APPEAL NO. 991508

On June 14, 1999, a contested case hearing (CCH) was held. The CCH was held under the provisions of the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq*. (1989 Act). The issue at the CCH was whether the first certification of maximum medical improvement (MMI) and impairment rating (IR) assigned by Dr. K on December 10, 1997, became final under Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 130.5(e) (Rule 130.5(e)). Appellant (claimant) requests that the hearing officer's decision that the first certification of MMI and IR assigned by Dr. K on December 10, 1997, became final under Rule 130.5(e) be reversed and that a decision be rendered in his favor. Respondent (carrier) requests affirmance.

DECISION

Affirmed.

Rule 130.5(e) provides that the first IR assigned to an employee is considered final if the rating is not disputed within 90 days after the rating is assigned. Impairment means any anatomic or functional abnormality or loss existing after MMI that results from a compensable injury and is reasonably presumed to be permanent. Section 401.011(23). An IR means the percentage of permanent impairment of the whole body resulting from a compensable injury. Section 401.011(24). Section 408.123(a) provides in part that, after an employee has been certified by a doctor as having reached MMI, the certifying doctor shall evaluate the condition of the employee and assign an IR using the IR guidelines described in Section 408.124. The Appeals Panel has held that if the IR becomes final under Rule 130.5(e), then so does the underlying finding of MMI. Texas Workers' Compensation Commission Appeal No. 92670, decided February 1, 1993. In Rodriguez v. Service Lloyds Insurance Company, 42 Tex. Sup. Ct. J. 900 (July 1, 1999) (motion for rehearing filed), the Supreme Court of Texas considered Rule 130.5(e) and the majority opinion concluded that Rule 130.5(e) does not allow for exceptions, stating that, "Thus, based on the Commission's [Texas Workers' Compensation Commission] intent and the Rule's clear language, we conclude that Rule 130.5(e) has no exceptions and that an [IR] is final if not disputed within ninety days."

Claimant testified that he injured his back at work on _____, when he slipped in a puddle of water and grabbed hold of a cart to keep from falling. The parties stipulated that claimant sustained a compensable injury on _____. Claimant was seen by Dr. F, who referred claimant to Dr. G. Dr. G noted in January 1997 that an MRI showed a large disc herniation at L5-S1 on the right side with obliteration of the nerve root on that side. Apparently, Dr. G recommended spinal surgery and Dr. C, who gave a second opinion on spinal surgery, saw claimant in March 1997 and wrote that claimant is a candidate for a fusion and that if claimant does not have a fusion, he may develop severe discogenic pain after surgery necessitating another surgery in the form of a fusion. In an operative report dated April 3, 1997, Dr. G wrote that he performed spinal surgery on claimant consisting of a laminotomy, discectomy, and foraminotomy at L5-S1 for a herniated disc at that level. A

fusion is not mentioned in the operative report. Claimant said that the April 1997 surgery did not help him and that he continued to have pain. Dr. G wrote in June 1997 that claimant continued to have pain and in September 1997 wrote that claimant had lumbar epidural steroid injections that did not relieve his pain. Dr. FR wrote in October 1997 that a postoperative MRI showed scar tissue with no recurrent herniation. Claimant underwent a myelogram and CT scan in November 1997.

In a Report of Medical Evaluation (TWCC-69) dated December 10, 1997, Dr. K, an orthopedic surgeon, noted that he was a carrier-selected doctor; that he examined claimant on December 9, 1997; and that claimant reached MMI on December 9, 1997, with an 11% IR. Dr. K noted in his narrative report that claimant's diagnosis is S1 nerve root radiculopathy of the right lower extremity and failed back surgery. Dr. K wrote in the narrative report that claimant is at MMI but needs further treatment with pain management and that a repeat surgical procedure may be necessary in the future. The parties stipulated that Dr. K was the first doctor to certify MMI and assign claimant an IR. In a letter dated January 2, 1998, the Commission notified claimant that Dr. K had reported that he had reached MMI on December 9, 1997, with an 11% IR and that if he did not agree with the certification of MMI or the IR he must dispute those issues by contacting the Commission within 90 days after receiving notice of the certification. Claimant said that he got notice of the IR about a week after the IR was done. The parties stipulated that there was no timely dispute of the certification of MMI and IR by claimant.

Dr. G wrote in January 1998 that he was recommending that claimant undergo a decompression and interbody fusion at L5-S1, but that he wanted claimant to undergo a discogram and CT scan. Dr. GU, who was apparently a second opinion doctor on spinal surgery, saw claimant in January 1998 and wrote that claimant has a possible recurrent herniated disc and scar tissue and that he agreed that claimant should have a decompression and fusion.

Claimant began treating with Dr. R in April 1998 and Dr. R wrote that claimant has a possible recurrent disc herniation, that he wanted claimant to undergo a discogram, and that if that test was positive, claimant would be a candidate for an L5-S1 discectomy with interbody fusion. Dr. R reviewed the results of a discogram and CT scan done in May 1998 and diagnosed claimant with a recurrent right L5-S1 disc protrusion with internal disc disruption syndrome at that level. Dr. R noted that claimant was a candidate for an L5-S1 fusion.

In a letter dated June 17, 1998, the Commission notified claimant that his request to dispute MMI and/or IR was denied because Commission records reflected that the dispute was raised after 90 days.

Dr. R noted that carrier had waived a second opinion on spinal surgery and in July 1998 Dr. R performed spinal surgery on claimant consisting of several procedures including an interbody fusion at L5-S1 for a recurrent disc herniation at L5-S1. Dr. R wrote in August 1998 that he disagreed with Dr. K's finding of MMI because claimant had surgery in July

1998. Dr. R wrote in April 1999 that the first surgery claimant underwent in April 1997 was inadequate and that only with a complete laminectomy/facetectomy with radical discectomy could claimant's pathology have been adequately addressed.

Claimant argued at the CCH that the first certification of MMI and IR assigned by Dr. K was not final under Rule 130.5(e) because it was based on a misdiagnosis and inadequate treatment. The hearing officer found that the evidence showed no circumstance which would prevent Rule 130.5(e) from being dispositive and concluded that the first certification of MMI and IR assigned by Dr. K on December 10, 1997, became final under Rule 130.5(e). On appeal, claimant contends, as he did at the CCH, that the great weight of the evidence shows that his first surgery should have included a fusion and thus his medical treatment was inadequate and that that prevents Dr. K's certification of MMI and an IR from becoming final under Rule 130.5(e). Basically, claimant cites prior Appeals Panel decisions for the proposition that inadequate treatment is an exception to Rule 130.5(e) which may prevent finality under Rule 130.5(e). Claimant's contention is contrary to the majority opinion in the Rodriguez, *supra*, case, which we are bound by. *See* Texas Workers' Compensation Commission Appeal No. 991307, decided July 28, 1999. We conclude that the hearing officer's decision is consistent with the law and supported by sufficient evidence.

The hearing officer's decision and order are affirmed.

_____
Robert W. Potts
Appeals Judge

CONCUR:

_____
Thomas A. Knapp
Appeals Judge

_____
Dorian E. Ramirez
Appeals Judge