

APPEAL NO. 990483

This appeal arises pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act). A contested case hearing (CCH) was held on January 5, 1999. The issue at the CCH was whether the first certification of maximum medical improvement (MMI) and impairment rating (IR) assigned by Dr. V on February 20, 1998, became final under Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 130.5(e) (Rule 130.5(e)). The hearing officer determined that the appellant (claimant) did not dispute Dr. V's certification of MMI and IR within 90 days of receipt; that there was no misdiagnosis, substantial change in condition, or improper treatment to prevent the operation of Rule 130.5(e); and the first certification of MMI and IR assigned by Dr. V on February 20, 1998, became final under Rule 130.5(e). The claimant appeals, urging that the hearing officer erred in applying the law on the issue of contest of compensability and that the hearing officer's determinations as to injury and disability are against the great weight of the evidence. The claimant urges that the determinations of the hearing officer are against the great weight and preponderance of the evidence and asks that the Appeals Panel reverse the decision of the hearing officer. The claimant states that, a week after returning to work, he suffered a continuation of his previous problem and underwent a microlumbar disk excision at L3-4 with foraminotomy of the left L4 nerve root, that that surgery was not discussed with the claimant prior to the initial certification of MMI, and that, after the surgery, Dr. V rescinded his certification of MMI. The respondent (carrier) replies that there was no misdiagnosis or substantial change in condition, that the claimant was advised that he might need surgery in the future, and that the claimant's appeal is untimely. The carrier urges that the hearing officer's determinations are supported by evidence and asks that the hearing officer's decision be affirmed.

DECISION

A timely appeal not having been filed, the decision and order of the hearing officer have become final pursuant to Section 410.169.

Records of the Texas Workers' Compensation Commission (Commission) show that the decision of the hearing officer was mailed to the claimant on January 28, 1999, with a cover letter of the same date. Pursuant to Section 410.202 and Rule 143.3(c), an appeal, to be timely, must be filed or mailed not later than the 15th day after the date of receipt of the hearing officer's decision. Under Rule 102.5(h), the claimant indicates that he received the decision and order of the hearing officer on February 2, 1999. Thus, the last day to timely file an appeal would be February 17, 1999. The claimant's appeal indicates a date of service of February 17, 1999. The carrier alleges in its response that the envelope in which the claimant's appeal was served on it has a metered stamp reciting a date of February 16, 1999, but that the U.S. postal stamp indicates it was mailed February 18, 1999. The carrier alleges that "it is obvious that the stamp [the meter stamp] was cut off another envelope" and that the postage for the weight of the appeal would have been \$3.20, not \$5.65 as

shown on the meter stamp. The carrier included a photocopy of the envelope with its appeal. A facsimile copy of the claimant's appeal was received by the Commission's Chief Clerk of Proceedings on March 4, 1999, accompanied by a form letter from the office of the Travis County District Clerk indicating that the enclosed instrument (the claimant's appeal) was being returned to the claimant's attorney because it does not pertain to a Travis County District Court case. Attached to the original of this form letter and the claimant's appeal, received by the Commission on March 8, 1999, is an envelope postmarked February 26, 1999, from the Office of the District Clerk of Travis County to the claimant's attorney. While the claimant's appeal states that it was sent to the Commission, no copy of the envelope in which it was originally mailed by the claimant's attorney is in the file. The appeal was not received by the Commission within 20 days of the receipt of the hearing officer's decision as required by Rule 143.3(c), having been apparently mailed to the wrong address. Thus, whether it was mailed on February 16, 1999, or February 17, 1999, the appeal was untimely, the jurisdiction of the Appeals Panel was not properly invoked, and the decision and order of the hearing officer became final under Section 410.169.

Stark O. Sanders, Jr.
Chief Appeals Judge

CONCUR:

Tommy W. Lueders
Appeals Judge

Elaine M. Chaney
Appeals Judge