APPEAL NO. 010182

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 January 5, 2001. The sole issue at the CCH was whether the impairment rating (IR) from of 14% Dr. C became final pursuant to Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 130.5(e) (Rule 130.5(e)). The hearing officer concluded that Dr. C's IR did become final pursuant to Rule 130.5(e) because the claimant did not dispute it within 90 days of receiving it. The appellant (claimant herein) files a request for review arguing that the hearing officer erred because Dr. C's certification of IR was conditional and that both Dr. C and the respondent (carrier herein) had told her that the IR could be revised if she later had surgery. The carrier responds that the certification of Dr. C was not conditional; that his IR was not disputed within 90 days; that surgery was not being actively considered at the time of the certification and that the claimant was estopped from disputing the certification.

DECISION

We affirm the hearing officer's decision.

It was undisputed that the claimant sustained a compensable injury on _____. The claimant testified that her injury was repetitive trauma injury to her wrists and to her neck. Surgery was apparently recommended on claimant's neck by her treating doctor in mid 1997, and again in late 1999, In each second opinion process, there were two non-concurring opinions, and the claimant was informed of this by the Medical Review Division of the Texas Workers' Compensation Commission (Commission) on August 6, 1997, and on December 16, 1999. No evidence was offered as to when any subsequent recommendation was made for surgery, but the claimant actually had surgery on her cervical area on February 15, 2000, after notice of a concurring second opinion was sent to the claimant by the Commission a month earlier. Dr. S performed the surgery. Statutory maximum medical improvement (MMI) had been reached in mid March 1999. There is no evidence that the claimant sought to have her date of MMI extended under Section 408.104.

A few weeks before Statutory MMI, the claimant was referred by Dr. F, her second treating doctor, to Dr. C for an IR evaluation. Dr. C certified on a Report of Medical Evaluation (TWCC-69) dated March 23, 1999, that the claimant attained maximum medical improvement [MMI] on March 3, 1999, with a 14% IR. In his narrative report attached to the TWCC-69, Dr. C discussed the history of the claimant's spinal surgery process and noted that she had in January and February requested from Dr. S an addendum recommendation for surgery since the denial of approval and had been told that one was "faxed" on two occasions but that the Commission had not received any recommendation. Dr. C also noted that "this claimant may indeed be a candidate for surgical intervention of the cervical spine. If indeed she does, then this will change her [IR], and I will be happy to rescind my MMI and [IR] at that time." He indicated that he agreed with Dr. S's surgical

recommendation although he acknowledged that there were non-concurring second opinions. No disagreement from Dr. F is indicated on the TWCC-69. On march 29, 1999, the Commission sent a letter to the claimant informing her of this IR and also the necessity and process for disputing this report within 90 days if she did not agree.

The claimant testified that when she asked Ms. A, the adjuster, if she could have another IR if she had surgery, she was told that it would be no problem to do so. However, the claimant's testimony indicated that this conversation occurred before she had the IR done by Dr. C. The claimant said that she did not dispute that her IR was correct at the time that it was done.

The claimant testified that she received Dr. C's certification sometime in April 1999. The claimant requested a benefit review conference (BRC) to dispute Dr. C's IR in a letter dated October 10, 2000. No explanation was furnished as to why the claimant did not dispute the IR for eight months after her surgery. Dr. S wrote in December 2000 that the claimant had not had a successful outcome from her surgery.

The claimant testified that the reason she sought a new IR was her belief that she had undergone a substantial change in condition after her surgery and also that her conversation with Ms. A left her with the impression that "there would not be a problem" with getting a post-surgical IR. In the meantime, the claimant was paid impairment income benefits (IIBs) beginning after Dr. C's certification through December 1999. There was no evidence that another IR was ever done or that the claimant disputed Dr. C's IR prior to October 2000. The claimant testified that she believed that three and possibly four recommendations for spinal surgery had been done on her behalf since her injury, but she had seen none of them until shortly before the CCH. Only a 1997 recommendation for surgery is in evidence and there are no copies of the second opinions from wither 1997 or 1999.

The hearing officer expressly found that the first IR was not conditional such that Rule 130.5(e) would not apply. This was not error, and there is sufficient support for this finding in the record. It is therefore final by operation of Rule 130.5(e); the newer version of that rule was not yet in effect. The decision of the hearing officer will be set aside only if the evidence supporting the hearing officer's determination is so weak or against the overwhelming weight of the evidence as to be clearly wrong or manifestly unjust. Atlantic Mutual Insurance Company v. Middleman, 661 S.W.2d 182 (Tex. App.-San Antonio 1983, writ ref'd n.r.e.). We refrain from substituting our judgment for that of the hearing officer.

