

APPEAL NO. 990080

This appeal arises pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act). A contested case hearing was held on December 17, 1998. He determined that the appellant's (claimant) first certification of maximum medical improvement (MMI) and impairment rating (IR) became final and that the claimant did not have disability as a result of an injury sustained on \_\_\_\_\_. The claimant appeals these determinations, contending that they are not supported by sufficient evidence. The respondent (carrier) replies that the decision is correct, supported by sufficient evidence, and should be affirmed.

DECISION

Affirmed.

On \_\_\_\_\_, the claimant lost her footing while descending a ladder. She was able to cling to the ladder with her legs and eventually reached the ground. She said she experienced low back and bilateral leg pain. Dr. N became her treating doctor. According to the claimant, she told him of her low back and radiating pain, but he took no x-rays and prescribed bed rest and pain medications. She said she was off work from July 26 to July 31, 1995, and that her symptoms never went away. She further testified that Dr. N diagnosed lumbar and bilateral thigh strains.

On December 7, 1995, Dr. W examined the claimant and completed a Report of Medical Evaluation (TWCC-69) in which he certified August 7, 1995, as the date of MMI and assigned a zero percent IR. According to his report, he selected this date of MMI because he understood this to be the date the claimant returned to work. He noted complaints of leg and hip pain. His diagnosis was bilateral thigh strain. On February 7, 1996, Dr. N completed a TWCC-69 in which he diagnosed hip and thigh sprains and assigned a five percent IR and a date of MMI of December 12, 1995. On March 15, 1996, the Texas Workers' Compensation Commission approved a change of treating doctors to Dr. B.

Meanwhile, on (subsequent date of injury), according to the claimant, she sustained another injury to the shoulders and low back as a result of a lifting incident and has not worked since that date. The claimant introduced medical evidence concerning this second injury, but no attempt was made to relate it to the issues then before the hearing officer, which dealt solely with an injury of \_\_\_\_\_, or otherwise place it in the context of these proceedings. Various reports in evidence refer to the different injuries. In any case, Dr. B requested an MRI, which was performed on June 11, 1996, and which disclosed, among other things, herniation at L5-S1. On September 25, 1996, the claimant underwent a laminectomy and discectomy.

Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 130.5(e) (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. 94354, decided May 10, 1994. There was no dispute that Dr. W's certification of MMI and IR was the first assigned to the claimant for purposes of this rule or that it was not disputed by the claimant within 90 days of her receiving it. In Texas Workers' Compensation Commission Appeal No. 93489, decided July 29, 1993, the Appeals Panel observed that the passage of 90 days would not be dispositive where there was "compelling medical or other evidence" showing that the original MMI and IR were invalid because of some significant error or because of a clear misdiagnosis or where there is "compelling evidence of a new, previously undiagnosed medical condition or prior improper or inadequate treatment of the claimant's injury which would render the certification of MMI invalid."

In this case, the hearing officer made findings of fact that the claimant's \_\_\_\_\_, injury was no more than a bilateral thigh strain and that Dr. W's certification became final. As noted above, despite evidence of a later, separate work-related injury, the issue in this case was solely limited to the \_\_\_\_\_, injury. In her appeal of the hearing officer's finality determination, the claimant again fails to distinguish between the two incidents and simply asserts a clear misdiagnosis. We infer that the misdiagnosis alleged is failure to diagnose herniation and stress. The claimant had the burden of proving that Dr. W's certification did not become final. Texas Workers' Compensation Commission Appeal No. 950724, decided June 12, 1995. Whether a misdiagnosis occurred was a question of fact for the hearing officer to decide. Texas Workers' Compensation Commission Appeal No. 960402, decided April 12, 1996. The MRI and diagnosis of Dr. B, on which the claimant relies for her claim of misdiagnosis, occurred after the second injury. Dr. N's diagnosis appears to be limited to a soft-tissue strain injury to the lower extremities. Under these circumstances and on this record, we find the determination of the hearing officer that the \_\_\_\_\_, injury involved only a bilateral thigh injury, sufficiently supported by the evidence and decline to reverse that determination under our standard of review. Cain v. Bain, 709 S.W.2d 175, 176 (Tex. 1986); Pool v. Ford Motor Company, 715 S.W.2d 629, 635 (Tex. 1986). Also important, we believe, is the claimant's explicit testimony that before the MRI she believed her injury was more than a strain. When she developed this knowledge was not explored, but she also testified to continued complaints of back pain since the injury. From the claimant's testimony, it can readily be inferred that the claimant knew she had what she believed was a serious back injury, but did nothing to timely dispute a zero IR. Given such inaction in the face of these known facts, the claimant has not established a case for avoiding the application of Rule 130.5(e) to her case. Texas Workers' Compensation Commission Appeal No. 980073, decided February 26, 1998; Texas Workers' Compensation Commission Appeal No. 962427, decided January 8, 1997.

The other issue in this case was disability, defined by the 1989 Act as the "inability to obtain and retain employment at wages equivalent to the preinjury wage," as a result of the \_\_\_\_\_, injury. This issue, too, was confused by the failure to distinguish the

effects of the two claimed injuries. Indeed, at one point, the claimant's attorney asked the claimant if she was able to work since August 26, 1996. The claimant replied that she was not, but the date was essentially meaningless in terms of the other evidence presented. The claimant also testified that her back pain significantly increased after (subsequent date of injury). Whether disability existed was a question of fact for the hearing officer to decide and could be proved by the testimony of the claimant alone if found credible. Texas Workers' Compensation Commission Appeal No. 93560, decided August 19, 1993.

The hearing officer did not believe the claimant met her burden of proving disability. He found no disability as a result of the \_\_\_\_\_, injury. In her appeal, the claimant asserts disability only after the surgery in September 1996 and raises no question about the failure to find disability before then. Given the restricted nature of this appeal, the events after the \_\_\_\_\_, injury, and lack of any identified rationale for overturning the disability finding in terms of the issue before the hearing officer, we find the evidence sufficient to support the disability determination.

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

Alan C. Ernst  
Appeals Judge

CONCUR:

Thomas A. Knapp  
Appeals Judge

Elaine M. Chaney  
Appeals Judge