

APPEAL NO. 000132

Following a contested case hearing held in on December 21, 1999, pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act), the hearing officer, resolved the disputed issues by determining that the first certification by Dr. M on February 25, 1999, of the respondent's (claimant) date of maximum medical improvement (MMI) and impairment rating (IR) became final under Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 130.5(e) (Rule 130.5(e)), and, thus, that claimant's IR is 19%. The appellant (carrier) has requested review, asserting that the Texas Workers' Compensation Commission (Commission) received notice on May 14, 1999, and again on May 17, 1999, from an employee of claimant's attorney, that the carrier was disputing Dr. M's IR and, therefore, the carrier's dispute of Dr. M's IR on July 12, 1999, was timely under Rule 130.5(e). Claimant urges in response that the evidence is sufficient to support the hearing officer's determination.

DECISION

Affirmed.

We note at the outset that the hearing officer's decision and order reflects that claimant testified at the hearing and that the IR assigned by the designated doctor, Dr. R, is 19%. The hearing record reflects that only the carrier's adjuster, Ms. R, testified and the report of Dr. R states that the IR is nine percent.

The parties stipulated that claimant sustained a compensable injury on _____, and that she reached MMI on February 25, 1999 (all dates are in 1999 unless otherwise stated).

Rule 130.5(e) provides that "[t]he first [IR] assigned to an employee is considered final if the rating is not disputed within 90 days after the rating is assigned."

In evidence is a Report of Medical Evaluation (TWCC-69) of Dr. M, dated February 25th, which certified that claimant reached MMI on February 25th and which assigned claimant a 19% IR. Ms. R testified by telephone that she received Dr. M's TWCC-69 on March 15th. The following documents are also in evidence as carrier exhibits: a Payment of Compensation or Notice of Refused or Disputed Claim (TWCC-21) dated March 16th, reflecting that Ms. R is the carrier's representative and stating, "MMI 2-25-99 Reasonable assessment made of 8% credit taken for TIB's [temporary income benefits] paid from 3-25-99"; a Notification Regarding Maximum Medical Improvement and/or Impairment Rating (TWCC-28) bearing Ms. R's typed name, which states that the carrier is disputing the doctor's IR and has made a reasonable assessment of eight percent impairment, and that based on this assessment the carrier will pay impairment income benefits (IIBS) for 24 weeks pending resolution of the IR dispute; and a Notice of Maximum Medical Improvement/Impairment Rating Dispute (TWCC-32) dated March 16th and signed by Ms.

R, which reflects that the carrier is disputing only Dr. M's 19% IR. Ms. R stated that she made the assessment of eight percent because she disagreed with Dr. M's 19% IR. She also acknowledged that she did not specifically dispute Dr. M's 19% IR on the TWCC-21 because it is her practice to use the TWCC-32 to dispute IRs.

Ms. R testified that she gave the administrative staff an instruction sheet and directed the staff to prepare the top portion of the TWCC-21 and the TWCC-28; that she prepared the bottom portion of the TWCC-21 and also prepared, in its entirety, the TWCC-32; and that the administrative staff was instructed to mail these documents to claimant by "registered" mail and also mail copies, but not by "registered" mail, to the Commission and to claimant's attorney. Ms. R stated that this procedure was the standard operating procedure and practice of her office. She indicated that claimant's file had more than 20 TWCC-21s which had been sent to the Commission. However, she also acknowledged that on some occasions, not indicating that she had claimant's file in mind, it was learned that documents the carrier mailed to the Commission were not in the Commission's file and that the Commission would in those cases grant permission for the documents to be "faxed." Ms. R conceded that she did not see the addressed envelopes in which these three forms were mailed to the Commission nor did she see them placed in the mail. However, she said she assumed the administrative staff correctly mailed the documents. In evidence is a certified mail receipt reflecting that claimant received an article numbered Z 137 993 937 on March 18th and a receipt for that article dated March 16th.

