

APPEAL NO. 991020

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 commenced on March 4, 1999, with the record closing on April 9, 1999. The sole issue at the CCH was whether the first certification of maximum medical improvement (MMI) and impairment rating (IR) assigned by Dr. K on August 26, 1997, became final under Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 130.5(e) (Rule 130.5(e)). The hearing officer concluded that this certification did become final. The appellant (claimant herein) files a request for review, arguing that the hearing officer's decision was contrary to the evidence. The claimant argues that the first certification should not become final because of misdiagnosis and because it was rescinded. The respondent (carrier herein) replies that there is sufficient evidence to support the findings of the hearing officer and the hearing officer's determination that the first certification became final pursuant to Rule 130.5(e).

DECISION

Finding sufficient evidence to support the decision of the hearing officer and no reversible error in the record, we affirm the decision and order of the hearing officer.

The parties stipulated that the claimant sustained a compensable left knee injury on \_\_\_\_\_. A number of other facts are not in dispute. These include that Dr. K has been the claimant's treating doctor; that on June 6, 1997, Dr. K performed surgery on the claimant's left knee; that afterwards Dr. K released the claimant to light-duty work and she worked for a period of time; that Dr. K certified that on August 26, 1997, the claimant had reached MMI with a four percent IR; that this was the first certification of MMI and IR; that the claimant did not dispute this certification within 90 days of receiving written notice of it from the carrier on September 25, 1997; that the claimant underwent a second surgery on her knee in May 1998 and a third surgery in June 1998; and that on July 14, 1998, Dr. K wrote a letter rescinding his first certification. Dr. K stated as follows in this letter:

[The claimant] reached [MMI] on 8-25-97 and had her [IR] then. Her knee problems continued and kept getting worse. Eventually we had to operate again on the knee for the same problem. Therefore, we need to rescind her [MMI] as she is not at [MMI] at this time either.

Rule 130.5(e) provides as follows:

The first impairment rating assigned to an employee is considered final if the rating is not disputed within 90 days after the rating is assigned.

We have held that this time does not begin to run until a party has received written notice of the assignment of an IR. Texas Workers' Compensation Commission Appeal No. 951229, decided September 5, 1995. In this case written notice of the IR was received by

the claimant on September 25, 1997. The claimant admits she not dispute this certification until July 1998, clearly more than 90 days after she received it.

Nor does the rescission by Dr. K make any difference. We have held that, where there is a clear misdiagnosis or egregious error in a first IR, finality of the first rating may not occur under the 90-day provision of Rule 130.5(e). Texas Workers' Compensation Commission Appeal No. 93489, decided July 29, 1993; Texas Workers' Compensation Commission Appeal No. 950928, decided July 21, 1995. Here, the hearing officer finds that there is no evidence of misdiagnosis and the evidence supports this, including the letter from Dr. K which indicates that he continues to treat the claimant for her same condition. The fact that the condition did not improve, or even got worse, does not necessarily establish a misdiagnosis.

The decision and order of the hearing officer are affirmed.

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Gary L. Kilgore  
Appeals Judge

CONCUR:

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Stark O. Sanders, Jr.  
Chief Appeals Judge

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Robert W. Potts  
Appeals Judge