APPEAL NO. 990855

On March 31, 1999, a contested case hearing (CCH) was held. The CCH was held under the provisions of the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq*. (1989 Act). The issue at the CCH was whether the first certification of maximum medical improvement (MMI) and assignment of an impairment rating (IR) by Dr. S on May 28, 1997, became final under Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 130.5(e) (Rule 130.5(e)). The appellant (carrier) requests reversal of the hearing officer's decision that the first certification of MMI and assignment of an IR was based on a clear misdiagnosis by Dr. S and did not become final under Rule 130.5(e). The respondent (claimant) requests affirmance.

DECISION

Affirmed.

Claimant works as a parts salesman for employer. He testified that he injured his back at work on _____, when he lifted a case of antifreeze. The parties stipulated that on _____, claimant sustained a compensable injury to his low back. Claimant indicated that employer sent him to Dr. S and that Dr. S took an x-ray, prescribed medications and physical therapy, and released him to return to work part time with restrictions. He said he saw Dr. S six times. In a Report of Medical Evaluation (TWCC-69) dated May 28, 1997, Dr. S certified that claimant reached MMI on May 22, 1997, with a zero percent IR. In a narrative report, Dr. S diagnosed claimant as having a lumbar strain and wrote that lumbar x-rays ruled out a fracture, that he initially released claimant to limited duty, that the treatment plan included physical therapy and medication, that from May 9 to May 28, 1997, he saw claimant six times, and that claimant is released from his care. Claimant apparently was last evaluated by Dr. S on May 28, 1997. The parties stipulated that on May 28, 1997, Dr. S, the claimant's treating doctor at that time, certified that claimant had reached MMI on May 22, 1997, and assigned him a zero percent IR, and that Dr. S was the first doctor to certify MMI and assign claimant an IR.

The adjustor handling claimant's claim stated in an affidavit that a copy of Dr. S's TWCC-69 and a TWCC-28 (Notification Regarding [MMI] and/or [IR]) were mailed to the claimant on June 20, 1997. The TWCC-69 in evidence contains a notice that the first IR assigned by a doctor is considered final if not disputed within 90 days from receiving notice of the rating and the TWCC-28 in evidence contains a notice that if claimant does not agree with the finding of MMI or with the IR assigned by the doctor, he can dispute the rating by contacting the Texas Workers' Compensation Commission (Commission) within 90 days from receiving notice of the doctor's rating. Claimant said he received carrier's letter notifying him that Dr. S had reported that he was at MMI and had a zero percent IR at the end of June 1997 or in early July 1997. Claimant said that he did not at that time dispute the zero percent IR and that he returned to his full-time normal work duties in May or June 1997 when Dr. S gave him a release. He moved twice but continued to work at employer's stores. He said he did not reinjured himself and that his condition got worse.

Claimant said that he did not know that he could continue to receive medical treatment under workers' compensation insurance and that in August 1997 he began seeing a doctor in (Country) about once every two months and that that doctor prescribed pain medications and told him in July or August 1998 that he should have an MRI.

Claimant said that he began seeing Dr. B, D.C., in August 1998 and in that month the Commission approved his request to change treating doctors from Dr. S to Dr. B. In an initial report dated August 18, 1998, which notes a date of visit of August 4, 1998, Dr. B diagnosed claimant as having a lumbar sprain/strain, radiculitis, and myospasm. Dr. B referred claimant for an MRI.

According to a Commission Dispute Resolution Information System entry of August 11, 1998, claimant requested on that day that the Commission set a benefit review conference on the "90 day issue," and a "dispute" was added on that issue.

A radiologist reported that the lumbar MRI done on September 9, 1998, showed a disc protrusion at L4-5, with minimal thecal sac impingement, and a minimal disc bulge at L5-S1. Dr. B referred claimant to Dr. A for electrodiagnostic testing and in a report dated October 20, 1998, Dr. A diagnosed claimant as having work-related HNP (herniated nucleus pulposus) at L4-5 and L5-S1 (he noted the MRI) and lumbar radiculopathy, including the bilateral L4 through S1 motor roots. Dr. A wrote that claimant has not reached MMI, that there is a significant chance that he may have to have surgery, and that he has a 29% IR. Dr. B referred claimant to Dr. G, an orthopedic surgeon, and Dr. G wrote in March 1999 that claimant's MRI findings are consistent with disc protrusions and that he is recommending that claimant undergo an intradiscal electro-thermal therapy procedure and that claimant not work. Claimant said that he is scheduled for a discogram and that he still works for employer.

The hearing officer found that the true nature of claimant's back injury of _____, was a disc protrusion causing minimal thecal sac impingement at L4-5 and a disc bulge at L5-S1 and that Dr. S was unaware of the true nature of claimant's back injury and clearly misdiagnosed it as a lumbar sprain. The hearing officer decided that the first certification of MMI and assignment of an IR by Dr. S on May 28, 1997, was based on a clear misdiagnosis by Dr. S on May 28, 1997, and did not become final under Rule 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. It is clear that claimant did not dispute the first IR within 90 days after receiving written notice of the rating and did not dispute that rating for over a year. In Texas Workers' Compensation Commission Appeal No. 93489, decided July 29, 1993, the Appeals Panel noted that if it were determined from compelling evidence that a certification of MMI or an IR was invalid because of a clear misdiagnosis, then a situation could result where the passage of 90 days would not be dispositive.

In Texas Workers' Compensation Commission Appeal No. 960831, decided June 17, 1996 (Judge Knapp dissenting), the Appeals Panel affirmed a hearing officer's decision that

a first IR did not become final under Rule 130.5(e) based on the hearing officer's finding of a clear misdiagnosis where the doctor who assigned the first IR had diagnosed a cervical strain and an MRI done two years later revealed two disc herniations. The hearing officer cites Appeal No. 960831 in his decision.

The hearing officer is the sole judge of the weight and credibility of the evidence. Section 410.165(a). That different factual determinations could have been made based upon the same evidence is not a sufficient basis to overturn factual determinations of the hearing officer. Texas Workers' Compensation Commission Appeal No. 94466, decided May 25, 1994. We conclude that the hearing officer's decision is supported by sufficient evidence and is not so against the great weight and preponderance of the evidence as to be clearly wrong and unjust. Cain v. Bain, 709 S.W.2d 175, 176 (Tex. 1986).

The hearing officer's decision and order are affirmed.

_____
Tommy W. Lueders
Appeals Judge

CONCUR:

_____
Philip F. O'Neill
Appeals Judge

DISSENTING OPINION:

I respectfully dissent. As written, Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 130.5(e) (Rule 130.5(e)) contains no exceptions. The Appeals Panel has noted that in certain limited circumstances, such as a clear misdiagnosis, an impairment rating (IR) might be found to be invalid, thereby precluding finality under Rule 130.5(e). Texas Workers' Compensation Commission Appeal No. 93489, decided July 29, 1993. Texas Workers' Compensation Commission Appeal No. 960831, decided June 17, 1996, which was relied upon by the hearing officer in the instant case, is distinguishable from the facts of the instant case because in Appeal No. 960831 the doctor who initially assigned an IR wrote an amended report after an MRI was done, which amended report tended to support a finding of a clear misdiagnosis. I would hold that the evidence is insufficient in the case under consideration to support a finding of a clear misdiagnosis at the time the first IR was assigned.

_____
Robert W. Potts
Appeals Judge