APPEAL NO. 93047

This appeal arises under the Texas Workers' Compensation Act, TEX. REV. CIV. STAT. ANN. art. 8308-1.01 *et seq*. (Vernon Supp. 1993) (1989 Act). Following a contested case hearing in (city), Texas, on December 22, 1992, hearing officer (hearing officer) determined that the insurance carrier, the appellant in this action, did not timely dispute the claimant's first impairment rating, and that claimant reached maximum medical improvement (MMI) on December 17, 1991, with a 24 percent whole body impairment rating. She accordingly ordered the carrier to resume payment of impairment income benefits to the claimant in accordance with that decision. The carrier contends on appeal that the evidence shows the carrier gave actual and constructive notice that it disputed the impairment rating, and asks that we reverse the hearing officer's decision. The claimant conversely argues that the evidence presented at the contested case hearing supports the hearing officer's findings.

DECISION

Finding no error, we affirm the hearing officer's decision and order.

The claimant in this case had suffered a compensable back injury on or about July 26, 1991. He was examined by (Dr. N) who certified MMI as of December 17, 1991, and assessed a 24 percent whole body impairment rating. According to Carrier's Exhibit 1, a carrier form letter addressed to the Texas Workers' Compensation Commission (Commission) dated January 30, 1992, and signed by (Ms. AH) as senior claims representative, the carrier stated its disagreement with Dr. N's impairment rating and said it would initiate benefits based upon 10 percent as a fair and reasonable assessment. An affidavit executed by Ms. AH stated the following facts. She was aware claimant had an appointment with Dr. N on December 17th, but she was away from her office from December 13th until early 1992. On January 10, 1992 she received a report from Dr. N dated January 2nd (although apparently not his Report of Medical Evaluation (TWCC-69)), which certified MMI. The same day, carrier suspended temporary income benefits (TIBS) and prepared a Payment of Compensation or Notice of Refused/ Disputed Claim (TWCC-21), A-1 accordingly. On January 30th, she spoke with claimant's attorney's office and was informed that Dr. N had assessed a 24 percent impairment rating. Although she did not receive Dr. N's TWCC-69 until February 3rd (by fax from claimant's attorney), she proceeded to dispute the impairment rating, based on the oral information she had received from the claimant's attorney's office. She completed an A-3 (Reduction/Resumption section of Form TWCC-21) requesting credit for overpayment, disputing the impairment rating, and requesting appointment of a designated doctor. She attested that this was mailed to the Commission and to the claimant.

Ms. AH's affidavit also stated that on March 4th she spoke with (Ms. MM), a Commission employee in (city), concerning claimant's TIBS rate and the dispute of the impairment rating. Her affidavit further stated "[it was my impression from that conversation that the dispute notice had been received from the TWCC because [Ms. MM] stated that

she felt that the TWCC Form 69 and the 24 percent rating was based on limited medical and that a designated doctor would be assigned. I did not continue to follow up on this as I anticipated a notification from the TWCC concerning the second opinion doctor."

Ms. AH's December 15th affidavit concluded that she was "not aware until very recently that there was any dispute whatsoever about these documents having been received by the TWCC. I do not know the explanation for why these documents were not received by the TWCC. All I know is that I mailed them as I have previously indicated and they were mailed on the dates indicated in those documents."

Carrier's Exhibit 3, a TWCC-21 dated February 3rd states, under Section A-1 (Initial Payment), "Carrier rec'd twcc 69 on 1/31/92, w/ 24% impairment. Carrier is taking credit for TIB (sic) overpay - Carrier disputes 24% and will initiate TIB (sic) based on 10%." According to a box checked on the form, it was mailed to the claimant on February 3rd.

