APPEAL NO. 94365

This appeal arises under the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act). A contested case hearing (CCH) was held in (city), Texas on February 15, 1994, with (hearing officer) presiding as hearing officer. The only issue presented at the CCH concerned whether the claimant disputed the first impairment rating (IR) assigned or whether it has become final for failure to timely dispute. The hearing officer concluded that the claimant did timely dispute the date of maximum medical improvement (MMI) and first IR assigned. In its request for review, the carrier asserts error in the hearing officer's finding and conclusion of a timely dispute and thus, asks that we reverse and render a decision that the initial date of MMI and IR became final pursuant to Tex. W. C. Comm'n, 28 TEX. ADMIN. CODE § 130.5(e) (Rule 130.5(e)). Claimant did not file a response on appeal.

DECISION

We reverse the decision of the hearing officer and render a decision that the initial certification of MMI and assignment of IR has become final for failure to timely dispute under Rule 130.5(e).

It is undisputed that claimant sustained compensable injuries in (month year), as a result of repetitive motion in the course and scope of her employment with the (employer). Following her injuries, claimant began treating with (Dr. B) and continued to treat with him for approximately one year. In June 1993, Dr. B sent claimant to a rehabilitation facility for testing, apparently to aid in his assessment of claimant's impairment rating. Claimant testified that she was required to disrobe at the rehabilitation facility and the affected areas were not examined. Following the testing at the rehabilitation facility, claimant was again seen by Dr. B, who orally advised her that he had determined that she had reached MMI and that he had determined her IR to be six percent. Thereafter, Dr. B completed a Report of Medical Evaluation (TWCC-69) which provided an MMI date of June 8, 1993, and assessed a whole body impairment of six percent, based upon five percent impairment of each upper extremity. He also stated in his report that he would see her back in two months.

There was substantial conflicting testimony concerning whether or not claimant received Dr. B's initial TWCC-69, which the carrier received on June 18, 1993. By certified letter dated June 21, 1993, the carrier sent a copy of the TWCC-69 along with a Payment of Compensation or Notice of Refused/Disputed Claim (TWCC-21) to claimant. At the hearing, the carrier introduced a return receipt card referencing the June 21, 1993, letter and its enclosures, which showed delivery to the claimant's home address on June 22, 1993; however, claimant maintains that she never received those documents. The return receipt card bears the signature of JH, who is claimant's son. Nevertheless, claimant testified at the hearing that it was not her son's signature on the card because he attends college and is not at home when the mail is delivered and, in addition, she has specifically instructed him not to sign for certified mail. Claimant maintained that her sister's signature appears on the

return receipt card. Claimant further testified that her sister has Alzheimer's disease and because of her illness, signs for mail, using names other than her own, and then does not give the mail to the addressee.

On or about August 9, 1993, following a physical examination of the claimant, Dr. B issued a second TWCC-69 and an accompanying narrative report. In this TWCC-69, the MMI date was reflected as August 9, 1993, but the IR of six percent remained unchanged and our review indicates that there were no other material changes in either the TWCC-69 or the accompanying narrative report. On August 2, 1993, the claimant filed and the Commission approved a request to change doctors from Dr. B to (Dr. P), because of claimant's dissatisfaction with the examination and testing conducted by the rehabilitation center at Dr. B's request. In a narrative report dated July 26, 1993, Dr. P disagreed with portions of Dr. B's report, noting that in his opinion, the main diagnosis, that of "a Severe Dysautonomic Dysfunction (Carpal Tunnel Syndrome) variant of a dysautonomic dysfunction (Reflex Sympathetic Dystrophy)," had been missed in this case. Following the approval of her request to change treating doctors, claimant continued to be seen by Dr. P. In a TWCC-69 dated December 21, 1993, Dr. P certified MMI as of that date with an IR of 18%.

In a Notice of Dispute dated October 18, 1993, claimant challenged the August 9th MMI date and the IR of six percent reported by Dr. B in his second TWCC-69. By letter dated October 21, 1993, addressed to the Commission, Dr. B stated that he had inadvertently stated that claimant's MMI date was August 9th MMI in his second TWCC-69, that the MMI date of June 8, 1993 reflected on the initial TWCC-69 was the actual date that the claimant reached MMI, and that the August 9th date should be disregarded.

In her decision and order, the hearing officer noted that Dr. B was the first doctor to certify MMI and assess IR. She further found that Dr. B changed his mind on the MMI date twice after issuing his initial TWCC-69, emphasizing that each time Dr. B modified his MMI date it was well within 90 days of the report about which he was changing his mind. The hearing officer concluded that claimant's dispute of Dr. B's MMI date and his IR on October 18, 1993, was within 90 days of the "finalization" of Dr. B's report and was, therefore, timely under Rule 130.5(e).

