APPEAL NO. 990194

This appeal arises pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. ' 401.001 *et seq.* (1989 Act). A contested case hearing was held on January 5, 1999. With respect to the issues before her, the hearing officer determined that the respondent's (claimant) compensable injury of _____, did not extend to a left knee injury; that the first certification of maximum medical improvement (MMI) and impairment rating (IR) did not become final under Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE ' 130.5(e) (Rule 130.5(e)); and that the claimant did not have disability as a result of his compensable injury from _____ to August 3, 1998. In its appeal, the appellant (carrier) asserts error in the hearing officer's determination that the first certification of MMI and IR did not become final pursuant to Rule 130.5(e). In his response to the carrier's appeal, the claimant urges affirmance. The claimant did not appeal the extent-of-injury or disability determinations and they have become final under Section 410.169.

DECISION

Affirmed.

The parties stipulated that the claimant sustained a compensable injury to his right knee on _____, when in the course and scope of his employment as a truck driver, he was pinned between a pipe rack and his truck while loading the truck. On July 2, 1997, the claimant sought treatment with Dr. L, to whom he had been referred by his employer. In progress notes from that visit, Dr. L diagnosed a right thigh contusion/abrasion and stated that an x-ray of the claimant's right knee was negative for fracture. On July 9, 1997, the claimant again saw Dr. L for follow-up. In progress notes from that visit, Dr. L stated that the abrasion was healing well and that the claimant's pain complaints were minimal. In a Report of Medical Evaluation (TWCC-69) of July 14, 1997, Dr. L certified that the claimant reached MMI on July 9, 1997, with an IR of zero percent.

The carrier introduced a Notification Regarding MMI and/or IR (TWCC-28) dated September 5, 1997, which states that the carrier received Dr. L's TWCC-69, certifying MMI with an IR of zero percent. Ms. B, an adjuster for carrier's third-party administrator, testified that the TWCC-28 was mailed to the claimant by first class mail on September 5, 1997. She stated that it was mailed to (address No. 1), the address the carrier had as the claimant's correct address. The (address No. 1) address was also the address listed for the claimant on Dr. L's TWCC-69. Ms. B testified that the TWCC-28 was not returned as undeliverable, noting that the carrier's standard policy is to attach returned envelopes to the mail and place them in the file.

The claimant testified that he did not receive either the TWCC-69 or the TWCC-28 in 1997 and that he first learned of Dr. L's certification when he hired an attorney to represent him in this claim. He further stated that at the time of his injury he was living at (address No. 2) and not on (address No. 1); that he had moved to (address No. 2) on or about May 31, 1996; and that his wife filed a change of address form with the postal service when they moved. On cross-examination, the claimant denied that he had given Dr. L the (address

No. 1) address when he went to see him in July 1997, noting that his wife completed the forms at Dr. L's office for him because he has difficulty reading and writing in English. In answers to Deposition on Written Questions, Mr. C, the health care coordinator for Dr. L, stated that the claimant provided the (address No. 1) address to Dr. L, and that a copy of Dr. L's TWCC-69 was not sent to the claimant by the doctor's office. On cross-examination, the claimant further acknowledged that he sustained a prior compensable injury in (prior date of injury) and that the doctors whom he saw in connection with that injury and the Texas Workers' Compensation Commission (Commission) also had the (address No. 1) address, although he was no longer living at that address.

Ms. L, the claimant's wife, testified that she handles mail and paperwork for the claimant. She stated that she did not receive either the TWCC-69 or the notification from the carrier about Dr. L's certification of MMI and IR. She stated that they moved from the (address No. 1) address to the (address No. 2) address on May 31, 1996. She testified that she filed a change of address with the post office after the move. Ms. L further testified that she went with the claimant to his initial appointment with Dr. L for this injury and that she completed the intake form, listing the (address No. 2) address. She stated that she does not have an explanation for why Dr. L did not update his records. The claimant introduced records demonstrating that the utilities were transferred from (address No. 1) to (address No. 2) on May 31, 1996. The claimant's personnel records indicate that the employer did not become aware of the change of address until November 20, 1997.

