

APPEAL NO. 990343

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 January 25, 1999. With respect to the issues before her, the hearing officer determined that the first certification of maximum medical improvement (MMI) and impairment rating (IR) became final pursuant to Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 130.5(e) (Rule 130.5(e)); that the appellant (claimant) reached MMI on August 3, 1995, with an IR of seven percent; and that the claimant has had disability since August 3, 1995. In her appeal, the claimant argues that the first certification of MMI and IR did not become final because it was the product of an undiagnosed condition, clear misdiagnosis, improper or inadequate treatment or other significant error. In its response, the respondent (self-insured) urges affirmance.

DECISION

Affirmed.

The parties stipulated that the claimant sustained a compensable injury in the course and scope of her employment as a nurse assistant at the self-insured hospital on _____. The claimant testified that she was helping another nurse assistant move a large, total care patient and she injured her neck, back and left arm. Dr. B became the claimant's treating doctor. In a letter of April 10, 1995, Dr. B diagnosed myofascitis with early cervical spondylosis and noted that "[t]here are no signs of any pathology that would require surgical intervention." Dr. B treated the claimant conservatively and her symptoms persisted. In December 1997, Dr. B referred the claimant for an MRI because of the persistent nature of the claimant's complaints and her failure to improve with conservative treatment. The claimant's December 11, 1997, cervical MRI revealed a left paracentral disc bulge at C5-6 and a mild right-sided and to a lesser extent left-sided posterior disc bulge at C7-T1. The opinion section of the MRI report stated that the test had revealed "mild degenerative changes in mid to lower cervical spine" and "no focal [herniation]."

In April 1998, the claimant had her first appointment with Dr. G, who became her treating doctor after Dr. B retired. Dr. G ordered a cervical myelogram and a post-myelogram CT scan. The July 24, 1998, cervical myelogram revealed bulging or protruded discs at C4-5, C5-6, and C6-7. The post-myelogram CT scan demonstrated a "bulged disc centrally at C4-5, with mild impingement on the thecal sac," a "left paracentral lateral osteophytosis with 2.5 mm overlying left paracentral herniated disc at C5-6 with significant impingement on the thecal sac and spinal cord," and "a sizable 4-5 mm osteophytosis left laterally with significant impingement upon the thecal sac" Dr. G recommended spinal surgery, an anterior cervical discectomy at C5-6 and C6-7 with bone grafting. Dr. A, the self-insured's second opinion doctor did not concur in the need for surgery; however, Dr. CB concurred in the claimant's need for spinal surgery and the surgery is currently pending.

On August 3, 1995, Dr. H examined the claimant at the request of the self-insured. In a Report of Medical Evaluation (TWCC-69) dated August 17, 1995, Dr. H certified that the claimant reached MMI on August 3, 1995, with an IR of seven percent for loss of cervical range of motion (ROM). It is undisputed that Dr. H's certification was the first

certification of MMI and IR. The claimant acknowledged that she received Dr. H's certification and that she did not dispute it within 90 days of the date of receipt.

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 parties are given written notice of the rating. Texas Workers' Compensation Commission Appeal No. 960220, decided March 20, 1996. 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, as here, a claimant asserts that a certification of MMI and IR should not be final under Rule 130.5(e), the claimant has the burden to prove that the passage of the 90 days was not determinative. Texas Workers' Compensation Commission Appeal No. 950724, decided June 12, 1995.

In this case, the claimant argues that there was compelling evidence of a previously undiagnosed condition, namely the herniated discs at C5-6 and C6-7, and that, as such, Dr. H's certification did not become final despite its not having been disputed in the 90-day period. Essentially, as the hearing officer noted, the claimant appears to be arguing that if the additional diagnostic testing had been performed in 1995, the herniations would have been discovered and Dr. H would not have certified MMI at that time with a seven percent IR solely for loss of ROM. The hearing officer rejected the claimant's argument, noting that it appears that there was really a substantial change in the claimant's condition which did not provide a basis for avoiding finality under Rule 130.5(e). After reviewing the record in this case, we cannot agree that the hearing officer erred in determining that Dr. H's certification became final. As the hearing officer noted neither the December 1997 MRI nor the 1995 MRI revealed herniation. Thus, she determined that the evidence simply did not support a determination that the herniations were present and undiagnosed when Dr. H completed his examination of the claimant in August 1995, certifying MMI and assigning a seven percent IR. As such, the claimant did not sustain her burden of proving that she fell within one of the stated bases for avoiding finality under Rule 130.5(e), and the hearing officer properly determined that the claimant reached MMI on August 3, 1995, with an IR of seven percent. In addition, the hearing officer correctly determined that although the claimant continues to experience disability, she is not entitled to temporary income benefits because she has reached MMI. See Section 408.102(a).

The hearing officer's decision and order are affirmed.

Elaine M. Chaney
Appeals Judge

CONCUR:

Susan M. Kelley
Appeals Judge

Judy L. Stephens
Appeals Judge