APPEAL NO. 990408

This appeal arises under the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq*. (1989 Act). On February 1, 1999, a contested case hearing (CCH) was held. With regard to the three issues before her, the hearing officer determined (1) that the first certification of maximum medical improvement (MMI) and impairment rating (IR) assigned by Dr. P on April 18, 1998, did not become final under Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 130.5(e) (Rule 130.5(e)), (2) that respondent (claimant) and appellant (carrier) had an opportunity to agree on a designated doctor as required by Rule 130.6(e), and (3) that claimant had disability from July 13, 1998, to the date of the CCH.

Carrier appeals, alleging seven points of error attacking the hearing officer's findings, conclusions and decision on all three issues. Carrier's principal argument is that a certified letter, with Dr. P's first assigned IR, was sent to claimant at his last known address and therefore claimant was presumed to have received notice of the zero percent IR. Carrier requests that we reverse the hearing officer's decision and render a decision in its favor on all three issues. Claimant urges affirmance.

DECISION

Affirmed.

As the hearing officer notes, the facts are generally not in dispute. The parties stipulated that claimant sustained a compensable (low back) injury on _____, that Dr. P (the treating doctor) certified that claimant had reached MMI on December 29, 1997, with a zero percent IR, and that Dr. P's certification was the first assigned to claimant. Claimant testified that he was a "screen burner" and that on _____, he slipped on a wet floor and fell, landing on his right side. Claimant said that he continued work that day but that the employer sent him to the doctor the next day (November 11th). A handwritten report dated November 12, 1997, from Dr. P is largely illegible regarding the diagnosis and treatment. Claimant testified that Dr. P prescribed physical therapy (PT) two times a week. Claimant continued to go to PT through the end of December 1997. Claimant said that he was incarcerated from about January 6, 1998, through May 10, 1998. In the meantime, Dr. P prepared a Report of Medical Evaluation (TWCC-69) dated April 18, 1998, certifying claimant at MMI on December 29, 1997 (apparently the last time claimant had PT) with a zero percent IR. Carrier's computer note entries, in evidence, indicate Dr. P's report was received by the carrier on April 28, 1998. It is undisputed that claimant called carrier's adjuster shortly after being released from jail, requesting additional medical treatment. The adjuster's computer note entry at 2:18 p.m. on May 15, 1998, states:

> The ee recd 0% rating. Will keep file open for at least 90 days in case he wants to dispute. The ee called me today and stated he has been incarcerated the past 4 months and he needs to see his dr. He stated he was jailed for driving a stolen car. he just got out and wants to see a dr. Told

him he has lifetime med trxtmt as long as it is related to his wc injury. We will continue to monitor file for medical mgmt.

Claimant testified that the adjuster did not tell him that Dr. P had certified him at MMI with a zero percent IR. Carrier, either on May 15, 1998 (according to the computer entry notes) or on May 18, 1998 (according to carrier's representations at the CCH) sent Dr. P's first certification of MMI/IR to claimant by certified mail (the envelope is postmarked May 18th) return receipt requested to claimant's last known address. That letter was returned "Unclaimed" on June 9, 1998. Claimant testified that he had moved and had not notified the carrier, Texas Workers' Compensation Commission (Commission), or the post office of his new address.

Claimant testified that he returned to Dr. P on July 13, 1998, and that Dr. P had told him that an IR had been given. Dr. P, on a "Disability Certificate," released claimant to regular duty on July 14, 1998. Claimant sought treatment from Dr. TP, who in a report dated July 13, 1998, recites a history of low back pain, and neck pain that radiates into the right shoulder, the slip-and-fall incident and gave a diagnosis to rule out a cervical herniated disc (HNP), lumbar HNP, radiculopathy, myofascitis, right rotator cuff tear and internal derangement of the right shoulder. Dr. TP took claimant off work on July 14, 1998.

Claimant contends that he did not receive a written copy of Dr. P's report until around September 3, 1998, and then promptly disputed that rating the same day. Claimant's attorney requested a designated doctor sometime in early September 1998. Admitted in evidence as Hearing Officer's Exhibit No. 2, over carrier's objection, is a Commission letter dated September 21, 1998, giving the parties 10 days to agree on a designated doctor and appointing Dr. C if the parties do not agree. Carrier contends that it never received this letter; however, attached to the back of the letter is a page indicating copies were sent to claimant, Dr. C, another doctor, carrier's adjuster and claimant's attorney. The hearing officer finds that notice "was provided to the Carrier's Austin representative by September 22, 1998."

Dr. D performed an arthropedic consult and in a report of October 7, 1998, recites the slip-and-fall incident, reviews x-rays, and diagnoses a cervical spine strain, lumbar spine instability at L5-S1, grade I spondylolisthesis at L5-S1 and a lumbosacral strain. Dr. D stated claimant could not work at that time. Eventually an MRI of the lumbar spine was performed on October 5, 1998, which showed a mild disc bulge at L2-3 and a "4-5 mm circumferential subligamentous herniated disc centrally–left paracentral laterally . . . ." The hearing officer comments that "current diagnoses have been herniated discs in the low back, neck and internal derangement of the right shoulder."

Carrier appeals the following findings of fact and the conclusions of law based on the appealed findings:

FINDINGS OF FACT

6. Claimant did not receive notice of [Dr. P's] certification in May, 1998.

* * * *

13. On September 21, 1998 a Commission letter was provided to the Austin representative for the Carrier advising that the designated doctor process had been started, that the parties had 10 days to agree on a doctor, and if no agreement was made then the Claimant would be examined by [Dr C].

