

APPEAL NO. 991457

This appeal after remand arises pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act). On June 8, 1999, a contested case hearing (CCH) was held. He (hearing officer) determined that the first certification of maximum medical improvement (MMI) and impairment rating (IR) certified by Dr. D on September 16, 1998 (the first certification), did not become final under Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE 130.5(e) (Rule 130.5(e)). Appellant self-insured ("carrier" herein) appeals, contending that the hearing officer erred in determining that the first certification did not become final pursuant to Rule 130.5(e). Respondent (claimant) responds that the Appeals Panel should affirm the hearing officer's decision and order.

DECISION

We reverse and render.

Carrier contends the hearing officer erred in determining that the first certification did not become final pursuant to the 90-day rule because of a clear misdiagnosis or inadequate treatment. The hearing officer determined that: (1) on _____, claimant sustained a compensable injury; (2) claimant underwent a right L4-5 microdiscectomy on May 18, 1998; (3) claimant continued to have back and leg pain; (4) on August 13, 1998, claimant's treating doctor certified that she had reached MMI as of that date; (5) on October 14, 1998, claimant received written notice that she had reached MMI with an IR of 12%; (6) in February 1999, claimant's treating doctor advised her that her spine was out of alignment and that bone was rubbing against bone; (7) claimant disputed the first certification on February 10, 1999; (8) the treating doctor changed claimant's diagnosis to degenerative disc disease, mechanical back pain, and intervertebral disc disorder, which would require additional spinal surgery; (9) on May 5, 1999, claimant had additional spinal surgery, after which she had "major improvement"; (10) claimant did not have sufficient information and understanding of her progressive problems until February 10, 1999; and (11) the first certification did not become final pursuant to Rule 130.5(e). In the decision and order, the hearing officer said, "there is compelling evidence of a new, previously undiagnosed medical condition or prior improper or inadequate treatment of the claimant's injury" and that, because of that, the first certification did not become final.

Rule 130.5(e), "the 90-day rule," 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." In earlier cases, the Appeals Panel had observed that Rule 130.5(e) is not absolute and that where there is compelling 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. Texas Workers' Compensation Commission Appeal No. 93489, decided July 29, 1993. However, in Rodriguez v. Service Lloyds Insurance Company, 42 Tex. Sup. Ct. J. 900 (July 1, 1999) (motion for reh'g filed), the Texas Supreme Court considered whether there are any exceptions to Rule 130.5(e). The Texas Supreme Court's majority opinion stated that: (1) "[t]he plain language of the

90-day Rule does not contain exceptions"; (2) "[t]he Rule's language is consistent with the Commission's intent"; (3) "in interpreting this rule . . . the [Texas Workers' Compensation Commission (Commission)] appeals panels have created exceptions"; and (4) "given the language and intent of the 90-day Rule, we cannot recognize the exceptions to the 90-day Rule that [the injured worker] pleads, including substantial change of condition."

We regard the majority opinion in Rodriguez as presently binding on the Appeals Panel. Accordingly, we conclude that the hearing officer erred in determining in Conclusion of Law No. 3 that the first certification did not become final.

We reverse the hearing officer's decision and order and render a new decision that Dr. D's 12% IR has become final pursuant to the 90-day rule.

Judy Stephens
Appeals Judge

CONCUR:

Joe Sebesta
Appeals Judge

Tommy W. Lueders
Appeals Judge