Initially, carrier maintains that the 90-day period of Rule 130.5(e) began to run against claimant in this case when Dr. B told her at her June 1993 examination that he was going to certify MMI, with an IR of six percent. The appeals panel has considered and specifically rejected the argument that a doctor's oral statements to a claimant concerning MMI and IR are sufficient to start the running of the 90-day period of Rule 130.5(e). Instead, the Appeals Panel held that a writing, which is the functional equivalent of a TWCC-69, is required to constitute a certification sufficient to initiate the running of the 90-day period. Texas Workers' Compensation Commission Appeal No. 94354, decided May 10, 1994.

In the alternative, the carrier asserts that Dr. B's initial certification of MMI on June 8, 1993, and his assignment of a six percent IR became final, because claimant's dispute thereof came more than ninety days after claimant had notice or knowledge of Dr. B's certification of MMI and assignment of IR, as evidenced by the return receipt card dated June 22, 1993 acknowledging receipt of the letter which had the TWCC-69 and the TWCC-21 enclosed. The carrier further asserts that even if claimant did not receive the copy of the TWCC-69 as she maintained at the CCH, her dispute is still untimely because of her acknowledged receipt of a letter dated July 26, 1993, from the Texas Workers' Compensation Commission (Commission) advising her that the deadline for raising a dispute of Dr. B's MMI date and corresponding IR was September 6, 1993.

The Appeals Panel has previously indicated that a doctor can modify or amend his certification of MMI and assessment of IR within a reasonable period of time for a proper reason. *See* Texas Workers' Compensation Commission Appeal No. 92639, decided January 14, 1993; Texas Workers' Compensation Commission Appeal No. 92441, decided October 8, 1992. The Appeals Panel has also noted that since a doctor can modify or amend his certification of MMI, that amendment or modification may preclude his opinion from becoming final even absent a challenge by one of the parties pursuant to Rule 130.5(e). Texas Workers' Compensation Commission Appeal No. 93259, decided May 17, 1993. However, we do not consider those cases dispositive of the issue presented herein. Contrary to the assertions of the claimant at the CCH and the factual finding of the hearing officer, there was no such amendment or modification in this instance. *See* Texas Workers' Compensation Commission Appeal No. 93987, decided December 14, 1993 (Appeals Panel affirmed hearing officer's determination that treating doctor's initial certification of MMI and assessment of IR became final under Rule 130.5(e), despite his issuance of a subsequent TWCC-69 where the IR increased from 13% to 25%, because there was no evidence of an undiagnosed medical condition or improper or inadequate medical treatment.). Instead, we are presented with the situation where a doctor issued a second TWCC-69 and in so doing made an admitted inadvertent error in recording the MMI date. If these circumstances were sufficient to start anew the running of the 90-day period upon the issuance of Dr. B's second TWCC-69, as the hearing officer found, the 90-day finality provision of Rule 130.5(e) would be substantially undermined. Thus, the proper question in this case is whether the claimant filed a dispute of Dr. B's initial certification of MMI and assignment of IR, within 90 days of having received notice thereof.

Generally, service by mail is complete upon deposit of the paper, properly addressed, in a post office or official depository. De Los Santos v. Southwest Texas Methodist Hosp. 802 S.W.2d 749 (Tex. App.-San Antonio 1990, no writ). Thus, an argument could be made that if the letter and the enclosures had been sent to the claimant by regular mail properly addressed, using the correct address, there might be a presumption of receipt. However, there is much better evidence of receipt of notice here, specifically, the return receipt which evidences that a certified letter along with a TWCC-21 and Dr. B's initial TWCC-69 was delivered to and received by someone at the claimant's correct address on June 22, 1993. Despite claimant's insistence that she did not actually receive the documents delivered to

her home, it does not follow that this evidence of delivery is insufficient to constitute the notice required to start the running of the 90-day period of Rule 130.5(e). It is well-settled that the 90-day period is triggered when a party is notified or has knowledge of the first certification of MMI and assignment of IR, or as of June 22, 1993, in this instance. Texas Workers' Compensation Commission Appeal No. 93501, decided August 2, 1993. Thus, claimant's dispute of Dr. B's MMI and IR of October 18, 1993, well beyond ninety days of the date the claimant had notice thereof, simply came too late in the day to avoid the finality provision of Rule 130.5(e).[1]

Accordingly, we reverse the decision and order of the hearing officer and render a decision that Dr. B's certification of MMI as of June 8, 1993, and his assessment of a six percent whole body impairment became final by operation of Rule 130.5(e) for claimant's failure to timely dispute the same.

Stark O. Sanders, Jr.
Chief Appeals Judge

CONCUR:

Robert W. Potts
Appeals Judge

Thomas A. Knapp
Appeals Judge

[1]We note that claimant acknowledged receipt of a letter dated July 26, 1993 sent by the Commission notifying the claimant that the Commission was in receipt of Dr. B's TWCC-69 and advising her that the MMI date of June 8, 1993, and the IR of six percent contained therein might become final if they were not disputed by September 6, 1993. Nonetheless, claimant did not file her dispute by the date identified by the Commission and in fact, did not do so until some six weeks thereafter. *See* Texas Workers' Compensation Commission Appeal No. 94322, decided May 2, 1994.