As noted above, the hearing officer determined that the first certification of MMI and IR did not become final under Rule 130.5(e). She found that the claimant did not receive written notice of Dr. L's certification until July 2, 1998, the date the Commission sent a letter to the claimant notifying him of Dr. L's assessment, and that he disputed the certification within 90 days of that date. Initially, the carrier argues that we should reconsider our prior decisions that the claimant must receive written notice of the certification in order to trigger his obligation to dispute it within the 90-day period provided in Rule 130.5(e). The carrier maintains that since Rule 130.5(e) speaks in terms of the first certification becoming final if it is not disputed within 90 days after the rating is *assigned*, there is no basis for the Appeals Panel to have determined that receipt of written notice of the certification is required to initiate the dispute requirement. We decline to reconsider our determination in that regard. We simply cannot agree that the use of the term "assign" in Rule 130.5(e) mandates that we reach the absurd result that the initial certification of MMI and IR becomes final against a party 90 days after the rating is assigned, whether or not the party had notice of the certification within the prescribed period for filing a timely dispute. *See* Texas Workers' Compensation Commission Appeal No. 982851, decided January 15, 1999, and Texas Workers' Compensation Commission Appeal No. 981857, decided September 24, 1998, and the cases cited therein for examples of other cases where the first certification of MMI and IR did not become final because of the lack of evidence that the claimant received written notice of the certification, triggering his obligation to dispute the initial rating.

Next, we consider the carrier's argument that the claimant should be considered to have received constructive notice of Dr. L's certification in September 1997, from the TWCC-28, which the carrier sent to the claimant at the (address No. 1) address, which was

the address it believed at the time was the claimant's correct address. The carrier emphasizes that when it sent the TWCC-28 to the claimant at that address, Dr. L, the employer, the doctors involved in the 1995 claim, and the Commission also listed the (address No. 1) address as the claimant's correct address. The carrier asserts that the claimant had an obligation to update his address, that he failed to do so, and that the hearing officer's determination that Dr. L's certification did not become final improperly rewards the claimant for his inaction. As noted above, we rejected the carrier's invitation to reverse our interpretation that a party must receive written notice of first certification to start the running of the 90-day period. In this instance, the hearing officer simply was not persuaded that the carrier had established that the claimant received written notice of Dr. L's certification prior to July 2, 1998. The hearing officer heard the carrier's argument to the effect that the claimant should be held to having had constructive notice of the certification in September 1997 because he did not successfully convey his change of address to either the carrier or the Commission and that he did so in an attempt to circumvent finality. The hearing officer considered and rejected this argument and she was acting within her province as the hearing officer in so doing. Our review of the record does not demonstrate that the carrier's constructive notice argument is sufficient to establish, as a matter of law, that Dr. L's certification became final under Rule 130.5(e). The determination that the claimant did not receive written notice of Dr. L's certification of MMI and IR until July 2, 1998, is supported by sufficient evidence and is not so against the great weight and preponderance of the evidence as to compel reversal on appeal. Pool v. Ford Motor Co., 715 S.W.2d 629, 635 (Tex. 1986); Cain v. Bain, 709 S.W.2d 175, 176 (Tex. 1986). Accordingly, we affirm the hearing officer's determination that the first certification did not become final under Rule 130.5(e) as it is undisputed that the claimant disputed the rating within 90 days of July 2, 1998.

In her decision the hearing officer states that the claimant "became aware of his [MMI] and [IR] on July 2, 1997"; however, it is apparent that she actually determined that he received notice on July 2, 1998. Therefore, we reform Finding of Fact No. 11 to correct this typographical error.

The hearing officer's decision and order are affirmed.

Elaine M. Chaney
Appeals Judge

CONCUR:

Robert W. Potts
Appeals Judge

Judy L. Stephens
Appeals Judge