

APPEAL NO. 991410

This appeal arises pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act). A contested case hearing was held on June 7, 1999. The issues concerned whether the first impairment rating (IR) assigned to the respondent (claimant), became final because he did not appeal it within 90 days, as provided in Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 130.5(e) (Rule 130.5(e)). There were dependent issues of the date of maximum medical improvement (MMI) and the amount of the IR.

The hearing officer determined that there was a misdiagnosis due to the failure of the appellant (self-insured) to authorize an MRI, upon which the first IR was based, and therefore it did not become final, notwithstanding the claimant's failure to timely dispute it. Because of this, the hearing officer held that MMI and IR were not ripe for decision.

The self-insured appeals, citing the recent Texas Supreme Court case of Rodriguez v. Service Lloyds Insurance Company, 42 Tex. Sup. Ct. J. 900 (July 1, 1999) (motion for rehearing pending) (Rodriguez case) as dispositive of this case, requiring reversal. There is no response from the claimant.

DECISION

Reversed and rendered.

The claimant injured his back and knee on _____, while employed by the self-insured. His treating doctor, Dr. P, issued a Report of Medical Evaluation (TWCC-69) on April 16, 1998, finding that the claimant had reached MMI on that date, with a 14% IR. The claimant admitted that he did not dispute this IR within 90 days after receiving it (the hearing officer found this date was May 20, 1998). He said that he believed that the IR was for his knee only.

The narrative report that accompanied the TWCC-69 indicated that the claimant's lumbar strain had resolved with conservative therapy. The claimant denied that this was so and said he felt it was worse. The claimant said Dr. P had requested an MRI of his back but it was denied. There was no evidence of any dispute resolution procedure to review this denial.

The claimant said he ultimately had an MRI on October 7, 1998, which showed a herniated disc. He had back surgery on February 4, 1999. The claimant said he had disputed the IR on February 1, 1999. Dr. P changed his IR to 20% on February 23, 1999.

The hearing officer held that the first IR from Dr. P did not become final because of a misdiagnosis brought about by the failure of the self-insured to approve a needed test. However, misdiagnosis has been held by the Texas Supreme Court in the Rodriguez case to not provide a basis for setting aside a first IR. That case also involved the belated

detection of a surgical condition in the injured worker's back after a first IR had been undisputed for 90 days. The Court's majority opinion concluded that the plain language of Rule 130.5(e) allowed for no exceptions.

Because the situation here is analogous to the facts of the Rodriguez case, we must, as we similarly did in Texas Workers' Compensation Commission Appeal No. 991307, decided July 28, 1999, reverse the decision of the hearing officer. We render a decision that the claimant's first IR became final because it was not disputed within 90 days and that he reached MMI on April 16, 1998, with a 14% IR.

Susan M. Kelley
Appeals Judge

CONCUR:

Philip F. O'Neill
Appeals Judge

Judy L. Stephens
Appeals Judges