

APPEAL NO. 991998

This appeal arises pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act). A contested case hearing was held on August 16, 1999. With respect to the issues before him, the hearing officer determined that the first certification of maximum medical improvement (MMI) and impairment rating (IR) became final pursuant to Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 130.5(e) (Rule 130.5(e)); and that the appellant (claimant) had disability as a result of her _____, compensable injury from July 31, 1998, to April 11, 1999. In her appeal, the claimant argues that the hearing officer erred in determining that the first certification of MMI and IR became final. In its response to the claimant's appeal, the respondent (carrier) urges affirmance. The carrier did not appeal the hearing officer's disability determination and it has, therefore, become final under Section 410.169.

DECISION

Affirmed.

Because only the issue of whether the first certification of MMI and IR became final is before us on appeal, our factual recitation will be limited to the facts most relevant to that issue. It is undisputed that the claimant sustained a compensable back injury on _____. On February 5, 1998, Dr. H, a doctor in the clinic where the claimant initially sought treatment after her injury, certified that she reached MMI on that date with an IR of zero percent. The parties stipulated that Dr. H was the first doctor to certify MMI and assign an IR. The claimant testified that she did not receive written notice of Dr. H's certification until the date of the hearing. She stated that in mid-November 1998 she called an adjuster with the carrier and was advised that a doctor had certified MMI, but she maintained that she was not told the date of MMI that had been certified or advised that she had been assigned a zero percent IR. The claimant testified that about a week after that conversation, she contacted her lawyer. Dispute Resolution Information System records from the Texas Workers' Compensation Commission (Commission) show that the claimant's attorney called the Commission to dispute the first certification on February 25, 1999.

Ms. M testified that she is the supervisor in the carrier's workers' compensation department and that she has been employed by the carrier for nearly 26 years. Ms. M stated that the carrier's records reflect that it received Dr. H's Report of Medical Evaluation (TWCC-69) on February 11, 1998, and that the TWCC-69, the accompanying narrative report from Dr. H, and a Notification Regarding Maximum Medical Improvement and/or Impairment Rating (TWCC-28) were mailed to the claimant by certified mail on April 20, 1998. That letter is addressed to the claimant at "(address 1)." The claimant acknowledged that she lived at that address in April 1998 and we note that that address is also the address the claimant used on the sign-in sheet at the hearing. Ms. M testified that

the certified mail, containing the TWCC-69, the narrative report, and the TWCC-28, were returned unclaimed to the carrier on May 11, 1998. She stated that on May 13, 1998, the documents were remailed to the claimant at the same address by regular mail and that there is no notation in the file that they were returned undelivered. The claimant testified that she received mail at the 24th Street address as well as at (address 2), noting that those addresses were the homes of her mother and father, respectively. However, she insisted that she did not receive the documents relating to Dr. H's certification of MMI and IR in the mail from the carrier.

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. The Appeals Panel has held that written notice of the certification is required to trigger the duty to dispute. Texas Workers' Compensation Commission Appeal No. 94354, decided May 10, 1994. In this instance, the hearing officer determined that the claimant received written notice of the initial certification on May 18, 1998, five days after the carrier sent the TWCC-69, Dr. H's narrative report, and the TWCC-28 to the claimant by regular mail. In his decision the hearing officer stated that the claimant was "deemed" to have received those documents five days after they were mailed under Rule 102.5(h). The claimant argues that the hearing officer erred in applying Rule 102.5(h) in this case because, by its very terms, that rule only applies to written communications to and from the Commission. The claimant's point is well taken; however, although the hearing officer erred in applying Rule 102.5(h) to a correspondence from the carrier to the claimant, his error in that regard is harmless. While Rule 102.5(h) does not specifically apply here, the hearing officer was free to consider that provision as a guide for making a determination of the date of receipt of the documents, which he determined were mailed on May 13, 1998. That is, while Rule 102.5(h) was not determinative in this instance, the hearing officer could consider it in order to find the beginning point of the 90-day dispute period.

The claimant also argues that the hearing officer erred in determining that the claimant received written notice of the initial MMI and IR certification on May 18, 1998, because the carrier improperly sent the mail to the claimant at the (address), rather than the (address). The claimant maintains that the (address) is her "official address" because it is the address that was used on the documentation from the employer. We find no merit in the assertion that the carrier incorrectly sent notice of the first certification of MMI and IR to the address where the claimant was actually living at the time that notice was given. To the contrary, it would seem that the preferred address would be the address of residence. The claimant testified that she did not receive the documentation of Dr. H's certification of MMI and IR from the carrier. However, the hearing officer rejected that testimony and he was acting within his province as the sole judge of the weight and credibility of the evidence under Section 410.165(a) in deciding to do so. As the fact finder, the hearing officer was free to credit the testimony and documentary evidence showing that the documents advising the claimant of Dr. H's certification were sent to her residence on May 13, 1998, and, further, to determine, based on that evidence, that the claimant received those documents on May 18, 1998, triggering the 90-day dispute provision of Rule 130.5(e). As

noted above, the first certification was not disputed until February 25, 1999, well beyond the deadline for disputing. Accordingly, the hearing officer properly determined that Dr. H's certification became final under Rule 130.5(e).

The hearing officer's decision and order are affirmed.

Elaine M. Chaney
Appeals Judge

CONCUR:

Joe Sebesta
Appeals Judge

Dorian E. Ramirez
Appeals Judge