APPEAL NO. 000641

This appeal arises pursuant to the Texas Workers= Compensation Act, TEX. LAB. CODE ANN. ' 401.001 *et seq.* (1989 Act). A contested case hearing (CCH) was held on March 14, 2000. The hearing officer determined that the first certification of maximum medical improvement (MMI) and impairment rating (IR) assigned by Dr. S on February 27, 1998, became final under Tex. W.C. Comm=n, 28 TEX. ADMIN. CODE ' 130.5(e) (Rule 130.5(e)). The appellant (claimant) appeals, urging that the first certification of MMI and IR did not become final because of a misdiagnosis. The respondent (carrier) replies that there are no exceptions to the 90-day rule and the hearing officer=s decision should be affirmed.

DECISION

Affirmed.

The claimant sustained a compensable injury to his right foot and ankle on _____, when a pallet jack rolled over his foot. The claimant received medical treatment from Dr. S. According to Dr. S, x-rays revealed osteoarthritic changes in the claimant=s ankle and an old avulsion fracture. A bone scan performed in November 1997 indicated a fracture of the fifth metatarsal. The claimant received physical therapy and was released to full-duty work on February 23, 1998. On February 27, 1998, Dr. S certified that the claimant reached MMI on February 25, 1998, with a 0% IR.

The claimant testified that in March 1998, he received Dr. S=s Report of Medical Evaluation (TWCC-69) and a letter indicating that he had 90 days to dispute the rating. The claimant said that he did not dispute Dr. S=s certification because he was not having any serious problems with his right foot and ankle. According to the claimant, he began to have severe pain in his right foot and ankle in July 1998 and he returned to Dr. S on July 28, 1998. The claimant testified that Dr. S took an x-ray from a different view which demonstrated a bone chip. An MRI of the claimant=s right ankle on August 18, 1998, revealed a bony fragment near the old avulsion fracture and a torn ligament. The claimant had right ankle surgery performed by Dr. R on September 22, 1998, and December 7, 1999. Dr. S opined that the claimant=s right foot and ankle condition present on July 28, 1998, was not a result of the injury of October 10, 1997, but after consulting with Dr. R, Dr. S indicated that he would rescind his IR. On April 5, 1999, Dr. R certified that the claimant reached MMI on March 29, 1999, with a 4% IR.

It is undisputed that the claimant did not dispute the first certification of MMI and IR assigned by Dr. S within 90 days after receiving written notice. The claimant asserts that Dr. S=s certification did not become final because of a misdiagnosis which was not known until after the MRI in August 1998. The claimant argues that Dr. S=s certification became final at a time during which the Appeals Panel considered a misdiagnosis as an exception to the 90-day rule. In the alternative, the claimant argues that Rule 130.5(e), as amended effective March 13, 2000, should apply because whether Dr. S=s certification became final was still in dispute on the date of the CCH, March 14, 2000.

Rule 130.5(e), effective January 25, 1991, provided that A[t]he first [IR] assigned to an employee is considered final if the rating is not disputed within 90 days after the rating is assigned." In Texas Workers' Compensation Commission Appeal No. 93489, decided July 29, 1993, the Appeals Panel observed that if there were evidence that the first certification was based on a clear misdiagnosis, the passage of 90 days would not be dispositive. The Texas Supreme Court rejected this notion in Rodriguez v. Service Lloyds Insurance Company, 997 S.W.2d 248 (Tex. 1999), wherein it held that the "plain language of the 90-day Rule does not contain exceptions" created by the Appeals Panel such as a so-called exception based on a misdiagnosis of the injury. The Supreme Court did not limit its decision to a prospective application only, and the Appeals Panel is bound by its terms. Texas Workers' Compensation Commission Appeal No. 991410, decided August 19, 1999; Texas Workers' Compensation Commission Appeal No. 991307, decided July 28, 1999.

Subsequent to the Rodriguez case, the Texas Workers= Compensation Commission (Commission) amended Rule 130.5 effective March 13, 2000. The Anew@ Rule 130.5(e) states:

> (e) The first certification of MMI and [IR] assigned to an employee is final if the certification of MMI and/or the [IR] is not disputed within 90 days after written notification of the MMI and IR is sent by the Commission to the parties, as evidenced by the date of the letter, unless based on compelling medical evidence the certification is invalid because of:
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> (1) a significant error on the part of the certifying doctor in applying the appropriate AMA Guides [Guides to the Evaluation of Permanent Impairment, third edition, second printing, dated February 1989, published by the American Medical Association] and/or calculating the [IR];
>
> (2) a clear mis-diagnosis or a previously undiagnosed medical condition; or
>
> (3) prior improper or inadequate treatment of the injury which would render the certification of MMI or [IR] invalid.
>
> (f) This rule applies to certifications of MMI and [IRs] that have not become final prior to the effective date of this rule.

The hearing officer determined that the first certification of MMI and IR assigned by Dr. S on February 27, 1998, became final under Rule 130.5(e). In so determining, the hearing officer found that the first certification of MMI and IR became final prior to the effective date of the amended Rule 130.5. The hearing officer correctly did not apply the Anew@ rule because the 90-day dispute period had passed prior to March 13, 2000. The term Afinal@ pertains to the passage of the 90-day dispute period, not the adjudication of the issue. The hearing officer correctly applied the Aold@ rule in accordance with the Rodriguez decision. 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).

The decision and order of the hearing officer are affirmed.

Dorian E. Ramirez
Appeals Judge

CONCUR:

Tommy W. Lueders
Appeals Judge

Elaine M. Chaney
Appeals Judge