APPEAL NO. 94229

This appeal is brought pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act). On November 2, 1993, a contested case hearing (CCH) was held in (city), Texas, with (hearing officer) presiding as hearing officer. The sole issue presented for resolution was:

Was the first certification of maximum medical improvement and impairment rating disputed within 90 days of being assigned?

The hearing officer determined that the appellant, claimant herein, had not disputed (Dr. S) certification of maximum medical improvement (MMI) and first impairment rating (IR) "within 90 days from the date that claimant received the report in the mail" and that the certification had become final.

Claimant contends that there is a good cause exception to "the 90 day time limit" and/or that the 90 days does not begin to run until the IR has been "discovered." Claimant requests that we reverse the hearing officer's decision and render a decision in his favor. Respondent, carrier herein, responds that the decision is supported by the evidence and requests that we affirm the decision.

DECISION

The decision and order of the hearing officer are affirmed.

Carrier in its response requests that we review the timeliness of claimant's appeal. Texas Workers' Compensation Commission (Commission) records indicate that the hearing officer's decision was distributed to claimant by mail on February 9, 1994. Section 410.202 requires that the written request for appeal be filed not later than the 15th day after the date on which the decision of the hearing officer is received and Tex. W.C. Comm'n 28 TEX. ADMIN. CODE § 143.3(c) provides that a request shall be presumed to be timely filed if it is mailed on or before the 15th day after the date of receipt of the hearing officer's decision. In that claimant's appeal is postmarked February 24, 1994, the 15th day after the decision was distributed, the appeal was timely filed.

This case essentially involves an interpretation of Rule 130.5(e). By way of background, claimant testified that he fell at work injuring his left foot, left knee, left hip, back and lower back on (date of injury). Claimant was sent to (Dr. S) by the employer and saw Dr. S for the first time on (date of injury). Claimant either did not miss any time from work (Carrier's Exhibit No. 1) or missed two days according to his testimony at the CCH. Claimant was terminated in a reduction in force on November 14, 1992. Claimant testified he saw Dr. S again in November and December with his last visit with Dr. S being on January 6 or 7, 1993. Claimant stated that "(Dr. S) told me there was not anything further he could do for me" and that claimant could see another doctor. (Exactly what Dr. S may have said is contradicted by various parts of claimant's testimony and in an affidavit). Claimant testified that Dr. S never discussed anything about MMI or IR with him. Dr. S, in a Report

of Medical Evaluation (TWCC-69) dated January 8, 1993,[1] certified MMI on "11-15-92" with a zero percent IR. It is unclear whether Dr. S sent claimant a copy of the January 8th TWCC-69, although, the documentary evidence indicates "insurance forms" were sent to claimant on January 8th. Carrier in sworn answers to interrogatories stated it forwarded the TWCC-69 to "claimant and TWCC on January 12, 1993." Claimant's testimony regarding the receipt of the January 8th TWCC-69 is vague as to when, where and the circumstances of receiving this particular form. The hearing officer, in the statement of evidence recited "[claimant] did receive correspondence from the doctor [meaning Dr. S] and from the carrier, but he testified that he was not aware that [Dr. S] had found he reached [MMI] with a 0% [IR]." We find that to be a fair summary of the evidence on that point. Claimant saw (Dr R) on March 16, 1993, and again in April and May 1993. Claimant consulted the attorney representing him at the CCH[2] on May 20 or 24, 1993, and at the time brought to the attorney all of his workers' compensation papers, including Dr. S's TWCC-69 dated January 8, 1993, and was advised of the importance of disputing Dr. S's first IR. By letter dated June 30, 1993, claimant, through his attorney, advised the Commission and carrier's adjustor that he was disputing Dr. S's IR of "January 7, 1993." Claimant testified he must have received Dr. S's TWCC-69 because it was in the records he gave to his attorney for review. Claimant testified, he did not know where the envelope the papers came in was although he did keep the envelope in which Dr. S had mailed claimant reports in November and December 1992.

Claimant contended at the CCH, and on appeal, that he disputed Dr. S's certification of MMI and IR within 90 days of the date he "discovered" the report, and he did not "discover" the report until his attorney brought the report to his attention. Claimant further contends that "there is a good cause exception to the strict interpretation of the 90 day time limit to dispute a MMI finding, and [IR]." Claimant emphasized that MMI and IR were never discussed with him by Dr. S, carrier, or individuals he spoke with at the Commission.

Carrier's position is that claimant certainly received Dr. S's January 8th report, that Dr. S's other reports were mailed and received within approximately a week from the date of those visits and that claimant would have received the January 8th report from either Dr. S or the carrier in January 1993 and that IR was not disputed until June 30, 1993.

The hearing officer determined in pertinent part:

FINDINGS OF FACT

[1]The date on the TWCC-69 has been marked over and the particular TWCC-69 is sometimes referred to as being dated January 7, 1993.

