APPEAL NO. 992419

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 October 5, 1999. The hearing officer determined that the first impairment rating (IR) assigned by Dr. S did not become final pursuant to Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 130.5(e) (Rule 130.5(e)) because, though the respondent/cross-appellant (claimant) did not dispute this certification within 90 days of receipt, it was "fundamentally flawed." The appellant/cross-respondent (carrier) appeals this determination, citing legal error. The claimant does not respond to the carrier's appeal, but appeals the determination that the claimant actually received written notice on the date found by the hearing officer, contending that this determination is against the great weight and preponderance of the evidence. The carrier replies that this determination of the date of receipt was supported by sufficient evidence and should be affirmed.

DECISION

Affirmed in part, reversed and rendered in part.

The claimant sustained a compensable low back injury on _____. In March 1998, Dr. S was his treating doctor. On March 15, 1999, Dr. S wrote:

> Patient was seen today. I had also spoke to [carrier's nurse] and I feel that he has reached maximum medical improvement [MMI]. Patient is willing to come in on the 18th so I can do his [IR] at that time. Described to him what an [IR] consists of, which is reexamining the patient, going through his records. He is agreeable and appointment set for 03/18/99.

The claimant testified that at the visit on March 15, 1999, Dr. S told him he was ready to return to work and on that day performed a physical examination. He denied that Dr. S discussed MMI or IR with him or that he, the claimant, agreed to return on March 18, 1999. Instead, on March 18, 1999, he completed an Employee's Request to Change Treating Doctors (TWCC-53) to Dr. R, D.C. This was approved on March 24, 1999.

On March 29, 1999, Dr. S completed a Report of Medical Evaluation (TWCC-69) in which he certified MMI as of March 15, 1999, the date of his last examination of the claimant, and assigned a five percent IR solely for a specific disorder of the lumbar spine. In block 10, "Date of Visit," on the TWCC-69 was written "no show." The report attached to the TWCC-69 stated that the "4th Edition of AMA Guides to the Evaluation of Permanent Impairment [Guides to the Evaluation of Permanent Impairment, third edition, second printing, dated February 1989, published by the American Medical Association (AMA Guides)] was utilized." Page and table numbers used in the report appear to refer to the

4th edition. The report itself reflects that range of motion (ROM) was within normal limits and no neurological impairment was found. Dr. S also wrote that the claimant did not keep his appointment for March 18, 1999, and that he, Dr. S, was "requested to do an [IR] based upon my records and findings." It was implied that the request came from the carrier. Dr. S further wrote that "[o]bservations during his therapy revealed full back [ROM]. No change in his neurological status and he has normal muscle strength." In response to an August 30, 1999, inquiry from the Texas Workers' Compensation Commission (Commission), Dr. S indicated that the date of the examination was March 15, 1999; that he had been treating the claimant "for weeks"; and that the claimant was a no-show for the scheduled March 18, 1999, examination.

By letter of April 1, 1999, addressed to the claimant, the carrier advised him that it had received "the attached report from [Dr. S]" with a five percent IR and date of MMI of March 15, 1999. The letter also advised the claimant of his right to dispute it within 90 days or it would become "valid and final." The letter was sent by registered mail, return receipt requested. The receipt form, or "green card," was signed on April 7, 1999, by an individual with the same last name as the claimant's, but with a different first name. The claimant admitted that the letter was addressed to the box number in the town where he receives his mail with the correct zip code. He denied knowing anyone with the name appearing on the green card. He further denied ever receiving the carrier's letter or the TWCC-69 until around the time of the benefit review conference on August 13, 1999. He said that he was still receiving temporary income benefits until the end of July 1999; called the carrier to ask why they stopped; was told it was because he was at MMI and had an IR; and then called the Commission. According to the claimant, he only found out about the IR when he called the Commission.

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 operation of this rule, so does the underlying certification of MMI. Texas Workers' Compensation Commission Appeal No. 92670, decided February 1, 1993. We also held that for purposes of the 90-day rule, the certification must be in writing and signed by the certifying doctor. Texas Workers' Compensation Commission Appeal No. 92165, decided June 5, 1992. The 90 days does not begin to run until the disputing party has written notice of the certification, which may be either the TWCC-69 itself or the "functional equivalent." Texas Workers' Compensation Commission Appeal No. 950666, decided June 12, 1995; Texas Workers' Compensation Commission Appeal No. 961257, decided August 5, 1996. The Texas Supreme Court has held that there are no exceptions to this rule. Rodriguez v. Service Lloyds Insurance Company, 997 S.W.2d 248 (Tex. 1999).

