

## APPEAL NO. 991318

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 May 26, 1999. He (hearing officer) determined that the appellant's (claimant) first certification of a date of maximum medical improvement (MMI) and an impairment rating (IR) by Dr. M, the treating doctor, became final because it was not timely disputed. The claimant appeals this determination, asserting legal error by the hearing officer. The respondent (carrier) replies that the decision is correct, supported by sufficient evidence, and should be affirmed.

### DECISION

Affirmed.

The facts of this case were largely stipulated. The claimant sustained a compensable left ankle injury on \_\_\_\_\_. On August 7, 1998, Dr. M completed a Report of Medical Evaluation (TWCC-69) in which he certified that day as the date of MMI and assigned a zero percent IR. This was the first certification of MMI and IR assigned to the claimant. Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 130.5(e) (Rule 130.5(e)) provides that the "first [IR] assigned to an employee is considered final if the rating is not disputed within 90 days after the rating is assigned." If the IR becomes final by virtue of this rule, the underlying date of MMI also becomes final. Texas Workers' Compensation Commission Appeal No. 92670, decided February 1, 1993. The 90 days begin to run on the date the disputing party receives written notice of the certification. Texas Workers' Compensation Commission Appeal No. 950666, decided June 12, 1995.

On June 5, 1998, the claimant's attorney advised the carrier that he was representing claimant. On September 24, 1998, the claimant received from the carrier a copy of Dr. M's TWCC-69 and a Notification Regarding Maximum Medical Improvement and/or Impairment Rating (TWCC-28). The carrier stated that a copy of these documents were not sent at the same time to the claimant's attorney "because of clerical error." On December 8, 1998, the claimant's attorney received a copy of the TWCC-69, but not the TWCC-28, in the carrier's exchange of documents for a December 15, 1998, benefit review conference (BRC). This BRC was reset to January 12, 1999, for the carrier to provide additional information on an issue of disability. At the January 12, 1999, BRC, the claimant's attorney received from the carrier the TWCC-28 and another copy of the TWCC-69. On this date, more than 90 days after the claimant received a copy of the TWCC-69, the attorney disputed the first certification on behalf of the claimant.

The claimant argued unsuccessfully at the CCH and renewed the argument on appeal, that the 90 days should not begin to run until her attorney received a copy of both the TWCC-69 and TWCC-28, thus making the dispute in this case timely. In support of this position, the attorney cites Rule 102.4 for the proposition that all notices and reports are to be sent to both the claimant and the claimant's representative, and Rule 141.4(b), which

requires the parties to exchange all pertinent information before a BRC. The attorney argues that the failure of the carrier to comply with either of these rules, for whatever reason, "denied the claimant the full benefit for hiring an attorney in the first place, i.e., to advise and react to the Claimant's claim."

The claimant described her position as seeking an "exception" to Rule 130.5(e). Recently, in Rodriguez v. Service Lloyds Insurance Company, 42 Tex. Sup. Ct. J. 900 (July 1, 1999) (motion to extend time to file a motion for rehearing extended to August 16, 1999), the Supreme Court held that there were no exceptions to Rule 130.5(e). We do not consider the relief sought in the case to be in the nature of an "exception" to the rule, but rather a determination of when the 90-day period in the rule is triggered.

The hearing officer, relying on existing precedent, determined that, although the actions of the carrier may give rise to an administrative violation, this possibility does not affect the application of Rule 130.5(e) in this case. He further noted that the critical event for triggering the 90-day dispute period was when the claimant received written notice of the first certification, not when the claimant's attorney received written notice. In Texas Workers' Compensation Commission Appeal No. 931011, decided December 10, 1993, a case concerning the 90-day dispute provision in Rule 130.5(e), the employee was notified of the IR, but the employee's attorney was not given notice of the IR. We stated that "evidence of communication to the party [of the IR] is necessary, but evidence of communication to a party's counsel has not been required to start the running of the 90-day period [for disputing the IR]," and that, "as in the violation of a rule in Appeal No. 92670, [*supra*], the failure of the carrier to notify counsel per Rule 102.4 is subject to administrative penalty per Section 415.002(22) which provides for administrative penalty for a carrier when intentionally violating a rule of the Commission [Texas Workers' Compensation Commission]." See *also* Texas Workers' Compensation Commission Appeal No. 94322, decided May 2, 1994, and Texas Workers' Compensation Commission Appeal No. 960540, decided May 1, 1996. We decline to revisit or change this existing precedent. It is worth observing, however, that ignorance of the law is not an excuse for failing to comply with its terms, Texas Workers' Compensation Commission Appeal No. 94269, decided April 20, 1994, and it is unclear why, as the claimant argues, the application of Rule 130.5(e) should not run until both a TWCC-28 and a TWCC-69 are received. Normally, the receipt of one or the other is sufficient written notice to start the time period for disputing. Finally, we note that the claimant's attorney received the TWCC-69 on December 8, 1998, which was still within 90 days of the claimant's receipt of this form and, arguably, there remained time to dispute it.

Finding no legal error, we affirm the decision and order of the hearing officer.

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Alan C. Ernst  
Appeals Judge

CONCUR:

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Susan M. Kelley  
Appeals Judge

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Elaine M. Chaney  
Appeals Judge