In evidence are certain Commission Dispute Resolution Information System (DRIS) notes. A DRIS note of May 14th states that Ms. W from claimant's attorney's office called about the carrier disputing the IR and was advised that the Commission did "not have TWCC-69 giving MMI/IR nor . . . any dispute of MMI/IR from carrier at this time." Also in evidence as a carrier exhibit is a letter of May 14th from Ms. W to the Commission which confirms Ms. W's conversation of that date wherein she was informed that the Commission had not received a TWCC-69 by Dr. M nor a TWCC-21 by the carrier dated March 16th. This letter goes on to state as follows: "I have attached a copy of each of these items for your convenience. I would appreciate it if you would file this information at this time." This exhibit does not have a TWCC-69 or TWCC-21 attached to it nor does it bear a date stamp reflecting receipt by the Commission.

Ms. R said she never received an indication from the Commission that the carrier's TWCC-32 had been received; that she did not inquire about the matter until calling the Commission on July 17th; and that when the Commission advised her on that date that the TWCC-21 and TWCC-32 forms were not in the Commission's file, she assumed they were lost and received permission to fax copies to the Commission, which she did on July 12th. In evidence is a fax transmittal sheet from Ms. R to the Commission dated July 12th, which states the following: "TWCC 32 & TWCC 21 not received per C - may be lost - OK to fax!" Claimant introduced a copy of the carrier's TWCC-32 bearing the Commission's date stamp reflecting receipt on July 12th. A DRIS note of July 12th states that the Commission received a call from the adjuster asking about the TWCC-32 dispute sent in on this file, that none was received, and that permission was given to fax it.

Ms. R also stated that claimant was scheduled to be examined by Dr. R on August 4th and that the carrier received claimant's TWCC-32 disputing Dr. R's nine percent IR on September 27th.

The carrier does not appeal factual findings that Dr. M's report of February 25th was the first to certify MMI and IR and that it received Dr. M's TWCC-69 on March 15th. The carrier does challenge the finding that it did not dispute Dr. M's 19% IR with the Commission until July 12th as well as the legal conclusions that the first certification of MMI and assignment of the IR by Dr. M on February 25th became final under Rule 130.5(e) and that claimant's IR is 19%.

The carrier first contends on appeal, as it did below, that it timely disputed Dr. M's IR when it mailed the TWCC-21 and TWCC-32 to the Commission on March 16th in conformance with its customary business practice. The carrier next contends that its dispute of Dr. M's 19% IR was communicated to the Commission on May 14th by Ms. W in her telephone call to the Commission and again on May 17th when the Commission received Ms. W's letter of May 14th enclosing Dr. M's TWCC-69 and the carrier's TWCC-21 for filing. The carrier maintains that "[i]t does not matter who filed the TWCC 21" and that the TWCC-21 is a sufficient notice of the carrier's dispute because it states the reasonable assessment of eight percent which would obviously not be made were the carrier not disputing the 19% IR.

Claimant responds that the carrier failed to prove both that it actually mailed the dispute to the Commission and that the Commission actually received the mailing. Claimant further responds that the carrier cannot make claimant's attorney its agent for filing its dispute without the attorney's assent which, of course, could not be given without committing a serious ethical violation.

In her discussion of the evidence, the hearing officer states that Ms. R's testimony was neither convincing nor persuasive in establishing that a dispute was timely sent to and received by the Commission. The hearing officer further states as follows: "A letter from claimant's attorney was offered dated March 11, 1999 [sic] which purportedly sent the TWCC-69 and TWCC-21 to the Commission. The attachments were not included in the exhibit. The letter was received by the Commission on May 17, 1999." The hearing officer further states that "[t]he TWCC-21 does not reflect that Carrier is disputing the 10% [IR] and [MMI] date certified by [Dr. M], nor does it request the appointment of a designated doctor or a benefit review conference and the evidence is insufficient to establish that it was ever received by the Commission as there was no date stamp received marked on the document." The hearing officer further states that the evidence is insufficient to support a finding that the Commission had actual notice on May 17th that the carrier was disputing Dr. M's report and, therefore, that Dr. M's report is final and claimant's IR is 19%.

