APPEAL NO. 992071

This appeal arises under the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq*. (1989 Act). On August 10, 1999, a contested case hearing was held. With regard to the only issue before him, the hearing officer determined that the first certification of maximum medical improvement (MMI) and impairment rating (IR) assigned by Dr. W on April 1, 1998, has become final under Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 130.5(e) (Rule 130.5(e)) and that appellant (claimant) reached MMI on March 31, 1998, with an eight percent IR as assessed by Dr. W.

Claimant appealed, requesting that we reverse the hearing officer's decision and render a new decision that Dr. W's certification has not "become final under Rule 130.5 as the treating physician did not properly diagnosis [sic] the ulnar nerve problem" which was caused by the compensable injury. Respondent (carrier) responds, urging affirmance.

DECISION

Affirmed.

Claimant testified through a translator and the hearing officer made several unappealed findings to the effect that claimant sustained a compensable injury lifting furniture at work on _____; that he injured his right elbow, which was diagnosed as a rupture of the triceps tendon; that Dr. W performed surgery on the right elbow on November 2, 1997; and that claimant returned to work on March 21, 1998.

In evidence is a Report of Medical Evaluation (TWCC-69) dated April 1, 1998, with range of motion measurements which certified MMI on March 31, 1998, with an eight percent IR. It is undisputed that this is the first certification of MMI and IR. Also in evidence is a letter dated April 16, 1998, from the Texas Workers' Compensation Commission (Commission), advising claimant, in Spanish, of Dr. W's March 31, 1998, certification of MMI and eight percent IR and advising claimant that if he does not agree with the IR he must dispute it within 90 days. Carrier also offers a form notice dated April 9, 1998, advising claimant of the MMI and IR certification. The hearing officer made an unappealed finding that claimant received Dr. W's IR of eight percent no later than April 15, 1998.

Claimant testified that he continued to have problems with his elbow and eventually required additional right elbow surgery in the form of an ulnar nerve decompression on January 14, 1999, which is when claimant disputed Dr. W's first certification of MMI and IR. Dr. W, in a report dated March 19, 1999, notes that claimant has had "two separate problems but both resulting from his original injury." The second problem arose after

claimant had returned to work when "he developed a tardy ulnar nerve palsy, i.e. the second problem originating from his original injury."

The hearing officer summarizes claimant's position as follows:

> Claimant argues that the initial [IR] should be set aside because he later developed tardy ulnar nerve palsy, which required a second operation. He believes there was a misdiagnosis of his condition that would justify setting the initial [IR] aside. Claimant does not contest the fact that he was aware of the initial [IR], and that he did not dispute the rating within 90 days. He contends that the tardy ulnar nerve problem had not been diagnosed at that time, and there was no reason to dispute the [IR] until later.

Carrier, after citing Texas Workers' Compensation Commission Appeal No. 950443, decided April 27, 1995, and asserting that this was not such a situation which would cause Dr. W's first certification of MMI and IR not to become final, argues that there is a recent Supreme Court decision which has eliminated the misdiagnosis exception to the 90-day rule.

Rule 130.5(e) provides that the first IR assigned to an injured worker will become final if not disputed within 90 days after the doctor assigned it. In Rodriguez v. Service Lloyds Insurance Company, 997 S.W.2d 248 (Tex. 1999), the Texas Supreme Court considered whether there are any exceptions to Rule 130.5(e). The 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 Commission's 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."

There was no contention that claimant did not dispute the first certification of MMI and IR within 90 days after receiving written notice of that rating. As the hearing officer notes, even if the tardy ulnar nerve palsy was considered a misdiagnosis, or change in condition, Rodriguez precludes the recognition of any exceptions to Rule 130.5(e).

Upon review of the record submitted, we find no reversible error and we will not disturb the hearing officer's determinations unless they are so against the great weight and preponderance of the evidence as to be clearly wrong or unjust. In re King's Estate, 150 Tex. 662, 244 S.W.2d 660 (1951). We do not so find and, consequently, the decision and order of the hearing officer are affirmed.

_____
Thomas A. Knapp
Appeals Judge

CONCUR:

_____
Stark O. Sanders, Jr.
Chief Appeals Judge

_____
Elaine M. Chaney
Appeals Judge