APPEAL NO. 990090

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. On the single issue before her, the hearing officer determined that the appellant's (claimant) first certification of maximum medical improvement (MMI) and impairment rating (IR) rendered by Dr. M became final under Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 130.5(e) (Rule 130.5(e)). The claimant appeals, urging that he was unaware of when he received the first certification and that he did not know of it until July 2, 1998, and he disputed it the same day, and that the first IR did not rate the whole injury. The respondent (carrier) replies that the findings and conclusions of the hearing officer are supported by sufficient evidence and should be affirmed.

DECISION

Affirmed.

The claimant sustained injury to his knees and back on _____; subsequently had arthroscopic surgery on his left knee; reached statutory MMI; and was certified by his then treating doctor, Dr. M, to be at MMI on September 27, 1997, with a zero percent IR. The claimant testified that total knee replacement surgery was discussed as a future possibility with Dr. Mc, who claimant saw in August 1997, and there is a medical record of August 15, 1997, from Dr. Mc discussing his left knee condition. Dr. M's first certification report was subsequently rendered. The carrier presented evidence that showed the claimant received and signed for written notification of the certification of MMI and IR by Dr. M on October 18, 1997. Claimant states that he did not know of Dr. M's certification until July 2, 1998, that he disputed it at that time, but that he may have "gotten some papers" from the carrier in October 1997. Claimant also contents that Dr. M only rated his left knee and not his back or right knee.

Subsequent to Dr. M's first certification, in a report dated October 3, 1997, Dr. W, who had been treating the claimant, rendered a report showing MMI as of September 30, 1997, with an 11% IR. The carrier apparently paid claimant impairment income benefits based on this 11%. The claimant had total knee replacement surgery in April 1998 and Dr. W rendered a report dated September 14, 1998, indicating MMI as September 3, 1998, with an 18% IR. The claimant disputed Dr. M's first certification of MMI and IR on July 2, 1998.

The hearing officer found that the claimant received written notice of the first certification of MMI/IR on October 18, 1997, and did not dispute it within 90 days. There is sufficient evidence to support these factual determinations by the hearing officer from the evidence presented by the carrier (particularly the green card receipt) and the testimony of the claimant that he might have gotten some papers and that he disputed after July 2, 1998. 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. The 90 days runs from the

date the party is given written notice of the rating. Texas Workers' Compensation Commission Appeal No. 960220, decided March 20, 1996. The fact that a party was not aware of the 90-day rule does not excuse the failure to comply with the rule. Texas Workers' Compensation Commission Appeal No. 94269, decided April 20, 1994. The Appeals Panel has held that, 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 determination is invalid. Texas Workers' Compensation Commission Appeal No. 93489, decided July 29, 1993. Where a claimant asserts that 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 this misdiagnosis. Texas Workers' Compensation Commission Appeal No. 950724, decided June 12, 1995. Here, the medical records over the course of the initial treatment, the first surgery, and the subsequent treatment show that there was no misdiagnosis or inadequate treatment, although eventually knee replacement surgery was deemed appropriate. This course of treatment does not establish a basis for the 90-day rule to become inoperative.

The claimant also faults the certification of Dr. M because it did not rate his whole injury. Although the medical records at that time appeared to concentrate on the left knee only, an assertion that the whole injury was not rated in a first certification is one of the matters that needs to be disputed within the 90 days. Texas Workers' Compensation Commission Appeal No. 941748, decided February 13, 1995. Thus, although the claimant's initial position is that he did not know of the first certification, a position not found by the hearing officer, the claimant has not established any other basis to reject the first certification. Accordingly, the decision and order are affirmed.

_____
Stark O. Sanders, Jr.
Chief Appeals Judge

CONCUR:

_____
Thomas A. Knapp
Appeals Judge

_____
Elaine M. Chaney
Appeals Judge