APPEAL NO. 013140-s
FILED JANUARY 28, 2002

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 6, 2001. The hearing officer determined that the appellant's (claimant) first impairment rating (IR) assigned by her treating doctor had become final because it was not disputed in 90 days. The hearing officer held that the claimant had not proven that the IR was assigned as a result of improper or inadequate care. He further held that she had disability for the period from May 30 through November 27, 2001. As neither party appealed the disability determination, it has become final pursuant to Section 410.169.

The claimant has appealed, generally asserting that her care was improper or inadequate. The respondent (carrier) responds that the claimant did not make this showing and thus cannot obviate the finality of the first IR under Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 130.5(e) (Rule 130.5(e)).

DECISION

We reverse and render.

The claimant fell and injured her back on _____. After a course of conservative treatment, her treating doctor referred her in October 2000 to a colleague for evaluation for spinal surgery. The claimant was certified to be at maximum medical improvement (MMI) by the referral doctor on February 5, 2001, with an 11% IR. Up to this time, the claimant had been receiving conservative treatment from the referral doctor to ameliorate her pain. She agreed that she was initially opposed to surgery. Medical records before and after the MMI certification document no more than temporary relief from pain.

The claimant worked from February 5 to May 29, 2001, when she was taken off work again for unrelieved pain. She had back surgery on August 9, 2001. The referral doctor was her surgeon. She said that her surgery had improved her in excess of a million percent and that she was pain free. A medical report less than two weeks after surgery showed "excellent" post operative response as to her gait.

When asked to specify what she believed was inadequate treatment, she stated that it was the delay in surgery. She said that she felt at one point the referral doctor became frustrated with her because nothing was working to alleviate her pain. On answers to the carrier's interrogatories, she had responded to a question about specifics of inadequate or improper treatment with "none." The claimant agreed that she had not disputed the IR in the 90-day period after receiving the certification of the referral doctor. The surgeon wrote a brief note in evidence that says that he should have realized on _____, that the claimant was no longer at MMI. It was clear throughout her testimony that the claimant thought well of her surgeon.

Rule 130.5(e), in effect when the first IR was rendered, provides:

> (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 [Texas Workers' Compensation 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];
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> (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.

The hearing officer is the sole judge of the relevance, materiality, weight, and credibility of the evidence presented at the hearing. Section 410.165(a). The decision should not be set aside because different inferences and conclusions may be drawn upon review, even when the record contains evidence that would lend itself to different inferences. Garza v. Commercial Insurance Company of Newark, New Jersey, 508 S.W.2d 701 (Tex. Civ. App.-Amarillo 1974, no writ). 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.).

Prior inadequate or improper treatment under Rule 130.5(e)(3) is a standard separate from, and is not equivalent to, malpractice. In our opinion, if compelling medical evidence demonstrates that the best efforts at the time fell short of relieving the effects of the injury or bringing about a medical MMI, then the prior treatment can be viewed as "inadequate." In this case, we can think of no more compelling medical evidence of the "inadequacy" of the prior conservative course than the "million" percent recovery experienced by the claimant after her surgery. We caution that not every surgical case will obviate finality of a first IR and that the particular facts of this case compel our decision. We reverse the hearing officer's determination that the claimant failed to present compelling medical evidence that her prior treatment was inadequate, and render the decision that the claimant's first IR did not become final because of compelling medical evidence that the claimant's prior treatment was inadequate.

Because the hearing officer determined that the claimant had disability, the carrier is ordered to pay temporary income benefits plus accrued interest for the period of disability as determined by the hearing officer.

The true corporate name of the insurance carrier is **TRAVELERS INDEMNITY COMPANY OF CONNECTICUT** and the name and address of its registered agent for service of process is

C.T. CORPORATION SYSTEM
350 N. ST. PAUL STREET
DALLAS, TEXAS 75201.

Susan M. Kelley
Appeals Judge

CONCUR:

Gary L. Kilgore
Appeals Judge

Terri Kay Oliver
Appeals Judge