APPEAL NO. 991307

Following a contested case hearing held on May 13, 1999, pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act), the hearing officer, resolved the disputed issues by determining that, based on a previously undiagnosed condition (torn rotator cuff), the first certification of maximum medical improvement (MMI) and impairment rating (IR) assigned by Dr. F on July 24, 1997, for the respondent's (claimant) _____, shoulder injury (strain) did not become final under Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 130.5(e) (Rule 130.5(e)) and that claimant's MMI date and IR are not ripe for adjudication until a designated doctor is appointed. The appellant (self-insured) asserts in its request for review that these determinations are against the great weight of the evidence. Claimant urges in his response that the challenged factual findings and legal conclusions should be affirmed.

DECISION

Reversed and a new decision rendered.

The parties stipulated that on _____, claimant sustained a compensable injury; that on July 24, 1997, Dr. F assigned the first certification of MMI and IR; that a member of claimant's household received Dr. F's July 24, 1997, report on August 27, 1997; and that neither claimant nor the carrier disputed Dr. F's July 24, 1997, report within 90 days of written notice of the certification.

Claimant testified that on _____, while working for the self-insured as a substitute school custodian (having previously retired and begun working on a substitute basis), he was taking a sofa out of a school building on a dolly and when the wind hit the sofa, he twisted and fell, striking his right shoulder on the sidewalk. He said he went to a (clinic) and was seen by Dr. F; that he was released to return to light-duty work; that he returned to the clinic for a second visit; that a few days later someone at the school told him he needed a full-duty release to continue working; that he returned to the clinic on July 24, 1997, and obtained a full-duty release; and that he continued working as a substitute custodian, albeit in pain, until January 16, 1998, when the increasing pain in his right shoulder became so severe he went to an emergency room. Claimant, who receives Social Security retirement benefits, said he was diagnosed with a torn rotator cuff by Dr. G, underwent a surgical repair, and has not since worked.

The clinic records reflect that on _____, Dr. F diagnosed shoulder strain which he treated, that he released claimant for limited duty effective the next day, and that he scheduled a follow-up visit for July 16, 1997. Dr. F's _____, records also reflect that claimant had a normal shoulder shrug and that the shoulder x-rays were negative. The clinic records further show that on July 16, 1997, Dr. F noted that the shoulder was improved, again released claimant for limited duty with an apparent decrease in restrictions, and scheduled a follow-up visit for July 24, 1997. The July 24, 1997, records reflect that on that date claimant was released for full duty and a follow-up visit was scheduled for August

11, 1997. On July 24, 1997, Dr. F signed a Recommendation for Spinal Surgery (TWCC-63) certifying that claimant had reached MMI on that date with an IR of "0%." As noted, the stipulations establish that claimant received written notice of this IR and did not dispute it within 90 days thereafter. 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."

Dr. G's December 3, 1997, record reflects that claimant, then 68 years of age, was seen for a history of right shoulder pain for about three months; that he brought x-rays which show an obvious rotator cuff tear; that an MRI will be obtained to confirm the tear; and that claimant will need a repair. Dr. G's January 27, 1998, report states that claimant has a global tear of his supraspinatus/infraspinatus at the right shoulder and needs a repair and reconstruction. Dr. G's January 29, 1998, Report of Operation reflects the diagnosis as global tear of the right rotator cuff. The report also comments that the appearance of the tissue suggested a longer than the three-month history stated by claimant.

Dr. J issued a peer review report to the carrier on February 23, 1999, noting, among other things, that a rotator cuff tear cannot be diagnosed with x-rays.

The hearing officer found in Finding of Fact No. 2 that Dr. F certified that claimant reached MMI on July 24, 1997, with a "0%" IR based on a diagnosis of shoulder strain and prior to claimant's being diagnosed with a torn rotator cuff and, in Finding of Fact No. 3, that the first IR certified by Dr. F did not become final because it was rendered upon lack of knowledge of a previously undiagnosed condition, specifically, a right rotator cuff tear. Based on these findings and the stipulated facts, the hearing officer determined in Conclusion of Law No. 3 that the first certification of MMI and IR by Dr. F on July 24, 1997, did not become final under Rule 130.5(e) and, in Conclusion of Law No. 4, that claimant's MMI date and IR are not ripe for adjudication until a designated doctor is appointed.

The Appeals Panel early in its consideration of Rule 130.5(e) recognized that the rule does not provide for any good cause exceptions. Texas Workers' Compensation Commission Appeal No. 92670, decided February 1, 1993. However, in Texas Workers' Compensation Commission Appeal No. 93489, decided July 29, 1993, the Appeals Panel observed that Rule 130.5(e) is not absolute and that where there is compelling medical or other evidence of a significant error or clear misdiagnosis, a situation could result where the passage of 90 days following the assignment of the first IR would not be dispositive. For example, in Texas Workers' Compensation Commission Appeal No. 93501, decided August 2, 1993, an MRI obtained after the first certification of an MMI date and assignment of an IR was held to constitute compelling medical evidence of a material change of condition sufficient to render the first assigned IR invalid. *And see* Texas Workers' Compensation Commission Appeal No. 94475, decided June 3, 1994. The facts in Texas Workers' Compensation Commission Appeal No. 94677, decided July 11, 1994, are similar to the case we now consider. In that case, after the first IR of eight percent was assigned in November 1992 by the treating doctor, a new and different type of imaging exam was obtained by the doctor in February 1993 following the employee's continued complaints and

this testing revealed subluxation and instability at L5-S1 which required surgery. *Compare* Texas Workers' Compensation Commission Appeal No. 94671, decided July 18, 1994.

In Rodriguez v. Service Lloyds Insurance Company, 42 Tex. Sup. Ct. J 900 (July 1, 1999) (motion to extend time to file motion for rehearing extended to August 16, 1999), the Texas Supreme Court considered Rule 130.5(e) in the context of a claimant whose first treating doctor, a chiropractor, assigned an IR of four percent which was, apparently, the first assigned IR and not disputed; who was later found by an orthopedic surgeon to have a severely ruptured disc with nerve root impingement requiring surgery; and who sought, unsuccessfully, a change in her initial IR through the Texas Workers' Compensation Commission's (Commission) benefit dispute resolution process. The Court's majority opinion stated that "[t]he plain language of the 90-day Rule does not contain exceptions"; that "[t]he Rule's language is consistent with the Commission's intent"; that "in interpreting this rule . . . the Commission appeals panels have created exceptions" which it referred to as "broad ad hoc exceptions" and identified as "substantial change of condition," "significant error," and "clear misdiagnosis"; and that "given the language and intent of the 90-day Rule, we cannot recognize the exceptions to the 90-day Rule that Rodriguez pleads, including substantial change of condition." The Court's minority opinion is generally supportive of the Appeals Panel's interpretation of Rule 130.5(e).

We regard the majority opinion in Rodriguez as presently binding on the Appeals Panel. Accordingly, we determine that the hearing officer's Findings of Fact Nos. 2 and 3 and Conclusions of Law Nos. 3 and 4 to be erroneous as a matter of law. We reverse the decision and order of the hearing officer and render a new decision that Dr. F's zero percent IR is final under Rule 130.5(e).

_____
Philip F. O'Neill
Appeals Judge

CONCUR:

_____
Gary L. Kilgore
Appeals Judge

_____
Alan C. Ernst
Appeals Judge