We cannot agree with the claimant that there was evidence that, at the time Dr. C's IR was rendered, an active consideration of surgery was underway that would support an interpretation of his IR as conditional. His expression of agreement with a surgical recommendation which was not supported in the second opinion process does not, standing alone as it does here, render his IR "conditional." The cases cited by the dissent are distinguishable from the facts before this tribunal, not the least of which would be the presence here of a recent non-concurring second opinion process and no evidence of an

active, ongoing spinal surgery consideration at the time that Dr. C rendered his opinion, or within the 90 day period thereafter. We will not interpret dicta form those cases to stand for the broad proposition that when predicted treatment is actually performed, well after the 90 day time period has run, the first IR has therefore become "conditional". *See* Texas Workers' Compensation Commission Appeal No. 992958, decided February 16, 200. In any case, the temptation to extend earlier decisions must be tempered by the opinion in Rodriguez v. Service Lloyds Insurance Company, 997 S.W.2d 248 (Tex. 1999).

We affirm the hearing officer's decision and order.

Susan M. Kelley
Appeals Judge

CONCURRING OPINION:

I concur and write separately to emphasize that I agree with the majority decision based on the specific facts of this case. There was no evidence regarding the wording of the nonconurrences after the spinal surgery recommendations. Therefore, the record before us indicates that surgery was not being actively considered at the time the 14% IR was certified by Dr. C.

If a "temporarily" nonconcurring second opinion doctor had stated that he would probably concur but he or she needed to see a diagnostic film first, then the outcome might have been different. Under such facts, the evidence would then show that surgery was indeed being actively considered, even though, technically, the second opinion doctor had not yet issued a concurrence regarding the need for surgery. Therefore, under those facts, the IR could be considered conditional.

In this case, considering the state of the record, at the time the Dr/ C's 14% IR was certified, it was not conditional. Claimant did not meet her burden to show that it was conditional because surgery was being actively considered. The record shows that surgery was recommended, there was no concurrence, and it was denied. There was nothing to show it was resubmitted or in the process of being reconsidered. I agree that the hearing officer did not err in determining that the IR became final in this case.

Judy L. S. Barnes
Appeals Judge

DISSENTING OPINION:

I dissent. I believe be we should reverse and render a new decision that the certification of Dr. C did not become final pursuant to Rule 130.5(e).

First, I believe the IR was conditional. The treating doctor states in his letter of October 10, 2000, that when he referred the claimant to Dr. C in 1998 to have an IR evaluation done, he felt she needed surgery, but was under pressure to get have an IR evaluation performed. Dr. C states in his report that the claimant may be a surgical candidate and if she had surgery he would rescind his rating and re-evaluate her. We have held that a conditional certification of IR cannot become final under Rule 130.5(e). *See* Texas Workers' Compensation Commission Appeal No. 941247, decided October 27, 1994; Texas Workers' Compensation Commission Appeal No. 000766, decided May 30, 2000; and Texas Workers' Compensation Commission Appeal No. 991489, decided August 30, 1999.

Secondly, I am concerned about the fact that the claimant's testimony that she was told by the carrier's adjuster that she could have another IR done if she had surgery was uncontradicted. The carrier did not present any evidence that this was not true and did not in fact challenge its accuracy. Finding that an IR under these circumstances became final seems to me to open the door to a carrier to be able to mislead a claimant and then take advantage of doing so.

As far as whether the surgery was under consideration at the time of statutory MMI, it appears to me that there was lengthy on-going dispute between the carrier and the claimant concerning the need for surgery and that it was eventually determined that surgery was necessary. In light of the evidence from the treating doctor and Dr. C, I do not see how it possible to find that surgery was not under consideration at the time of Dr. C's certification of MMI and IR. In fact the hearing officer did not find that surgery was not under consideration, but hinged his decision on a finding that Dr. C's Report of Medical Evaluation (TWCC-69) was not condition on the face of the form. We have repeatedly held that the narrative report associated and attached with the TWCC-69 should be considered in evaluation the certification and the hearing officer did not do this as the narrative report clearly showed that the certification was conditional.

I do not see the applicability of Rodriquez v. Service Lloyds Insurance Company, 997 S.W.2d 248 (Tex. 1999) to this situation where we are not talking about any exception to Rule 130.5(e), but whether a conditional certification was sufficient to trigger the rule. This distinction is well-explained in Appeal No. 991489, *supra*, where we stated as follows:

> The determination that Rule 130.5(e) does not operate to finalize conditional ratings is not premised upon there being exceptions to Rule 130.5(e). To the contrary, we have stated that conditional ratings simply are not certification that trigger the duty to dispute.

Gary L. Kilgore
Appeals Judge