

APPEAL NO. 990511

This appeal arises pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act). On February 4, 1999, a hearing was held. He (hearing officer) determined that appellant's (claimant) initial impairment rating (IR) became final under Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE. § 130.5(e) (Rule 130.5(e)). Claimant asserts that he did not receive written notice of the initial IR on February 21, 1997, or at any other time; he adds that his injuries were not accurately diagnosed and not properly treated. Respondent (carrier) replied that the decision should be affirmed.

DECISION

We affirm.

Claimant worked for (employer) on \_\_\_\_\_. He did not testify as to how his injury occurred or even what symptoms he had at the time which resulted in his seeking medical care. The medical records indicate that claimant worked grinding pipe. Although the injury date is \_\_\_\_\_, the earliest medical document in the record is an August 1, 1996, note of Dr. W, who claimant identified as his treating doctor, and who provided the initial IR, the basis for the dispute at this hearing. Dr. W noted on August 1, 1996, that claimant had pain at the base of the neck and "down the arm." There is a reference also to a numb thumb. Dr. W's statement that claimant reported no prior problems with his neck or left upper extremity indicates that the injury involved the neck and the left upper extremity. Dr. W indicated that it appeared to be a cervical radiculopathy. Dr. W later in August noted a delay in physical therapy and said that claimant was off work.

In late August and September, Dr. W noted that claimant had physical therapy and needed an EMG. On September 30, 1996, Dr. W said the EMG demonstrated no radiculopathy, with the median and ulnar nerves normal. He indicated no explanation for claimant's complaints of "some tingling" in his fingers. He released him to work and stated that he anticipated no permanent impairment. Dr. W's Report of Medical Evaluation (TWCC-69) is dated October 6, 1996; it provides a date of maximum medical improvement (MMI) of September 30, 1996, with an IR of zero percent. Dr. W's notes indicate that claimant returned in November 1996 and Dr. W ordered a CT scan and myelogram. Dr. W commented on November 18, 1996, that the myelogram does not show the basis for pain in claimant's left arm, noting that the myelogram does show "a small disc on the right side at C5-6 but this would not be causing left sided symptoms." He again released claimant to work with no impairment.

Claimant then had carpal tunnel surgery on the right wrist in March 1998 and carpal tunnel surgery on the left wrist in April 1998, even though an EMG and nerve conduction study in January 1998 found "no electrodiagnostic abnormalities . . . in either upper extremity nor in the cervical paraspinals." Dr. D in October 1998 found "a manifestation of chronic pain and deconditioning" rather than any "localized anatomical pain source." The above medical documents are not all that are in the record, but they are believed to be

fairly representative. There is no evidence from any medical doctor that Dr. W failed to do any test that should have been done at the time of the initial IR or that Dr. W treated claimant in any way that was incorrect. While claimant did not testify about inadequate medical treatment, he does reference it on appeal. The medical evidence does not show inadequate treatment or a misdiagnosis.

The parties at the hearing litigated whether or not claimant disputed the initial IR within 90 days of having been provided written notice of that IR. The hearing officer commented that the claimant is a poor historian. The record sufficiently supports that observation.

Claimant repeatedly denied that he ever received a copy of Dr. W's TWCC-69. However, when asked about a copy of the Texas Workers' Compensation Commission (Commission) letter dated February 21, 1997, claimant said he did not remember or does not recall seeing it; at one point he said he has not seen the Commission letter "unless I forgot about it." (The February 21, 1997, letter provided claimant with the date of MMI and the zero percent IR, with boldface type telling claimant to contact the Commission within 90 days if he did not agree with them.) The hearing officer could reasonably note the differences in claimant's testimony in regard to whether he ever received a copy of Dr. W's TWCC-69 as compared to his testimony concerning whether he received a letter from the Commission about the initial IR.

However, the hearing officer did not determine that claimant did not dispute the initial IR within 90 days on the basis of how emphatic claimant was in his denial of receipt. The claimant had provided an address of (address) in (City), in his August 7, 1996, Notice of Injury or Claim. There was no showing that claimant thereafter changed his address. Carrier provided the testimony of Mr. P to the effect that the assistant manager of the apartment at address stated that claimant's common-law wife, Ms. S, was the lessee of the apartment and that the lessee did not move from those premises until December 1997.

The Commission's February 21, 1997, letter was addressed to claimant at address in City. As set forth by the carrier, Rule 102.4(a) provides that all notices to a claimant will be sent to the "last address supplied . . . [by] any claim form filed by the claimant . . . ." Then Rule 102.5(a) restates the preceding to the effect that notices are to be sent to the last address supplied, and Rule 102.5(h) says that receipt will be deemed five days after the date the Commission letter was mailed. There was no evidence that the Commission letter was returned.

Although the evidence at hearing indicated that claimant lived at or received mail at several different locations and that he, at different times, had another alleged common-law wife, the hearing officer found that claimant received the Commission letter no later than February 26, 1997. Claimant's appeal contains statements that he lived with his sister and moved to another address in April 1997; neither point was provided in evidence at the hearing. Even had they been, there was no evidence that claimant changed his address with the Commission from the address location set forth on his own claim provided the Commission in August 1996. The evidence sufficiently supports the determination that

claimant received written notice of the initial IR no later than February 26, 1997. See Texas Workers' Compensation Commission Appeal No. 94229, decided April 11, 1994, which said that a claimant cannot claim that a notice received was not read to avoid the fact that notice was provided.

There was no evidence that claimant disputed the initial IR within 90 days of February 26, 1997, or that he disputed the initial IR at any time in 1997.

Finding that the decision and order are sufficiently supported by the evidence, we affirm. See In re King's Estate, 150 Tex. 662, 244 S.W.2d 660 (1951).

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Joe Sebesta  
Appeals Judge

CONCUR:

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Elaine M. Chaney  
Appeals Judge

Concurring opinion:

I concur in this case and write separately to note that in 1996 claimant's doctors were considering whether he had carpal tunnel syndrome (CTS) and/or a cervical injury. The hearing officer could find from the evidence that this case does not involve a situation where claimant had general upper extremity pain which was misdiagnosed as a CTS injury but then was later proved to be a cervical injury, or vice versa. If such had been the case, the misdiagnosis assertion might have been more credible.

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Judy L. Stephens  
Appeals Judge