APPEAL NO. 990799

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 March 16, 1999. The issue at the CCH was stated as whether the first certification of maximum medical improvement (MMI) and the impairment rating (IR) assigned to the respondent (claimant) by Dr. G on October 10, 1997, became final under Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE §130.5(e) (Rule 130.5(e)).

The hearing officer held that the first IR had not become final because the claimant had received inadequate care for his back injury, and that his condition was clearly misdiagnosed at the time the first IR was done.

The appellant (carrier) appeals, arguing that the evidence does not support a misdiagnosis or inadequate treatment, and that, in any case, the need for further surgery was developed and known to the claimant well within the 90-day period. The claimant responds by asserting arguments he raised at the CCH, that claimant's treating chiropractor had disputed the IR timely, that the 90-day period should not be deemed to have started prior to the date the claimant had surgery, and that the evidence supported the rationale of the hearing officer.

DECISION

Affirmed.

The claimant was employed by (employer), a well servicing company, on _____. He was injured when he jumped from a platform because a high pressure hose came loose and began whipping around the area. Claimant hurt his back.

It was brought out in the testimony that claimant had previous back surgery in 1991 due to a 1986 injury. However, he had been released and had been back at work doing labor such as well servicing. The claimant sought treatment by Dr. M, D.C., who was apparently his treating doctor, but because Dr. M did not have prescriptive authority, claimant returned to Dr. G, who had done his 1991 surgery, for treatment. Claimant said he received therapy and pain medication with little lasting impact. An MRI of the lumbar spine taken January 31, 1997, showed no evidence of recurrent disc herniation. On May 8, 1997, Dr. G stated that electrical studies showed a nerve root irritation at the L5 nerve root. Dr. G continued conservative management. In June 1997, a series of epidural blocks were authorized through the carrier, but claimant determined not to undergo them. He testified at the CCH, that he felt he was having some heart problems that would make these shots inadvisable (although he had not been concretely diagnosed with cardiac disease). On July 10, 1997, the adjuster for the carrier wrote to Dr. G and inquired as to what further procedures would be necessary to bring him to a state of MMI, and if no further treatment was necessary, to complete the enclosed Report of Medical Evaluation (TWCC-69) form.

Dr. G's response is handwritten and regrettably cannot be fully read; it appears to defer any conclusion on MMI pending another examination. A subsequent typewritten file note states that "at this point in time the patient is stuck." Dr. G points out that the MRI was not impressive, but that claimant's pain and problems are real. He concluded by stating that claimant would be returned to light work and his home exercise program would be monitored. On September 12, 1997, Dr. G noted that the claimant had some L5 nerve root irritation on an EMG but no other findings that appeared to be operable in nature. He suggested that a referral be made to a new doctor in the area, Dr. S, for a second evaluation of claimant's back. Dr. G concluded that claimant was "ready for a disability rating based on no improvement, based on our opinion no operative intervention capability and based on the fact that he does not want further pain reduction techniques."

On October 10, 1997, Dr. G assessed a 12% IR. Dr. G's chart note of October 20th states that, in his opinion, claimant needed a second opinion "despite the fact that we have gone on with the disability rating. It is my opinion the patient is a candidate for further opinion." The underlying narrative indicated that the IR resulted from a specific condition of the spine, from range of motion deficits, and from loss of strength and sensation. The date of MMI was September 23, 1997.

Claimant was aware of, and actually received, the TWCC-69 filed by Dr. G sometime in early November. In addition, copies were mailed by the Texas Workers' Compensation Commission (Commission) and the carrier with instructions about the importance of disputing the IR within 90 days. The carrier's certified receipt for its letter was signed by the claimant on November 12, 1997. (Ninety days from this date would be February 11, 1998.)

Claimant first saw Dr. S on November 11, 1997. He testified that he understood that this was a referral for considering and evaluating whether surgery would be necessary. Dr. S noted that claimant had low back pain secondary to spondylolisthesis and possibly some pseudoarthrosis following lumbar fusion. Dr. S noted that claimant might very well require instrumented fusion at L4-S1, but that a CT scan would more accurately delineate any pathology. A month later, Dr. S noted that things had not changed as far as claimant's pain and the CT scan was pending, and a further recommendation was made for a discogram at L5-S1. On January 8, 1998, Dr. S noted that claimant could hardly walk after a three-hour car trip, and that his CT scan showed spondylosis of L5. Dr. S's recorded diagnosis at this examination was pseudoarthrosis and that claimant would require a fusion. Dr. S noted that the second opinion process would be required by the Commission. However, a week later Dr. S appears to be continuing conservative treatment. It was not until his February 13, 1998, appointment with Dr. S that the surgical recommendation is once more made and apparently activated. After this, the claimant had surgery on April 27, 1998. On May 12, 1998, claimant was noted by Dr. S as contending his pre-operative pain had completely resolved. At the CCH, claimant was a little more guarded in his assessment, stating that while his pain improved, he still had pain of the magnitude precluding work.

Concerning whether Dr. M filed a dispute on claimant's behalf, the claimant said he did not know until after the fact that Dr. M indicated his disagreement with the IR at the bottom of the TWCC-69 form. He stated that he did not disagree with this. Dr. M was contacted by the ombudsman for the Commission and responded that he filed the TWCC-69 simply to give his opinion to the carrier about the IR, and did not do so after speaking with the claimant or as an agent. Dr. M did not date his submission but it appears that the Commission received the TWCC-69 from him at least by mid November 1997.