In this case, the claimant argued that he never received the carrier's April 1, 1999, letter even though it was correctly addressed and that he did not know who signed the green card. Whether and when written notice of the IR is received is a question of fact for the hearing officer to decide. Texas Workers' Compensation Commission Appeal No. 981048, decided July 2, 1998. Receipt may be proved by circumstantial evidence. Texas

Workers' Compensation Commission Appeal No. 962190, decided December 13, 1996. Such evidence may include evidence of a mailing under a specific certification number and the return of a green card with the same number. Texas Workers' Compensation Commission Appeal No. 961730, decided October 17, 1996; Texas Workers' Compensation Commission Appeal No. 981857, decided September 24, 1998. The fact that the mail may actually be signed by someone at the correct address other than the claimant does not as a matter of law establish nonreceipt by the claimant. Texas Workers' Compensation Commission Appeal No. 960335, decided April 5, 1996; Texas Workers' Compensation Commission Appeal No. 952190, decided February 7, 1996. And a refusal to read or accept one's mail is not enough to establish nonreceipt. Texas Workers' Compensation Commission Appeal No. 94229, decided April 11, 1994. In this case, the hearing officer did not find credible the claimant's denial of receipt or of knowing the person who signed the green card. Rather, he found that the claimant "received written notice of the certification of MMI and assignment of an [IR] by [Dr. S] on April 7, 1999." Finding of Fact No. 6. Section 410.165(a) provides that the hearing officer is the sole judge of the weight and credibility of the evidence. We will reverse a factual determination of a hearing officer only if that determination is so against the great weight and preponderance of the evidence as to be clearly wrong and unjust. Cain v. Bain, 709 S.W.2d 175, 176 (Tex. 1986); Pool v. Ford Motor Company, 715 S.W.2d 629, 635 (Tex. 1986). The claimant appeals Finding of Fact No. 6, arguing that it is against the great weight and preponderance of the evidence. We disagree. The hearing officer made this finding based on his evaluation of the claimant's credibility and evidence of an actual mailing to the correct address. Under our standard of review, we find the evidence sufficient to support this determination of the date of receipt of the certification and decline to reverse it on appeal.

Of more concern, and the focus of the carrier's appeal, are the following findings of fact and conclusion of law:

FINDINGS OF FACT

2. The TWCC-69 executed by [Dr. S] on March 29, 1999 was issued without an examination.

3. The TWCC-69 executed by [Dr. S] on March 29, 1999 states on the face of the TWCC-69 that there was no examination of the Claimant for the purposes of establishing an [IR].

4. The TWCC-69 executed by [Dr. S] on March 29, 1999 states on its face that the wrong edition of the [AMA Guides] was utilized.

5. The TWCC-69 executed by [Dr. S] on March 29, 1999 is fundamentally and fatally flawed on its face.

CONCLUSION OF LAW

3. [Dr. S's] certification of MMI and assignment of an IR was so fundamentally flawed that Claimant had no obligation to dispute the [IR] under Rule 130.5(e).

We first address the examination question. The carrier argues on appeal that Findings of Fact Nos. 2 and 3 are against the great weight and preponderance of the evidence and the result of legal error. The facts surrounding the examination question are largely undisputed. Dr. S, as the treating doctor, had seen the claimant as recently as March 15, 1999. Though he apparently intended to base his formal certification of a date of MMI and IR on an examination on March 18, 1999, when the claimant did not show for this examination, he proceeded to complete the TWCC-69. We have held that an IR must be "derived from" an actual examination. Texas Workers' Compensation Commission Appeal No. 982463, decided December 3, 1998; *see also* Texas Workers' Compensation Commission Appeal No. 972320, decided December 19, 1997. Thus, a certification premised on a claimant's noncompliance with or abandonment of treatment is invalid. Texas Workers' Compensation Commission Appeal No. 981990, decided October 7, 1998 (Unpublished); Texas Workers' Compensation Commission Appeal No. 980912 , decided June 18, 1998. We have also held that a certification of MMI and IR is not invalid just because the examination was done before the TWCC-69 was completed. Texas Workers' Compensation Commission Appeal No. 980526, decided April 29, 1998 (Unpublished); Texas Workers' Compensation Commission Appeal No. 961334, decided August 23, 1996.

