APPEAL NO. 93669

On June 3, 1993, a contested case hearing was held in (city), Texas, with (hearing officer) presiding. The record was held open until July 9, 1993, and then was closed. The issues to be determined at the contested case hearing were whether claimant had reached maximum medical improvement (MMI) and, if so, what was his correct impairment rating. Claimant sustained an injury on (date of injury), while employed as a custodian by (employer).

The hearing officer adopted the report of the designated doctor that claimant had not reached MMI[1] and therefore had no valid impairment rating assigned. As part of his finding, the hearing officer determined that the claimant had timely disputed the first impairment rating assigned to him by his treating doctor, (Dr. F), within 90 days after he had notice of the MMI and impairment rating certification of Dr. F. The hearing officer determined that the great weight of other medical evidence was not against the report of the designated doctor.

The carrier has appealed on the single point of error that the claimant did not timely dispute, within 90 days, the impairment rating and MMI certification of Dr. F. The carrier argues that the rating was assigned by Dr. F on June 5, 1992, that Texas W.C. Comm'n , 28 TEX. ADMIN. CODE § 130.5(e) (Rule 130.5) requires a dispute within 90 days after the rating is assigned (not 90 days after a party has knowledge of the rating), and that claimant did not dispute the rating until October 6, 1992. The claimant has not responded.

DECISION

After reviewing the record, we affirm the hearing officer's decision.

The claimant injured his back and neck on (date of injury), when a heavy trash cart he was pushing turned over and twisted him. The record indicates that he had not worked since that date. In June 1992, the claimant's treating doctor was Dr. F. The claimant testified that he was told by Dr. F during a June 5, 1992, visit that Dr. F's opinion was that he had reached MMI. Claimant said he told him at that time that he disagreed. The claimant said that Dr. F did not also tell him that he would assign a four percent impairment rating. Claimant was represented at this time by attorney RK.

Dr. F completed a TWCC-69, Report of Medical Evaluation, certifying that claimant reached MMI on June 5, 1992, with a four percent impairment. On June 22, 1992, the carrier mailed a copy of a TWCC-21 indicating that it would end payment of temporary income benefits, because claimant had reached MMI on June 5, 1992; this indicated that it

[1] The record indicates that claimant likely reached statutory MMI, according to TEX. LAB. CODE ANN. §401.011(30)(B), in that 104 weeks from the date income benefits had accrued had already passed by June 3, 1993. While the first sentence of the hearing officer's order would not then be strictly accurate, the order as a whole makes clear that temporary income benefits are not due past the point of statutory MMI.

was sent to claimant's representative, but not to claimant. Although the carrier argued at the end of the case that the carrier sent the TWCC-69 to claimant's attorney on June 22, 1992, there was no evidence to this effect. This notice did not reflect the basis for MMI or any impairment rating.

The claimant said that he did not receive a copy of Dr. F's report until he received it August 28, 1992, from the carrier. Claimant stated that he did not know he had 90 days to contest the rating until sometime in August 1992 when he was so informed by the carrier. The record indicated that claimant notified the Commission on October 26, 1992, that he disputed this report, and a designated doctor was appointed. Claimant also terminated his relationship with his attorney around October 24, 1992.

Although the application of Rule 130.5(e) was in dispute at the time of the benefit review conference on March 30, 1993, there is nothing in the record to indicate whether the carrier disputed appointment of the designated doctor.

Purported answers of a deposition to Dr. F were put into the record by the carrier. Although claimant testified that he agreed these were sworn answers given by Dr. F on May 13, 1993, the answers in the record are neither signed nor sworn. These say, in summary, that "on or after 6-5-92," copies of the TWCC-69 were mailed to the carrier and to the claimant. The answers do not claim that a copy was mailed to claimant's attorney, nor is the actual date of mailing specified.

Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 130.5 (Rule 130.5(e)) provides that the first impairment rating "assigned" is considered final if not disputed within 90 days after it is assigned.

The point of appeal raised by the carrier has been commented upon by the Appeals Panel previously. We have determined that the term "assigned," for purposes of starting the 90-day deadline for disputing an impairment rating, does not refer to the date a doctor renders a report, but from the date the parties become aware of the rating rendered. In short, an "assignment" is not perfected that can be disputed until communicated to a party. We have stated that it is hard to envision that one could dispute something of which one is not aware. *See* Texas Workers Compensation Commission Appeal No. 92693, decided February 8, 1993; Texas Workers' Compensation Commission Appeal No. 93501, decided August 3, 1993.

In response to carrier's contention that an oral opinion given in the claimant's doctor's office on June 5, 1992, began the 90 day period, we would observe that notice of an impairment rating is best conveyed through the doctor's written report, because such a report could raise colorable disputes that a verbal notice would not. For example, the TWCC-69 requires a doctor to indicate how a percentage is calculated. The written report could show a computation error that verbal discussion would not. The verbal notice here

did not have the requisites of a "certification" of MMI as required by Rule 130.1. The verbal notice also did not, according to claimant, include the percentage of impairment. It can be argued that the notice here at best conveyed an intent to make an assignment at some future time.

What constitutes actual knowledge of an impairment rating for purposes of beginning the time limit set forth in rule 130.5(e) is a question of fact. We do not find that the hearing officer's determination that this occurred on August 28, 1992, is against the great weight and preponderance of the evidence in this case. Although notice to a claimant's attorney will customarily be considered to be notice to the claimant, the record does not prove when claimant's attorney had actual knowledge of Dr. F's report. The hearing officer evidently determined that the TWCC-21 sent to the claimant's attorney did not prove that the TWCC-69 was also mailed at this time. He may have considered that Dr. F did not claim to have mailed a copy to claimant's attorney, nor did Dr. F specify the date he contends he mailed a report to the claimant. The hearing officer's factual findings are sufficiently supported by the evidence.

For these reasons, the determination of the hearing officer is affirmed.

Susan M. Kelley
Appeals Judge

CONCUR:

Stark O. Sanders, Jr.
Chief Appeals Judge

Thomas A. Knapp
Appeals Judge