[2]There was testimony that claimant may have telephonically consulted another attorney prior to May 1993 but apparently never entered into an attorney - client relationship with that attorney.

6.Dr. S did not discuss with or inform the Claimant at any of the office visits that Claimant had reached maximum medical improvement with a 0% impairment rating.

7.Claimant received in the mail no later than January 30, 1993, a copy of Dr. S's report of medical evaluation (TWCC-69) signed by Dr. S on January 8, 1993, concluding that Claimant had reached maximum medical improvement on November 15, 1992, with a 0% impairment rating.

8.Claimant was not aware of a 90 day deadline for disputing an impairment rating until May 24, 1993, when he first consulted an attorney.

9.Claimant filed notice disputing Dr. S's finding of maximum medical improvement with a 0% impairment rating on June 30, 1993.

10.Dr. S's impairment rating signed on January 8, 1993, was the first impairment rating assigned to the Claimant.

11.Claimant did not dispute Dr. S's findings of maximum medical improvement and impairment rating with 90 days of the date he first received the report in the mail.

CONCLUSIONS OF LAW

2.The first certification of maximum medical improvement and impairment rating was not disputed within 90 days from the date that Claimant received the report in the mail.

3.The first certification of maximum medical improvement and impairment was not timely disputed and has become final.

The provision at issue is Rule 130.5(e) which states:

(e)The first impairment rating assigned to an employee is considered final if the rating is not disputed within 90 days after the rating is assigned.

As indicated above, claimant's first contention is that there is a good cause exception, to Rule 130.5(e), quoted above, and that the Appeals Panel has implicitly so stated in Texas Workers' Compensation Commission Appeal No. 92670, decided February 1, 1993, by stating, " . . . even if there were a good cause exception to Rule 130.5(e), it would not be present here." The Appeals Panel has stated on several occasions that Rule 130.5(e) does not contain a good cause exception for failure to dispute within the 90 day period. Texas Workers' Compensation Commission Appeal No. 93917, decided November 23, 1993; Texas Workers' Compensation Commission Appeal No. 93684, decided September 21, 1993; Texas Workers' Compensation Commission Appeal No. 931011, decided

December 10, 1993; Texas Workers' Compensation Commission Appeal No. 93783, decided October 19, 1993; Appeal No. 92670, supra, does not disagree with the cited decisions but only is intended to say that there is no good cause exception to Rule 130.5(e) but "even if there were . . it would not . . . ." be applicable to the situation in Texas Workers' Compensation Commission Appeal No. 92670.

Claimant also raises the issue that Rule 130.5(e) "does not define what it means by "after the rating is assigned." Although Rule 130.5(e) does not define what is meant by "after 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 rule until the party is aware of the rating or has actual knowledge. *See also* Texas Workers' Compensation Commission Appeal No. 931011, decided December 10, 1993, which further held that:

> 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 . . . .

The rationale for this position is explained in Texas Workers' Compensation Commission Appeal No. 92542, decided November 30, 1992, quoting Texas Workers' Compensation Commission Appeal No. 93423, decided July 12, 1992. which held:

> that it would require some stretch of the imagination to find that claimant could dispute a doctor's report before he was aware that it was rendered. Consequently it is when the claimant has actual knowledge of the MMI certification or impairment rating that becomes the more critical matter, rather than when the rating is assigned.

See also Texas Workers' Compensation Commission Appeal No. 93570, decided August 24, 1993. It is clear from these decisions that evidence of communication is of primary importance. Appeal No. 931011, *supra*. However, we are not willing to hold that these decisions mean a party can receive a written communication, fail or decline to read the communication, and then subsequently claim unawareness or lack of actual knowledge of the communication. In the instant case, there is evidence that the TWCC-69 in question was sent to claimant by January 30, 1993. It is undisputed that claimant received the communication. The hearing officer determined, as fact, that claimant received the TWCC-69, by mail, "no later than January 30, 1993 . . . ." The hearing officer's determination on this point is not so against the great weight and preponderance of the evidence or incorrect as a matter of law.

In line with prior decisions, we reject claimant's contention that there exists a "good cause" exception to Rule 130.5(e). We further reject claimant's contention that the 90 days in Rule 130.5(e) does not begin until the first IR is "discovered," which claimant defines as

being when the IR (and MMI) are first explained or the claimant became aware of the significance of the rating.

Upon review of the record submitted, we find no reversible error and we will not disturb the hearing officer's determinations unless they are so against the great weight and preponderance of the evidence as to be manifestly unjust. In re King's Estate, 150 Tex. 662, 244 S.W.2d 660 (1951); Pool v. Ford Motor Co., 715 S.W.2d 629, 635 (Tex. 1986). We do not so find and consequently the decision and order of the hearing officer are affirmed.

Thomas A. Knapp
Appeals Judge

CONCUR:

Susan M. Kelley
Appeals Judge

Philip F. O'Neill
Appeals Judge