In the case we now consider, it was unfortunate that Dr. S used the words "no show" on the TWCC-69. It was clear, however, that he had actually examined the claimant over the course of his treatment with his last examination being on March 15, 1999. From this evidence, we conclude that Dr. S was satisfied when he completed his TWCC-69 that his prior examination was sufficient. Under these circumstances, we find that the hearing officer's Findings of Fact Nos. 2 and 3 are both contrary to the great weight and preponderance of the evidence and premised on the erroneous concept that an examination must be performed on the date of the certification. These findings of fact are reversed.

Ultimately determinative of the outcome of this case was the hearing officer's finding that Dr. S's certification was invalid because Dr. S relied on the wrong edition of the AMA Guides. Section 408.123 provides that after a doctor has certified MMI, the certifying doctor “shall evaluate the condition of the employee and assign an [IR] using the [IR] guidelines described by Section 408.124.” Section 408.124 provides that an award of an impairment income benefit "shall be made" based on, and the Commission "shall use" in determining an IR, the AMA Guides. In Texas Workers' Compensation Commission Appeal No. 941360, decided November 28, 1994, the Appeals Panel sought to harmonize this statutory provision with Rule 130.5(e) by holding that a certification of IR "not made in compliance with" the statutorily prescribed version of the AMA Guides was invalid and, because it was invalid, it could not and did not become final. This holding was consistent

with other cases which found that "invalid" certifications could not become final. *See, e.g.*, Texas Workers' Compensation Commission Appeal No. 950431, decided May 4, 1995, involving an unsigned TWCC-69; Texas Workers' Compensation Commission Appeal No. 93259, decided May 17, 1993, involving a certification of a prospective date of MMI; and Texas Workers' Compensation Commission Appeal No. 941247, decided October 27, 1994, involving a conditional certification. At the same time, another line of Appeals Panel decisions established the proposition that the use of the wrong edition of the AMA Guides did not invalidate the TWCC-69, but had to be raised within the 90-day dispute period provided by Rule 130.5(e) or the certification would become final. *See, e.g.*, Texas Workers' Compensation Commission Appeal No. 941309, decided November 14, 1994; Texas Workers' Compensation Commission Appeal No. 950448, decided May 9, 1995; and Texas Workers' Compensation Commission Appeal No. 981825, decided September 21, 1998. Upon further consideration of this matter, the Appeals Panel determines that those cases requiring a timely dispute of the use of the wrong edition of the AMA Guides were wrongly decided. We reject them and hold that if a report of a certifying doctor shows on its face that the wrong edition of the AMA Guides was used, this error is so fundamentally violative of the statutory mandate of Sections 408.123 and 408.124 that the certification cannot become final simply by the failure of the objecting party to timely dispute that certification in accordance with Rule 130.5(e).

The hearing officer reached this same result by attempting to distinguish Appeal No. 981825 and Appeal No. 961334, *supra*. In rejecting these cases, we need not further distinguish them. One final comment is in order. We do not construe this opinion as in effect creating an exception to Rule 130.5(e), something clearly impossible in light of Rodriguez, *supra*. Rather, we are harmonizing the rule with the 1989 Act and determining what circumstance will not trigger the application of the rule. Only after the rule is triggered does the holding of Rodriguez apply.

For the foregoing reasons, we reverse the determination that Dr. S's certification was invalid based on an alleged failure to examine the claimant (Findings of Fact Nos. 2 and 3)

and render a decision that the certification was based on an examination. We affirm the remaining findings of fact and conclusions of law that the claimant received written notice of the certification on April 7, 1999, but, because the certification was invalid as based on the wrong edition of the AMA Guides, Rule 130.5(e) did not apply and the certification did not become final.

_____
Alan C. Ernst
Appeals Judge

CONCUR:

_____
Robert W. Potts
Appeals Judge

_____
Susan M. Kelley
Appeals Judge