APPEAL NO. 980218
FILED MARCH 23, 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 January 5, 1998, with hearing officer. The issues at the CCH were whether the first certification the impairment rating (IR) (the "first certification") assigned by (Dr. DE) became final under Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 130.5(e) (Rule 130.5(e)), and whether the respondent (claimant) had disability. The hearing officer determined that the first certification did not become final and that claimant had disability from October 13, 1997, to December 20, 1997. On appeal, appellant (carrier) contends that the hearing officer erred in determining that the first certification did not become final. The parties did not appeal the disability determination. There is no response from claimant in the file.

DECISION

We affirm.

Carrier contends the hearing officer erred in determining that the first certification did not become final. It asserts that there was no misdiagnosis and that the hearing officer did not make a finding that there was a clear, egregious misdiagnosis.

It was undisputed that claimant did not dispute Dr. DE's four percent first certification within the 90-day period. Claimant testified that he injured his neck and right shoulder in a _____, work-related automobile accident. He said he first treated with (Dr. CH) and that Dr. CH referred him to Dr. DE. Claimant said he received pain medication and physical therapy to his neck and back, that included massage to his shoulder. He said he felt shoulder pain beginning after the auto accident, but that he was told his shoulder pain was due to his neck problem.

In a January 7, 1997, medical record, Dr. DE said that claimant came in because of neck and right shoulder problems, that claimant has occasional trapezial pain at the end of the work day, that he released claimant and will see him "prn." On February 14, 1997, Dr. De certified that claimant reached maximum medical improvement (MMI) on January 7, 1997, and that his IR is 4%. On June 19, 1997, Dr. DE said more of claimant's discomfort has localized in his shoulder, that he has quite a bit of crepitus, that he has a positive impingement arc, that x-rays showed a subacromial spur, and that Dr. DE said, "he's just got some shoulder bursitis." In an October 23, 1997, letter, Dr. DE said:

> Previously [claimant] had had an [IR] of four percent based on his degenerative disc problems. This has to be rescinded, however, because a further work-up revealed a rotator cuff tear happening concomitantly with the cervical spine injury . . . . The type of pain he was having in the neck and in the shoulder would be identical with having a rotator cuff tear . . . .

There hearing officer noted in the decision and order that Dr. DE did not rate the shoulder, that he did not diagnose the "possible existence" of the rotator cuff tear until August 28, 1997, and that the first certification did not become final.

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. The Appeals Panel has held that, in certain limited and rare situations, compelling medical evidence of a new, previously undiagnosed medical condition or improper or inadequate treatment of an injury could mean that a first certification did not become final. Texas Workers' Compensation Commission Appeal No. 93489, decided July 29, 1993. Where a claimant asserts that a certification of MMI and IR should not be final under Rule 130.5(e) because of a clear misdiagnosis, the claimant has the burden to prove this misdiagnosis. Texas Workers' Compensation Commission 950724, decided June 12, 1996. The Appeals Panel has also recognized where a hearing officer determines that a doctor fails to rate an injured body part, he or she was unaware the body part was injured and did not treat it, and he or she later amends the first certification of IR and MMI or rescinds it for that reason, the first certification may not be final. Texas Workers' Compensation Commission Appeal No. 94124, decided March 15, 1994; Texas Workers' Compensation Commission Appeal No. 94219, decided April 7, 1994. However, the Appeals Panel has determined that where a claimant and his or her doctor are aware all along that the body part was injured but not rated, this failure to rate the injury will not prevent the first certification from becoming final. Texas workers Compensation Commission 93979, decided December 14, 1993.

The 1989 Act provides that the hearing officer is the sole judge of the weight and credibility of the evidence. Section 410.165(a). Where there are conflicts in the evidence, the hearing officer resolves the conflicts and determines what facts the evidence has established. As an appeals body, we will not substitute our judgment for that of the hearing officer when the determinations are not so against the great weight and preponderance of the evidence as to be clearly wrong or manifestly unjust. Cain v. Bain, 709 S.W.2d 175, 176 (Tex. 1986); Texas Workers' Compensation Commission Appeal No. 950456, decided May 9, 1995.

Whether the first certification was not final due to a clear misdiagnosis was a question of fact for the hearing officer to decide. Pursuant to his fact finding authority under Section 410.165(a), the hearing officer could have concluded that Dr. DE's failure to diagnose and treat the rotator cuff tear showed that there was a clear misdiagnosis. The hearing officer could and did determine that Dr. DE's determination that claimant "just" had some bursitis was significantly different from a diagnosis of rotator cuff tear. The hearing officer could find from claimant's testimony and the medical evidence that, although claimant was aware that he had shoulder pain, he was told it was due to his neck injury. The hearing officer could also find that Dr. DE did not think claimant had sustained a shoulder injury and that he did not realize that claimant's shoulder had been injured until six months after the first certification. We conclude that the hearing officer did not err in determining that the first certification did not become final pursuant to Rule 130.5(e). The

hearing officer's determinations are not against the great weight and preponderance of the evidence. Cain, *supra*.

Carrier contends that the hearing officer failed to make findings regarding a clear misdiagnosis. The hearing officer could determine that there was a clear misdiagnosis and that claimant's IR did not become final without making express findings. Further, the findings can be inferred from her decision. We perceive no reversible error.

We affirm the hearing officer's decision and order.

Judy Stephens
Appeals Judge

CONCUR:

Susan Kelley
Appeals Judge

Gary Kilgore
Appeals Judge