14. Due to the compensable injury, Claimant was unable to obtain and retain employment at wages equivalent to Claimant's pre-injury wage beginning on July 13, 1998 through the present.

Carrier first contends that it had sent Dr. P's first certification to claimant's last known address, that claimant "had not returned to this address following his incarceration" and that by sending the TWCC-69, properly addressed, with appropriate postage in the U.S. mail creates a presumption of receipt, citing several Appeals Panel decisions. Carrier cites Texas Workers' Compensation Commission Appeal No. 94365, decided May 11, 1994, and Texas Workers' Compensation Commission Appeal No. 970220, decided March 18, 1997, as authority. In Appeal No. 94365, the notice was sent by regular mail and the notice was not returned. In Appeal No. 970220, the notice was sent by certified mail and not returned. We believe that whether the notice was received or not is within the hearing officer's fact finding authority. In this case, the carrier knew about Dr. P's report but did not tell claimant about it when he spoke with the adjuster on May 15, 1998. The adjuster had become aware that claimant had been incarcerated but apparently made no effort to establish where he was living after his release and finally, the claimant was clearly seeking additional medical care and had no knowledge, at that time, that Dr. P had assessed the IR. Then, three days later, carrier's adjuster sent claimant the first certification to claimant's last known address. The presumption of receipt is not an irrefutable presumption and in this case, as distinguished from Appeal Nos. 94365 and 970220, *supra*, carrier was clearly aware that its letter had not been delivered as being returned unclaimed. Perhaps, as carrier states, it had followed the letter of the rule but the hearing officer could certainly find that it violated the spirit by failing to inform the claimant that an IR had been rendered and that he had 90 days to dispute that rating if he disagreed with it. Carrier cites Texas Workers' Compensation Commission Appeal No. 970495, decided April 28, 1997, for the proposition that claimant has an obligation to notify the carrier and the Commission of a change of address. That may be the case, but the Appeals Panel noted in Appeal No. 970495 that they were concerned that "notice to the claimant was apparently sent to an incorrect address (although we note that the claimant has the responsibility to keep the Commission informed as to a change of address) and may not have been received by the claimant . . . ." That case went on to remand the case (on largely other grounds) with written notice of the remand going to "claimant (at his new address) . . . ." Under the

circumstances, we do not find error in the hearing officer's refusal to apply a presumption of receipt. We would also note that there is no evidence, one way or the other, that the Commission sent claimant an EES-19 letter advising him of Dr. P's rating. In response to carrier's allegations that claimant continued to receive checks at his old address, there was no evidence that carrier paid, or claimant received, any income benefits after his incarceration.

Carrier contends that the hearing officer's finding that the Commission's September 21, 1998, letter, advising that the designated doctor process had started, had been received by carrier was in error. Carrier acknowledges Rule 102.5(h) which states that for purposes of determining receipt for notices and other written communications which require action by a date specific after receipt, the deemed receipt date is five days after the date mailed. The Commission's letter required action by the parties if a designated doctor had been agreed on, and under Rule 130.6(c), if at the end of the 10th day the Commission has not received notification that a designated doctor had been agreed on, the Commission will presume that an agreement was not possible and a designated doctor would be selected. Carrier argues that the presumption cannot apply where the communication does not show if, how, or when the communication was "mailed." The Notice of Maximum Medical Improvement/Impairment Rating Dispute (TWCC-32) notice letter was clearly at issue and the hearing officer, in the presence of the parties, retrieved the Commission claim file, which contained the notice letter. As previously mentioned, the last page of Hearing Officer's Exhibit No. 2 in evidence does have a list of individuals, with addresses, including carrier's adjuster, to whom, ostensibly, the notice was sent. Also on this page is a very faint, mostly illegible, Commission date stamp of an undetermined date. While carrier timely objected on the record to the introduction of this letter from the Commission's claims file, the hearing officer overruled the objection and admitted the letter. In this case, where receipt of the Commission's notice letter was at issue, the hearing officer did not err in applying the deemed receipt rule and since no notice of agreement was given, the Commission appointed the designated doctor.

Carrier also contends that claimant did not have disability because Dr. P, on July 14, 1998, had returned claimant to regular duty. As carrier's appeal notes, Dr. TP took claimant off work the same day and the two doctors, on the same date, "came to completely opposite and contradictory conclusions." Carrier argues that Dr. TP's off-work slip is "conclusory" and all the "medical evidence submitted to support disability is conclusory and does not state any basis for continued off work status . . . ." While we do not necessarily agree with carrier's thesis, we would add that the hearing officer can find disability based on the claimant's testimony alone, if believed, even though contradicted by medical reports. Houston General Insurance Company v. Pegues, 514 S.W.2d 492 (Tex. Civ. App.-Texarkana 1974, writ ref'd n.r.e.); Texas Workers' Compensation Commission Appeal No. 971558, decided September 24, 1997. We find no error in the hearing officer's assessment of disability as supported by the reports of Dr. TP and Dr. D, in addition to claimant's testimony, as opposed to Dr. P's single release slip.

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 clearly wrong or unjust. In re King's Estate, 150 Tex. 662, 244 S.W.2d 660 (1951). We do not so find and, consequently, the decision and order of the hearing officer are affirmed.

_____
Thomas A. Knapp
Appeals Judge

CONCUR:

_____
Stark O. Sanders, Jr.
Chief Appeals Judge

_____
Tommy W. Lueders
Appeals Judge