APPEAL NO. 950255

Pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act), a contested case hearing was held in (city), Texas, on December 30, 1994, with (hearing officer) presiding. The hearing officer determined the following: that the first certification of maximum medical improvement (MMI) and impairment rating (IR) assigned by (Dr. M) on November 30, 1993, is final; that the claimant reached MMI on November 18, 1993, with a seven percent IR; and that as a result of the claimant's (date of injury), injury, claimant has not had disability from November 18, 1993, through the date of the hearing. The claimant appeals this determination, contending that he disputed the MMI date and IR after learning of the requirement to do so, that the carrier did not inform him of such requirement, and that Dr. M's MMI and IR have not become final because they were based upon a misdiagnosis or mistreatment of the claimant's condition. The carrier responds that the hearing officer's decision is correct.

DECISION

Affirmed.

The claimant, an employee of (employer), injured his back on (date of injury), when he picked up some plastic sheets from the floor. He testified that he initially saw the employer's doctor, then began treating with Dr. M who prescribed epidural injections and therapy. According to the limited medical evidence in the record, the claimant also had an MRI on May 15, 1993, which showed the following: "1. Disc desiccation with mild loss of discal height at L5-S1. Evidence of a small 2-3 millimeter posterocentral disc protrusion with radial annular tear which effaces the anterior epidural fat and abuts the anterior aspect of the thecal sac and S1 root sleeves bilaterally without significant mass effect. 2. Mild bilateral facet osteoarthritis at L5-S1."

The claimant saw Dr. M on November 18, 1993, for what he assumed was a routine visit. Although he said Dr. M did not mention this to him, the doctor completed a Report of Medical Evaluation (TWCC-69) determining the claimant had reached MMI on that date with a seven percent IR. Dr. M stated in that report that claimant continued to have pain, although not on a daily basis. He also wrote:

> He has no muscle spasm. There is tenderness to palpation, mildly, in the midline. He reports no sciatic notch or posterior thigh tenderness . . . There are [negative tests] . . . At this time, he is instructed to continue with his stretching exercises at home, and with the use of a non-steroid, anti-inflammatory medication. As you are aware, the patient has an MRI of his lumbar spine, showing L5-S1 disc desiccation, along with a posterocentral disc protrusion, with a radial annular tear.

Both claimant and his wife testified that they were not aware of this report until December 27, 1993, when the carrier transmit it by facsimile to claimant's wife, at her

request, after she had telephoned inquiring about a check the claimant had received. The letter from the carrier which accompanied the TWCC-69 was in evidence; it states that Dr. M had assessed claimant a "disability rating" of seven percent which "entitles you to Impairment Income Benefits . . . for 21 weeks . . . You are also entitled to lifetime medical benefits as is related to this injury." The claimant conceded that he did not contact the Texas Workers' Compensation Commission (Commission) or the carrier after receiving this information, and that he did not think very much about the doctor's IR.

In June of 1994 the claimant was at home when a sneeze caused him severe back pain. He went to the emergency room and later returned to Dr. M who, in August 1994, recommended surgery. The claimant said he wanted a second opinion before going through with surgery. In September 1994 he changed treating doctors, to (Dr. N). On September 12th Dr. N wrote that claimant had had a lumbar myelogram on September 3rd which revealed a narrowing of the L5-S1 interspace and what appeared to be a "central disc impression" at that level. He also said that the accompanying CT scan revealed mild spondylosis at L3-4 and circumferential disc bulging at L5-S1 with foraminal encroachment on the left side, and that a May 1994 MRI revealed similar findings, but that a June 1993 discogram revealed the disc to be intact at L5-S1. No mention was made of the 1993 MRI. Dr. N stated his impression as herniated nucleus pulposus of the lumbar spine and initially recommended epidural injections. In November Dr. N recommended that claimant have surgery (a lumbar laminectomy), which was performed on December 13th. At the time of the hearing the claimant stated that he had improved with the surgery.

It was virtually undisputed at the hearing that claimant did not receive Dr. M's TWCC-69 until December 27, 1993, and that the 90-day dispute requirements of Rule 130.5(e) (Tex. W. C. Comm'n, 28 TEX. ADMIN. CODE § 130.5(e)) were not mentioned in either the carrier's cover letter or in subsequent conversations claimant or his wife had with the carrier's representative. The claimant's wife testified that she first learned of the 90-day rule in July of 1994 when she called the Commission after the sneezing incident; at that point, she said, she requested a benefit review conference.

