APPEAL NO. 931011

This appeal arises under the Texas Workers' Compensation Act of 1989 (1989 Act), TEX. LAB. CODE ANN. § 401.001 *et seq*. (formerly V.A.C.S., Article 8308-1.01, *et seq*). On October 12, 1993, a contested case hearing was held in (city), Texas, with (hearing officer) presiding. She determined that appellant (claimant) reached maximum medical improvement on June 30, 1992, with two percent impairment as found by the initial impairment rating because claimant did not dispute the rating within 90 days of receiving it. Claimant asserts that evidence presented is not accurately reflected in the decision of the hearing officer; she also states the order is against the great weight and preponderance of the evidence emphasizing that claimant's attorney never received notice of the initial impairment rating. Respondent (carrier) replies that the decision should be upheld.

DECISION

We affirm.

Claimant fell while working as a stock clerk on (date of injury). She stated that she hurt her head, neck, and back. She saw several doctors who specialized in treatment of the ear, nose, and throat, and also saw (Dr. N) for her concussion. She stated that Dr. N referred her to an ear, nose, and throat doctor. No indication was given as to when any referral occurred or when/if any referring doctor provided a report to Dr. N.

At some point Dr. N stated on a Report of Medical Evaluation (TWCC-69) that claimant reached MMI on June 30, 1992, with two percent impairment. The carrier introduced a Payment of Compensation or Notice of Refused or Disputed Claim (TWCC-21) which states that on August 5, 1992, it mailed claimant a copy of this form which stated that claimant reached MMI on June 30, 1992 with two percent impairment. A copy of the TWCC-69 of Dr. N is attached to the TWCC-21 and is in evidence. Claimant and carrier stipulated that the claimant disputed the impairment rating of Dr. N on December 18, 1992.

The TWCC-69 in evidence is not accompanied by any narrative from Dr. N. The form itself indicates no qualification or condition placed on the opinion of Dr. N that claimant reached MMI. The evidence does not provide a basis to conclude that the certification of MMI was not valid; therefore there was nothing to prevent the inception of the 90-day period specified by Tex W. C. Comm'n, 28 TEX. ADMIN. CODE § 130.5(e) (Rule 130.5(e)) once claimant became aware of the rating.

The hearing officer found that the claimant is presumed to have received notice of the impairment rating on or about August 10, 1992. At the hearing the claimant testified on cross-examination that the TWCC-69 was attached to the TWCC-21 and that she received them "soon after" the date the TWCC-21 was mailed--August 5, 1992. Later, on redirect, claimant said that she really did not know when she got the TWCC forms.

While the appeal does not contest a finding of fact that says Texas Workers' Compensation Commission (Commission) rules presume mail will be received within five

days, we note that Rule 102.5 is titled "General Rules for Written Communications To and From the Commission;" subparagraph (h) therein provides that in order to determine the date of receipt, "the commission shall deem the received date to be five days after the date mailed." No rule appears to presume a receipt date for communications between parties.

Claimant states that the hearing officer did not accurately reflect two affidavits she offered indicating that certain members of the law firm representing her did not receive copies of the initial impairment rating. The hearing officer accepted claimant's submission of the affidavits as attachments to claimant's dispute of the benefit review officer's report. The affidavits are contained within Hearing Officer Exhibit 3. After placing them in evidence, the hearing officer, later in the record, prior to accepting Carrier's Exhibits 1 and 2, assured claimant that Hearing Officer's Exhibit 3 would be considered. The hearing officer's opinion duly states under "Evidence Presented" that Hearing Officer Exhibit 3 was in evidence. The hearing officer is not required to discuss each piece of evidence when she chooses to provide a "Statement of Evidence" in her opinion. *See* Texas Workers' Compensation Commission Appeal No. 93955, December 8, 1993. The hearing officer did not abuse her discretion in her consideration of the affidavits in question.

The claimant next attacks the sufficiency of the evidence by stating that her attorney did not receive a copy of the impairment rating. Rule 130.5(e) provides that the 90 days for disputing the initial impairment runs from the day the rating is assigned. The appeals panel in Texas Workers' Compensation Commission Appeal No. 92542, decided November 30, 1992, and Texas Workers' Compensation Commission Appeal No. 93423, decided July 12, 1993, has stated that the 90 days does not begin to run until the party is aware of the rating or has actual knowledge. Texas Workers' Compensation Commission Appeal No. 93139, decided April 8, 1993, stated that there is no good cause exception provided in the 90-day rule and added that no conditions have been placed on the rule. (Texas Workers' Compensation Commission Appeal No. 93691, dated September 15, 1993, does require that the impairment rating must be based on a valid certification of MMI.) In Texas Workers' Compensation Commission Appeal No. 92670, decided February 1, 1993, the appeals panel ruled that a certifying doctor's failure to send a copy of the report to the treating doctor within seven days per Commission rule did not stop the running of the 90 days. That opinion pointed out that such a violation of the rule could be administratively punished, but the violation did not provide for obviating the running of the 90 day period.

The appeals panel has required that an assigned rating be communicated to a party to start the 90-day period. It has not required that a particular method must be used to obtain notice. Evidence of communication to the party is necessary, but evidence of communication to a party's counsel has not been required to start the running of the 90-day period. As in the violation of a rule in Appeal No. 92670, *supra*, the failure of the carrier to notify counsel per Rule 102.4 is subject to administrative penalty per Section 415.002(22) which provides for administrative penalty for a carrier when intentionally violating a rule of the Commission.

The statement of the claimant as to receiving notice of the impairment rating soon

after August 5, 1992, sufficiently supports the findings of fact that indicate receipt of the rating by August 10, 1992, and that state over 90 days elapsed between August 10, 1992 and December 18, 1992. The findings of fact sufficiently support the conclusions of law that Dr. N's determination is final and MMI occurred on June 30, 1992. (We note that Conclusion of Law 4 states "June 30, 1993," when it should say "June 30, 1992," as is correctly provided in the Decision and Order. Similarly, Finding of Fact 10 should read "September 9, 1992," not "September 10, 1993.")

The decision and order are sufficiently supported by the evidence and are affirmed.

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Joe Sebesta
Appeals Judge

CONCUR:

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Susan M. Kelley
Appeals Judge

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Philip F. O'Neill
Appeals Judge