APPEAL NO. 980172
FILED MARCH 13, 1998

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 December 18, 1997, with hearing officer. He determined that the first certification of a date of maximum medical improvement (MMI) and an impairment rating (IR) by (Dr. S) became final because it was not timely disputed and that the appellant (claimant) reached MMI on November 16, 1996, with a 13% IR as certified by Dr. S. The claimant appeals these determinations, contending that they are not supported by sufficient evidence. The appeals file contains no response from the respondent (carrier).

DECISION

Affirmed.

The claimant sustained a compensable low back injury on _____, while smoothing wet cement. He was initially seen at a clinic and then by (Dr. R), D.C., who released the claimant to light duty. Dr. R referred the claimant to (Dr. P) on July 8, 1996, for low back pain and pain radiating into the right leg. On July 15, 1996, after MRI and electrodiagnostic testing, Dr. P diagnosed a herniation at L4-5. He referred the claimant to (Dr. B) for a surgical consultation. In a report of July 22, 1996, Dr. B confirmed the diagnosis of herniation and surmised that the claimant would probably not get better and would need surgery. The claimant then returned to Dr. P on August 12, 1996, at which time surgery was discussed, and, according to Dr. P's report, the claimant "refused consideration of surgical intervention." On September 23, 1996, Dr. P again recommended surgery and, in a report of February 28, 1997, Dr. P noted that the claimant "[s]till does not wish surgical referral." He reported his pain as a "6" on a scale of "1" to "10."

Dr. S, an orthopedic surgeon, examined the claimant on November 16, 1996, at the request of the carrier. He noted that the claimant had a seven- to eight-week course of physical therapy without significant improvement in symptoms. He, too, diagnosed a herniation at L4-5 with radiculopathy and recommended surgery, with the alternative being continued conservative treatment. According to Dr. S's report, he discussed surgery with the claimant, but the claimant indicated an unwillingness to undergo surgery. Because he declined surgery, Dr. S concluded that the claimant was at MMI. He assigned a seven percent IR for a specific disorder of the spine, four percent for loss of lumbar range of motion, and two percent for a neurological deficit, which yielded a 13% whole body IR. On November 16, 1996, Dr. S signed a Report of Medical Evaluation (TWCC-69) in which he certified MMI "as of this date" and a 13% IR and provided a copy to the claimant.

Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 130.5(e) (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." If the IR becomes final by virtue of this rule, the

underlying date of MMI also becomes final. Texas Workers' Compensation Commission Appeal No. 92670, decided February 1, 1993. The 90 days begins to run on the date the disputing party receives written notice of the certification. Texas Workers' Compensation Commission Appeal No. 950666, decided June 12, 1995.

There was no dispute that Dr. S provided the first, and in this case only, certification of MMI and IR for purposes of Rule 130.5(e). By letter of December 6, 1996, the Texas Workers' Compensation Commission (Commission) advised the claimant of Dr. S's certification. According to Commission logs, the claimant also personally went to the Commission's field office on December 6, 1996, with a copy of Dr. S's TWCC-69 which he said he received in the mail. The Commission employee noted in the log for this date that she explained the concept of MMI and IR to the claimant and the requirement to dispute it within 90 days if he disagreed with it. According to the log, the claimant said he understood and that he needed surgery but was undecided about whether to have it or not. He is further reported as saying that if he decided on surgery, he would dispute the certification.

The claimant testified at the hearing that he discussed Dr. S's certification with the Commission employee and was told how many days he had to dispute it. He said he told the employee that he "would be thinking about it and the surgery." He also testified that he never told the Commission employee that he wanted to dispute the certification, that he only had the surgery on his mind, and that if the surgery was successful, he would never have disputed the certification. He also admitted to having received written notice of the certification from the carrier, but was not sure when. The claimant eventually underwent surgery on July 10, 1997. The pre- and post-operative diagnoses were herniation at L4-5.

Commission logs further reflect that the claimant called the Commission on September 10, 1997, to reinstate temporary income benefits (TIBS). He was told that no more TIBS were due because he had already reached MMI. According to the log, the claimant said that he did not want the surgery, but he got worse and worse and eventually had surgery. He said he did not recover as well as he thought he would and needed income benefits. By letter of September 11, 1997, to the Commission, the claimant's attorney stated that the claimant wanted to "formally" dispute the certification.

The position of the claimant at the CCH was that Dr. S's certification did not become final because it was invalid, specifically, that is was "premature" until the surgery was performed and that there was a material change in the claimant's condition resulting from the surgery. Alternatively, the claimant contended that he "impliedly" disputed the certification within 90 days as evidenced by the Commission's notes.

The hearing officer made the following findings of fact and conclusions of law which have been appealed by the claimant:

FINDINGS OF FACT

4. Claimant was aware, had personal knowledge, and had received written notice from [Dr. S] on December 6, 1996, of the first certification of [MMI] and [IR] assigned by [Dr. S].

5. Claimant was aware, had personal knowledge, and had received written notice from the [Commission] on December 11, 1996, of the first certification of [MMI] and [IR] assigned by [Dr. S].