The claimant advances two main arguments on appeal. First, he contends that the carrier should be estopped from asserting that Dr. M's IR became final because it failed to inform the claimant about the 90-day dispute provisions of Rule 130.5(e). As authority, claimant cites Texas Workers' Compensation Commission Appeal No. 94322, decided May 2, 1994. Second, the claimant, citing Appeals Panel decisions, contends that his MMI and IR did not become final because his earlier treatment with Dr. M was inadequate and that there was compelling evidence of a new and previously undiagnosed medical condition.

We do not find Appeal No. 94322, *supra*, applicable to the facts herein. Although the majority in that case (one judge dissented) reversed, on equitable grounds, a hearing officer's decision that an employee's IR had become final where the employee in filing his dispute relied upon a deadline supplied in a letter from a Commission employee, that decision stressed that it was a narrow one and limited to the facts contained therein. The

majority was persuaded by, among other things, the fact that the written communication emanated from a person "cloaked with apparent authority to do so." In the instant case, we have been cited to no authority for the proposition that during the period in question the carrier bore the burden to inform the claimant of the requirements of Rule 130.5(e). Further, this panel has held that a party's lack of awareness of this or any other part of the workers' compensation law will not excuse a failure to comply. *See* Texas Workers' Compensation Commission Appeal No. 94269, decided April 19, 1994, *citing* Allstate Insurance Company v. King, 444 S.W.2d 602 (Tex. 1969). It was undisputed that claimant received Dr. M's TWCC-69 on December 27, 1993; the 90 days for dispute ran from that date. Texas Workers' Compensation Commission Appeal No. 94354, decided May 10, 1994. It also appears undisputed that the claimant had no complaint about the report until after the incident in June of 1994.

With regard to the claimant's second point on appeal, the Appeals Panel held in Texas Workers' Compensation Commission Appeal No. 93489, decided July 29, 1993, that the elapse of 90 days for purposes of Rule 130.5(e) might not be held to be dispositive where there is "compelling medical or other evidence" showing that the original MMI and IR were "invalid because of some significant error or because of a clear misdiagnosis" or where there is "compelling evidence of a new, previously undiagnosed medical condition or prior improper or inadequate treatment of the claimant's injury which would render the certification of MMI invalid." Thus, in Texas Workers' Compensation Commission Appeal No. 94268, decided April 20, 1994, an employee's first IR (for what was diagnosed as a ganglion cyst following brief treatment by employer's doctor) did not become final where it was shown claimant's actual condition was later diagnosed as carpal tunnel syndrome. However, we have previously observed that MMI does not mean there will not be a need for some future medical treatment, and the need for additional treatment does not mean MMI was not reached at the time it was rendered. Texas Workers' Compensation Commission Appeal No. 94269, decided April 20, 1994. The same is true where surgery is performed some time after the expiration of the 90-day dispute period. Appeal No. 93489, *supra*, upheld the finality of the first IR and MMI despite the fact that the employee later underwent an arthroscopic examination and surgery by a different doctor, and the employee testified that her knee improved dramatically. *And see* Texas Workers' Compensation Commission Appeal No. 93987, decided December 14, 1993, which upheld the finality of the original IR despite the employee's later shoulder surgery.

Based upon the medical evidence in the instant case, we agree with the hearing officer that it does not appear that Dr. M misdiagnosed claimant's condition or rendered inadequate treatment. The evidence shows that, prior to certifying MMI and assigning an IR, Dr. M had ordered diagnostic tests which showed a disc protrusion with annular tear at L5-S1 and had utilized conservative treatment. We note that after claimant changed doctors, Dr. N recommended the same treatment prior to recommending surgery. In addition, the medical reports do not establish the presence of a condition that had not been identified at an earlier time. In our opinion, the hearing officer did not err in determining that this case does not present the "compelling medical evidence" required to support a finding that the

first IR did not become final. Having reviewed the record, we conclude that the hearing officer's findings of fact, conclusions of law, and decision are sufficiently supported by the evidence and are not against the great weight and preponderance of the evidence. In re King's Estate, 150 Tex. 662, 244 S.W.2d 660 (1951). Because we affirm the hearing officer's determination that claimant reached MMI on November 18, 1993, we also find no error in his determination that claimant did not have disability from that date until the date of the hearing.

The hearing officer's decision and order are affirmed.

Lynda H. Nesenholtz
Appeals Judge

CONCUR:

Joe Sebesta
Appeals Judge

Philip F. O'Neill
Appeals Judge