APPEAL NO. 991238

This appeal arises under the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq*. (1989 Act). On May 17, 1999, a contested case hearing was held. With respect to the issue before him the hearing officer determined the first certification of maximum medical improvement and impairment rating (IR) assigned by Dr. L on April 19, 1993, became final under Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 130.5(e) (Rule 130.5(e)). The appellant (claimant) files a request for review, arguing that first certification did not become final due to inadequate treatment. The respondent (self-insured) replies that the hearing officer resolved the factual dispute concerning this and that we should affirm his decision.

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 facts of this case were not in serious dispute and were summarized by the hearing officer as follows:

> Claimant testified that he worked as a laborer for (City 1) and that he twisted his back while picking up a saw on _____. He felt low back pain and began treatment with [Dr. L]. Claimant had a laminectomy performed by [Dr. L] in December of 1992. Claimant testified that his low back pain improved after the surgery for about 6 months. After about 6 months, his low back pain began to worsen and he ultimately had a spinal fusion performed by [Dr. A] in March of 1998.
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> Claimant received an [IR] of 12% from [Dr. L] on April 19, 1993. He received 36 weeks of impairment benefits based on this [IR]. Claimant was aware of the [IR] given by [Dr. L] but did not dispute that rating within 90 days. In fact, Claimant did not dispute the April 19, 1993 [IR] until almost 5 years later when the need for a second surgery developed. Claimant argues that the first [IR] did not become final because Claimant received inadequate treatment by [Dr. L] as evidenced by the fact that Claimant needed further surgery 5 years later.
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> Carrier argues that there is no evidence of an inadequate treatment. The medical evidence indicates Claimant improved for 6 months after the initial surgery, that Claimant returned to work at his regular job, and that he gradually got worse, resulting in the need for a spinal fusion in March of 1998. Carrier argues that the first [IR] of 12% by [Dr. L] was not disputed within 90 days and has become final.
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> Rule 130.5(e) provides as follows:

> The first [IR] assigned to an employee is considered final if the rating is not disputed within 90 days after the rating is assigned.

We had 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. However, on July 1, 1999, the Texas Supreme Court in Rodriguez v. Service Lloyds Insurance Company, No. 98-0006, (Tex.) July 1, 1999, held that it did not recognize "ad hoc exceptions to the 90-day rule." Even were this not the case, the hearing officer found that the evidence did not establish misdiagnosis or inadequate treatment and this factual finding is sufficiently supported by the evidence in the record.

The decision and order of the hearing officer are affirmed.

Gary L. Kilgore
Appeals Judge

CONCUR:

Elaine M. Chaney
Appeals Judge

Judy L. Stephens
Appeals Judge