Clearly, the carrier had the burden of proving that it timely disputed Dr. M's 19% IR. Unlike the Commission, the carrier, a party, has no "deemed receipt" rule to fall back on to

establish the receipt of its mailed communications. See Rule 102.5(d), formerly Rule 102.5(h). While Ms. R did testify concerning the usual course of the carrier's business regarding its mailing of forms to the parties and the Commission (*compare* Texas Workers' Compensation Commission Appeal No. 950982, decided July 28, 1995), the hearing officer was not required to infer from Ms. R's testimony that the carrier actually mailed the forms, correctly addressed, to the Commission, much less that such mail was actually received by the Commission. We view the evidence as sufficient to support the hearing officer's implied finding (implied from her discussion of the evidence and which should have been an express finding) that the carrier failed to prove that it actually mailed a dispute of Dr. M's IR to the Commission on March 16th and that such dispute was actually received by the Commission.

We disagree with the hearing officer's implied finding (implied from her discussion of the evidence and which should have been an express finding) that the carrier's TWCC-21 did not constitute notice of a dispute of Dr. M's 19% IR. Rule 130.5(a) provides, in part, that an insurance carrier that disputes an IR shall file with the Commission a statement of disputed IIBS that gives the carrier's reasonable assessment of the correct rating. In Texas Workers' Compensation Commission Appeal No. 94509, decided June 8, 1994, a Rule 130.5(e) case, the claimant contended that the carrier did not file a dispute with the Commission, referring to Rule 130.5(a), and the carrier had filed a TWCC-21 assessing an IR of seven percent. We noted that our decision in Texas Workers' Compensation Commission Appeal No. 93046, decided March 5, 1993, indicated that a TWCC-21 could convey notice of a dispute and that our decision in Texas Workers' Compensation Commission Appeal No. 92394, decided September 17, 1992, stated that no particular words of art are required to raise a dispute.

Claimant contends that the carrier cannot unilaterally designate Ms. W as its agent for the purpose of filing the carrier's dispute of Dr. M's IR with the Commission while the carrier contends that it does not matter who does the filing. We agree with the carrier under the particular facts of this case. Claimant apparently feels that Ms. W's letter to the Commission was not intended to constitute the filing of a carrier dispute of Dr. M's 19% IR. However, in her May 14th letter, Ms. W specifically asked the Commission to file Dr. M's TWCC-69 and the carrier's TWCC-21. That having been said, however, the hearing officer's discussion indicates that while she was persuaded that Ms. W's May 14th letter was received by the Commission on May 17th, she was not persuaded that the carrier's TWCC-21 was received because she characterizes the letter as the letter "which purportedly sent the TWCC-69 and TWCC-21 to the Commission" and, later in the discussion, states that "the evidence is insufficient to establish that it was ever received by the Commission as there was no date stamp received marked on the document." We cannot say that this implied finding (implied from her discussion of the evidence and which should have been an express finding) that the carrier failed to prove that its TWCC-21 was ever received by the Commission is so against the great weight of the evidence as to be clearly wrong or manifestly unjust. Cain v. Bain, 709 S.W.2d 175, 176 (Tex. 1986); In re King's Estate, 150 Tex. 662, 244 S.W.2d 660 (1951). That another fact finder may well

have drawn different inferences from the evidence does not permit us to substitute our judgment of that of the hearing officer.

The carrier further contends that, although not addressed by the hearing officer, estoppel is subsumed in the Rule 130.5(e) issue and that claimant was estopped from raising the Rule 130.5(e) issue because he did not do so until after being examined by and receiving the nine percent IR from Dr. R. In evidence is claimant's Request for Benefit Review Conference (TWCC-45) dated September 17th which states that claimant is disputing the findings of the designated doctor and that the carrier did not timely dispute Dr. M's IR. We need not address this estoppel argument. The carrier's request to add it as an issue at the hearing was denied and that ruling has not been appealed. Further, the hearing officer's failure to make any findings on estoppel has not been appealed.

The decision and order of the hearing officer are affirmed.

Philip F. O'Neill
Appeals Judge

CONCUR IN THE RESULT:

Robert W. Potts
Appeals Judge

CONCUR IN THE RESULT:

Elaine M. Chaney
Appeals Judge