

APPEAL NO. 990300

This appeal arises pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act). On January 6, 1999, a contested case hearing was held. She (hearing officer) determined that the first certification of maximum medical improvement and zero percent impairment rating (IR) for respondent (claimant) assigned by Dr. M on July 10, 1997, (the "first certification") did not become final pursuant to Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 130.5(e) (Rule 130.5(e)). Appellant (carrier) appeals, contending that the first certification did become final and that there was no clear misdiagnosis in this case. Claimant replied that the Appeals Panel should affirm the hearing officer's decision and order.

DECISION

We affirm.

Carrier contends the hearing officer erred in determining that there was a clear misdiagnosis and that the first certification did not become final. Carrier asserts that claimant knew he had a neck injury with neck pain, so he was required to dispute the zero percent first certification.

Claimant testified that he was injured on _____, when he hit his shoulder on the rack of a truck. He said he felt immediate shoulder pain that was "coming up" the side of his neck. Claimant said he first went to the company doctor, who said there was nothing wrong with him. He then saw Dr. M, who x-rayed his neck and ordered MRI testing, and then told claimant nothing was wrong with his neck except some slight bulges. When claimant told Dr. M he was still having shoulder and neck pain, he said Dr. M replied that there is nothing to be concerned about. Claimant said Dr. M convinced him that he had carpal tunnel syndrome (CTS) and said that he underwent surgery on his left hand in 1997. Claimant testified that he was told to go back to work, but that he was still having problems. Claimant said he requested another doctor and went to Dr. R, who sent him to Dr. MI. Claimant said both Dr. R and Dr. MI said they thought claimant's symptoms were caused by his neck. Claimant said that after he found out he had a problem with his neck, he disputed the first certification. Claimant testified that when he was treating with Dr. M, he was told there was no problem with his neck, that he did not know he had a neck problem, and that all he knew was that he had shoulder pain shooting into his neck.

In August 1997, Dr. M noted that claimant may have a possible cervical radicular syndrome, but that there was no abnormality on claimant's x-rays other than some "narrowing" at C5-6. In August 1997, Dr. M sent claimant for EMG testing and the prescription stated "cervical radicular syndrome L shoulder bursitis." In September 1997, Dr. M wrote that EMG testing demonstrated "significant" CTS and said claimant's shoulder is better and that "there is no evidence of cervical radiculopathy." In September 1997, Dr. D stated that claimant injured his shoulder and arm and that he had a positive test for compression of the carpal tunnels. In a January 1998 report, Dr. D noted that claimant was

still having pain after his CTS release surgery. In May 1998, Dr. R stated that the vast majority of claimant's discomfort is coming from his cervical spine. In June 1998, Dr. D released claimant to regular duties, noting that he was seeing Dr. MI for neck pain. A July 23, 1998, myelogram report states, in pertinent part, "right sided filling defect with mass effect on nerve roots at the C4-5 level." A CT scan report states that claimant has a small right foraminal disc herniation at C4-5 which "markedly narrows the right C4-5 foramen and prevents filling of nerve roots with contrast." On July 28, 1998, Dr. MI stated that claimant has a "degenerative disc with symptomology secondary to his on the job injury suffered _____, and that he is a candidate for a cervical fusion. Claimant's surgery recommendation was approved under the spinal surgery process. In a September 3, 1997, letter, carrier's claims representative stated that carrier has "never disputed that cervical problems were related to [claimant's] compensable injury."

On the Report of Medical Evaluation (TWCC-69) certifying the first certification, Dr. M's only diagnosis is 726.1, which concerns the shoulder. Dispute Resolution Information System notes show that claimant disputed the first certification by calling the Texas Workers' Compensation Commission on September 8, 1998.

The Appeals Panel has opined that compelling medical evidence of a new, previously undiagnosed medical condition or improper or inadequate treatment of an injury could render an initial certification of IR invalid. See Texas Workers' Compensation Commission Appeal No. 93489, decided July 29, 1993. The "common thread" running through cases where the Appeals Panel has agreed that it is appropriate not to apply Rule 130.5(e), is that an element of the compensable injury, or its attendant impairment which was not included in the first IR, was diagnosed or arose after the 90-day period. Texas Workers' Compensation Commission Appeal No. 941748, decided February 13, 1995. In short, a claimant cannot dispute something he does not know about; however, a claimant is expected to act with reasonable prudence when information is developed within the 90-day period that indicates a basis for disputing a first certification of IR.

Here, the first certification was based on Dr. M's belief that claimant's symptoms were caused by CTS. Claimant said Dr. M told him this and said that he did not have a neck problem. Claimant said he was then treated by Dr. D for CTS. However, after the 90 days had already passed, claimant learned from Dr. R and Dr. MI that his pain was due to a surgical condition in his neck. In this case, the hearing officer properly concluded that it was reasonable that claimant did not dispute the IR within 90 days because he did not know that his symptoms were caused by a neck injury rather than by CTS. In fact, there was evidence that claimant was told that his pain was not due to a neck injury and that his doctors focused only on CTS after the EMG studies were performed. When claimant discovered the true diagnosis regarding the neck, he disputed the first certification in September 1998.

We conclude that the hearing officer did not err in determining that the first certification did not become final based upon an undiagnosed surgical neck condition. It does not appear that, during the 90-day period, claimant knew that he had significant

impairment in his neck, so that he could have disputed. Claimant did know that he sustained a neck injury, but the hearing officer could find from the evidence that he did not believe his continuing problems or impairment was due to a neck condition.

We affirm the hearing officer's decision and order.

Judy Stephens
Appeals Judge

CONCUR:

Philip F. O'Neill
Appeals Judge

Tommy W. Lueders
Appeals Judge