appeal No. 960402, decided April 12, 1996. The hearing officer, as finder of fact, is the sole judge of the relevance and materiality of the evidence as well as of the weight and credibility that is to be given the evidence. Section 410.165(a). It was for the hearing officer, as trier of fact, to resolve the inconsistencies and conflicts in the evidence. Garza v. Commercial Insurance Co. of Newark, New Jersey, 508 S.W.2d 701 (Tex. Civ. App.-Amarillo 1974, no writ). This is equally true regarding medical evidence. Texas Employers Insurance Association v.

Campos, 666 S.W.2d 286 (Tex. App.-Houston [14th Dist.] 1984, no writ). 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.

We conclude that the determination regarding the timeliness of the claimant's dispute is not so against the great weight and preponderance of the evidence as to be clearly wrong or manifestly unjust. With a timely dispute, the matter of a clear misdiagnosis is largely moot. Nevertheless, we conclude that the clear misdiagnosis finding is supported by Dr. B's October 27, 1997, report.

Finding no reversible error, we affirm.

Christopher L. Rhodes
Appeals Judge

CONCUR:

Alan C. Ernst
Appeals Judge

Judy L. Stephens
Appeals Judge