

APPEAL NO. 991038

This appeal arises under the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act). On April 21, 1999, a contested case hearing was held. With respect to the issues before him, the hearing officer determined 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)), because respondent (claimant) disputed it within the 90-day period. Appellant (carrier) appeals that determination, contending that the hearing officer erred in determining that claimant did not receive notice of the first certification until September 28, 1998, and that the first certification did not become final. Claimant responds that the Appeals Panel should affirm the hearing officer's decision and order.

DECISION

We affirm.

Carrier contends the hearing officer erred in determining that the first certification did not become final. Carrier asserts that a copy of the Report of Medical Evaluation (TWCC-69) with the first certification was sent to claimant at his home and that his companion or common-law wife, Ms. W, signed for this mail. Carrier contends that, because someone at that address signed for the mail and received it, the 90-day period started from that date. Carrier also notes that claimant had designated Ms. W as his "legal surrogate" by signing a power of attorney permitting her to deposit checks and take care of his automobile.

It was undisputed that claimant sustained a compensable injury on _____, and that he later underwent knee surgery. Claimant said he had been working as a driver, that he injured his knee in addition to other body parts, and that his treating doctor is Dr. H. Claimant said he was incarcerated from February 26, 1998, to September 28, 1998. He testified that Dr. H had told him that he would be referred for an IR. The record reflects that on April 20, 1998, Dr. H certified that claimant reached MMI on March 27, 1998, with an eight percent IR. It was undisputed that this was the first certification, that carrier mailed a copy of the first certification and an impairment income benefits (IIBS) check to claimant, and that Ms. W signed for this certified mail delivery on May 6, 1998. It was also undisputed that the Texas Workers' Compensation Commission (Commission) mailed a copy of the first certification to claimant on May 19, 1998. Claimant said he did not think he would be receiving any notice of an IR because he had been incarcerated and had not yet seen a doctor about an IR. Claimant testified that Ms. W did not tell him about the receipt of a TWCC-69.

He said that when he was released on September 28, 1998, he found out about the first certification when Ms. W showed him his mail. He said he disputed the first certification about a week later by calling the Commission. The hearing officer determined that, because claimant disputed the first certification within 90 days of the date he first had personal notice of it, the first certification did not become final.

Rule 130.5(e) provides that the first IR assigned to an injured worker will become final if not disputed within 90 days after the doctor assigned it. The 90-day period starts to run from the date the parties become aware of the rating. Texas Workers' Compensation Commission Appeal No. 92693, decided February 8, 1993.

The 1989 Act provides that the hearing officer is the sole judge of the weight and credibility of the evidence. Section 410.165(a). Where there are conflicts in the evidence, the hearing officer resolves the conflicts and determines what facts the evidence has established. As an appeals body, we will not substitute our judgment for that of the hearing officer when the determination is not so against the great weight and preponderance of the evidence as to be clearly wrong or manifestly unjust. Cain v. Bain, 709 S.W.2d 175, 176 (Tex. 1986); Texas Workers' Compensation Commission Appeal No. 950456, decided May 9, 1995.

The hearing officer heard the testimony from claimant and reviewed the evidence regarding the mailing of written notice. He determined the credibility of the evidence before him. The hearing officer determined when claimant first received notice of the first certification and determined that claimant received it on or about September 28, 1998, when he was released from jail. From the evidence, the hearing officer could determine that claimant disputed the first certification within the 90-day period and that it did not become final. We have reviewed the record and we conclude that the hearing officer's determinations are not so against the great weight and preponderance of the evidence as to be clearly wrong or manifestly unjust. Cain, *supra*.

Carrier contends that, because notice of the first certification was sent to claimant by both the Commission and by carrier, and because it was received at his home, claimant received notice for the purposes of Rule 130.5(e). Carrier also apparently asserts that claimant may have received notice of the first certification while incarcerated. Carrier asserts that there is nothing to show that claimant could not receive mail while he was incarcerated. However, whether claimant received notice of the first certification is a fact issue for the hearing officer to consider. Texas Workers' Compensation Commission Appeal No. 941433, decided December 8, 1994. If claimant had not been incarcerated, our holding in this case would have been different given the fact that the notice was sent to and received at claimant's home. However, given the facts of this case, the hearing officer could and did determine that claimant did not receive notice until he was released and returned home on September 28, 1998.

We affirm the hearing officer's decision and order.

Judy Stephens
Appeals Judge

CONCUR:

Joe Sebesta
Appeals Judge

Robert W. Potts
Appeals Judge