It was claimant's argument that, prior to actually having surgery (April 27, 1998), he did not have any basis for disputing the IR. On November 24, 1998, Dr. G attempted to explain why he had done an IR. While the letter is somewhat hard to understand, Dr. G appears to agree that the claimant, at the time of his IR, was not treated to the appropriate potential and "of course we did not know that because of the inability to do the second opinion prior to giving him a disability rating." Dr. G stated that the "disability rating" should be reevaluated.

The hearing officer determined both that the claimant's medical condition was misdiagnosed at the time his first IR was done, and that he received inadequate medical care for a spondylolisthesis, in spite of a fusion being done. The hearing officer also found that the claimant first knew of his first IR not later than October 27, 1997. (Ninety days from this date ended on January 25, 1998.) The carrier challenges this basis for setting aside the first IR, arguing that claimant's condition had not changed and was known at the time of the first IR.

Rule 130.5(e) provides that the first IR assigned to an injured worker becomes final if not disputed within 90 days. The Appeals Panel has, however, interpreted the rule and the 1989 Act together and has therefore held that in exceptional situations where compelling medical evidence of a new, previously undiagnosed medical condition, substantial change in a claimant's medical condition, or improper or inadequate treatment of an injury is present, that the first IR will not be found to have become final under Rule 130.5(e). These cases represent decisions where Rule 130.5(e) is found essentially not to have been triggered. *See* Texas Workers' Compensation Commission Appeal No. 950971, decided July 31, 1995; Texas Workers' Compensation Commission Appeal No. 94932, decided August 23, 1994; Texas Workers' Compensation Commission Appeal No. 93501, decided August 2, 1993. Whether a misdiagnosis occurred is a factual determination for the hearing officer. Texas Workers' Compensation Commission Appeal No. 960402, decided April 12, 1996. The need for surgery per se is not the equivalent of a clear misdiagnosis. Texas Workers' Compensation Commission Appeal No. 970020, decided February 7, 1997.

However, the Appeals Panel has also held that IRs made conditional or contingent upon the occurrence of further treatment or further surgery may not always be accorded finality under Rule 130.5(e). *See* Texas Workers' Compensation Commission Appeal No. 941247, decided October 28, 1994; Texas Workers' Compensation Commission Appeal No. 94324, decided May 4, 1994.

We also acknowledge those cases in which the Appeals Panel has indicated that the 90 days allowed by Rule 130.5(e) have been granted precisely to allow a reaction to new knowledge or information about the extent of an injury that arise within that period following the assessment of an initial IR. Commenting on certain cases where the Appeals Panel found the first assigned IR not to have become final, the majority decision in Texas Workers' Compensation Commission Appeal No. 941748, decided February 13, 1995, stated:

> The common thread in Appeal Nos. 93501, 931115 [Texas Workers' Compensation Commission No. 931115, decided January 20, 1994], and 941069 [Texas Workers' Compensation Commission Appeal No. 941069, decided September 20, 1994] is that the element of the compensable injury that was not included in the initial IR was diagnosed or arose after the expiration of the 90-day period. Therefore, the claimant was unaware of its existence, and, more significantly, the attendant impairment associated with that non-rated portion of the compensable injury during the relevant period. Accordingly, claimant could not have disputed the rating on the basis of its failure to include a rating for all of the permanent impairment related to the compensable injury within 90 days.

We note, however, that such cases have tended to involve questions over the extent of the injury, as opposed to cases where it would appear that the first IR rendered was conditional, provisional, or partial.

The hearing officer has correctly stated that the claimant was not diagnosed with a failed fusion until he treated with Dr. S. We cannot necessarily agree with the claimant that he had no basis for disputing the IR until the very day of his surgery; clearly, surgery and pseudoarthrosis (which represented a new diagnosis compared to early opinions), or the arguable inadequacy of treatment therefor, were reported by Dr. S on January 8, 1998, still within the 90-day period. However, Dr. S, the next week, appears to have put such plans on hold until February 13, 1998, outside of the 90-day period. In this case, although the hearing officer analyzed the matter purely in terms of whether there was inadequate treatment or a misdiagnosis, we are struck by the fact that Dr. G rendered an IR at the same time that he urged the necessity of a second opinion precisely to evaluate whether further surgery would be warranted. This is analogous to the language in the "conditional IR" cases cited above (and other cases cited therein). We may reconcile the contingent IR cases (where subsequent surgery or treatment was rendered within the 90 days) with the line of cases stating that new conditions known within 90 days should be disputed therein, by noting that a contingent IR that indicates it is provisional or temporary pending the occurrence of further specified treatment or surgery which ultimately occurs could be interpreted as an IR which falls by its own terms because it was provisional from the outset.

Under the array of facts here, we affirm the hearing officer's decision that claimant's first IR did not become final. Although we will not second guess and do not necessarily agree with the hearing officer's factual resolution of the matter of whether there was, or was

not, inadequate treatment or a misdiagnosis, we note that we will uphold the hearing officer's judgment if it can be sustained on any reasonable basis supported by the evidence. Daylin, Inc. v. Juarez, 766 S.W.2d 347, 352 (Tex. App.-El Paso 1989, writ denied); Texas Workers' Compensation Commission Appeal No. 950791, decided July 3, 1995. The evidence in this case supports with equal force that the first IR was expressly conditional on a second opinion of the need for further surgery.

Finally, because the evidence was undisputed that Dr. M did not file a dispute to the IR with the involvement of the claimant in any way, we cannot agree with claimant's contention that he made a timely dispute through Dr. M. *See* Texas Workers' Compensation Commission Appeal No. 990201, decided March 22, 1999.

For the reasons stated above, we affirm the hearing officer's decision and order.

_____
Susan M. Kelley
Appeals Judge

CONCUR:

_____
Stark O. Sanders, Jr.
Chief Appeals Judge

_____
Dorian E. Ramirez
Appeals Judge