6. Claimant first disputed the first certification of [Dr. S] on September 10, 1997, which date was more than 90 days after either December 6, 1996, or December 11, 1996.

7. [Dr. S], the first certifying doctor, rated Claimant's entire compensable injury, and knew of the extent of Claimant's compensable injury.

8. There was no compelling medical evidence of a new, previously undiagnosed medical condition, or some significant error, or prior improper or inadequate treatment of Claimant's compensable injury which invalidated the first certification of [Dr. S].

CONCLUSIONS OF LAW

3. The first certification of [MMI] and [IR] assigned by [Dr. S] on November 16, 1996, became final under Rule 130.5(e).

4. Claimant reached [MMI] on November 16, 1996, with a 13% [IR] for the compensable injury.

We address first the claimant's contention that he "impliedly" disputed Dr. S's certification on his visits of December 6 and/or 12, 1996. The log notes for these visits are discussed above, as is the claimant's testimony which generally confirms the log notes. The hearing officer obviously concluded, consistent with the evidence, that the claimant was told of the application of Rule 130.5(e) to his case and what he had to do to prevent Dr. S's certification from becoming final. Whether, and if so when, a party disputes a certification is a question of fact for a hearing officer to decide. Texas Workers' Compensation Commission Appeal No. 931170, decided February 3, 1994, and Texas Workers' Compensation Commission Appeal No. 931110, decided January 20, 1994. That determination is subject to reversal on appeal only if it is so against the great weight and preponderance of the evidence as to be clearly erroneous and unjust. Cain v. Bain, 709 S.W.2d 175, 176 (Tex. 1986); Pool v. Ford Motor Company , 715 S.W.2d 629, 635 (Tex. 1986). We believe the testimony of the claimant and the log notes sufficiently support the findings and conclusions of the hearing officer that the claimant did not dispute the first certification, but expressly withheld a dispute pending further consideration of the surgery

recommendation. The claimant seems to concede as much by describing the alleged dispute as "implied." In any case, we decline to reverse the hearing officer's determination that no timely dispute was made in this case.

In Texas Workers' Compensation Commission Appeal No. 93489, decided July 29, 1993, the Appeals Panel observed that if an MMI or IR certification were determined, based on compelling medical or other evidence, to be invalid because of some significant error or because of a clear misdiagnosis, then a situation could result where the passage of 90 days under Rule 130.5(e) would not be dispositive. In that case, we found that there was no compelling evidence of a new, previously undiagnosed medical condition or prior improper or inadequate treatment of the claimed injury which would render the first certification of MMI and an IR invalid.

In the case we now consider, there has been only one diagnosis of the claimant's injury--herniation at L4-5. Dr. P, Dr. B and Dr. S all concurred in this diagnosis. Dr. S based his certification of an IR on this diagnosis. The pre- and post-operative report contained this diagnosis. Thus, we are hard-pressed to find any evidence of a misdiagnosis or a material change in the claimant's condition at the time of or after the surgery. Ultimately, the claimant's argument to avoid the finality provisions of Rule 1305(e) comes down to the contention that Dr. S should have waited until surgery to determine a date of MMI even in the face of the claimant's refusal at that time to consent to surgery. We have previously observed that MMI is not a pain-free status and does not mean that there will be no need for some future medical treatment, and the need for additional or future medical treatment does not mean that MMI was not reached at the time it was certified. Texas Workers' Compensation Commission Appeal No. 94269, decided April 20, 1994. Nor does surgery more than 90 days after the first certification of a date of MMI and an IR, even if the certifying doctor were to rescind the certification (a condition not present in this case), render Rule 130.5(e) no longer applicable to the first certification. Texas Workers' Compensation Commission Appeal No. 94011, decided February 16, 1993; Texas Workers' Compensation Commission Appeal No. 93987, decided December 14, 1993; Appeal No. 93489, *supra.* In Texas Workers' Compensation Commission Appeal No. 950443, decided April 27, 1995, we wrote that future treatment or even surgery "does not cancel out the application of the rule; rather, it is the very limited circumstance where the rating or certification is based on essentially a false premise, that is, a clear misdiagnosis or significant error in the diagnosis or treatment." In this case, the claimant's own testimony was that he knew he had severe pain and that surgery was recommended, but, rather than dispute Dr. S's certification pending resolution of the surgery question, he chose to do nothing during the 90 days allowed to dispute. *See also* Texas Workers' Compensation Commission Appeal No. 962427, decided January 8, 1997, which addressed the notion that a first certification could have been timely disputed "through the exercise of minimal diligence."

Having reviewed the record in this case, we find the evidence sufficient to support the findings of the hearing officer that there was no compelling evidence of a misdiagnosis or improper or inadequate care or that Dr. S was unaware of the entire injury.

For the foregoing reasons, we affirm the decision and order of the hearing officer.

Alan C. Ernst
Appeals Judge

CONCUR:

Philip F. O'Neill
Appeals Judge

Elaine M. Chaney
Appeals Judge