The claimant testified at the hearing that he never received Carrier's Exhibits 1 or 3. He stated that in June of 1992 he and his attorney discussed the fact that the carrier had never disputed his impairment rating, and they discussed the benefits claimant would receive based upon this situation. An affidavit executed by claimant's attorney, (Mr. M), stated that he had represented the claimant since August 1, 1991; that on or about January 23rd he learned claimant was not receiving benefit checks and he made several attempts to contact Ms. AH; that when his office spoke to her on January 30th, they learned that carrier claimed not to have received Dr. N's TWCC-69, and they accordingly faxed it to Ms. AH the same day; and that subsequently his office received no documentation from Ms. AH or from carrier indicating it wished to contest the impairment rating until September 23, 1992, when Ms. AH faxed to them a TWCC-21 dated August 30, 1992. Specifically, Mr. M attested, he never received Carrier's Exhibits 1 or 3.

The claimant introduced into evidence a TWCC-21 he had received dated February 21st, which gave as the reason for termination of benefits "MMI 12/17/91." Claimant argued that it would be incongruous for the carrier to file this TWCC-21 if it had already disputed the impairment rating. In rebuttal, the carrier introduced a PHD-25 (request for further information) dated February 24th in which the Commission had requested carrier to file an A-1, A-2, and A-3, "IIBS per MMI-Dr. [N] - 24%." Handwritten at the bottom was the following: "3/4/92 See attached-Included is letter of Dispute filed 1/30/92," signed by Ms. AH.

The hearing officer took official notice of the Commission's claim file in this case; while she did not list the contents of that file in her written decision, her statement of evidence says Carrier's Exhibits 1 and 3 were not received by the Commission until the November 12, 1992 benefit review conference, and that the claims file indicates the Commission did not have any previous notice from carrier that it was disputing Dr. N's impairment rating. A

dispute resolution form signed by Ms. MM on October 8th indicated that claimant's attorney requested a benefit review conference because carrier paid claimant impairment income benefits "per reasonable assessment even though we do not have that in writing."

In its appeal, the carrier disputes the following findings of fact and conclusion of law:

FINDINGS OF FACT

6.The first notice that the commission, Claimant, or Claimant's attorney had that Carrier was disputing [Dr. N's] 24% impairment rating was when Carrier stopped paying impairment income benefits on August 30, 1992, based on a 10% assessed impairment (citation to record omitted).

7.More than 90 days elapsed between the time the first impairment rating was assigned to Claimant and the time Carrier disputed said rating.

CONCLUSIONS OF LAW

2.The first impairment rating assigned to Claimant was not timely disputed by Carrier (citation omitted).

The carrier contends that it has presented evidence to show the required notice was sent; in addition to this evidence of actual notice, it alleges, there was constructive notice through numerous telephone conversations between the carrier, Commission personnel, and claimant's attorney. Finally, it argues, the 1989 Act does not affirmatively require a carrier to dispute an impairment rating by a method other than paying the carrier's reasonable assessment of the correct rating, and the pertinent Commission rule gives no specific requirement for the form of notice of dispute. Therefore, it argues, as a matter of law the written notice and the several verbal notices constituted timely dispute of the impairment.

Article 8308-4.26(e) and (f) provide that the insurance carrier shall begin to pay impairment income benefits (IIBS) not later than the fifth day after the date on which the carrier receives the doctor's report certifying MMI, and that the carrier shall pay IIBS based on either the impairment rating or, if the carrier disputes the rating, based on its reasonable assessment of the correct rating. Article 8308-4.26(g) says that if the impairment rating is disputed, the Commission shall direct the employee to be examined by a designated doctor either agreed to by the parties or appointed by the Commission.

The Commission rule implementing these provisions, Tex. W.C. Comm'n, 28 TEX.

ADMIN. CODE § 130.5 (Rule 130.5), provides that a carrier that disputes an impairment rating shall file with the Commission a "statement of disputed impairment income benefits" that gives the carrier's reasonable assessment of the correct rating, with a copy to the employee and his representative. The rule says such statement shall be filed no later than five days from receipt of the doctor's report, if the carrier does not begin paying IIBS, and no later than three weeks from receipt of the report if the carrier begins paying IIBS. The rule also provides that the first impairment rating assigned to an employee is considered final if the rating is not disputed within 90 days after it is assigned.

As this panel has previously stated, Rule 130.5 "affords a method by which the parties may rely that an assessment of impairment and MMI may safely be used to pay applicable benefits, by providing the time limit in which such assessment will be open to dispute. On the other hand, the rule also allows a liberal time frame within which the parties may ask for resolution of a dispute through the designated doctor provisions of the Act." Texas Workers' Compensation Commission Appeal No. 92670, decided February 1, 1993.

Whether a carrier timely disputed an impairment rating pursuant to this rule is a question of fact. In this case the hearing officer was presented with evidence, in the form of Carrier's Exhibits 1 and 3 and Ms. AH's affidavit, to support the carrier's contention that actual notice was given within the required 90 day period following receipt of Dr. N's impairment rating. Evidence to the contrary included the testimony of claimant and the affidavit of his attorney, stating that they had not received those documents, and the lack of any such notice in the Commission's file. As fact finder, the hearing officer is the sole judge of the relevance and materiality of the evidence offered and of the weight and credibility to be given to the evidence. Article 8308-6.34(e). She was entitled to find more credible the testimony of claimant and his attorney that they were not aware that carrier was disputing the impairment rating until September. Sufficient evidence in the record supports this determination by the hearing officer.

The carrier refers us to Texas Workers' Compensation Commission Appeal No. 92279, decided August 10, 1992, in which, it claims, the Appeals Panel upheld a hearing officer's finding of timely notice of a disputed claim, which finding relied on the carrier's evidence showing standard filing procedures had been followed. We find that nothing in that decision causes us to reach a different conclusion here. In that case, as in this one, there was evidence to support either a determination that the TWCC-21 had or had not been timely filed. (We note that, in that case, in addition to testimony of the carrier's adjuster concerning the procedure involved in filing such forms, the evidence contained a copy of the TWCC-21 from the carrier's file which was stamped as received by the Commission. There was also an affidavit from a reprographics supervisor at the Commission identifying the stamp and stating that carriers and adjusters are not allowed to file-stamp such documents.) There, as here, the Appeals Panel found there was sufficient evidence to uphold the determination of the fact finder.

The carrier further argues that it also gave constructive notice, within 90 days, that the impairment rating was being disputed, citing Ms. AH's affidavit stating she had numerous telephone conversations with Ms. MM, a Commission employee, concerning appointing a designated doctor. The carrier also cites Texas case law holding that actual knowledge of an employee's injury is a fact issue to be decided "from a preponderance of evidence that would lead a reasonable man to conclude that a compensable injury had been sustained," Miller v. Texas Employer's Insurance Association, 488 S.W.2d 489, 492 (Tex. Civ. App.-Beaumont 1972, writ ref'd n.r.e.). While the analogy to actual knowledge in the case of injury may be an apt one, the only evidence on point in this record is Ms. AH's statement that she talked to Ms. MM about "claimant's temporary income benefit rate and our dispute of the impairment rating. It was my impression from that conversation that the dispute notice had been received by the TWCC because she stated that she felt that the TWCC Form 69 and the 24% rating was based on limited medical and that a designated doctor would be assigned. I did not continue to follow up on this as I anticipated a notification from the TWCC concerning the second opinion doctor." As with the question of actual notice, whether constructive notice had been given is a fact issue which, based on the evidence of record, the hearing officer did not err in deciding in favor of the claimant.

Upon review of the record, we cannot say that the hearing officer's determination was so against the great weight and preponderance of the evidence as to be manifestly unfair and unjust. In re King's Estate, 244 S.W.2d 660 (Tex. 1951). We accordingly affirm the decision and order.

Lynda H. Nesenholtz
Appeals Judge

CONCUR:

Robert W. Potts
Appeals Judge

Philip F. O'Neill
Appeals Judge