

APPEAL NO. 000137

This appeal arises under the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act). On December 30, 1999, a contested case hearing was held. With regard to the only issue before her, the hearing officer determined that respondent (claimant) had timely disputed the first certification of maximum medical improvement (MMI) and impairment rating (IR) of Dr. T and that that certification had not become final pursuant to Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 130.5(e) (Rule 130.5(e)).

Appellant (carrier) appeals, contending that Rule 130.5(e) does not require written notice, that claimant had actual ("became aware of") notice of Dr. T's IR "when he discussed same with the adjuster" and that claimant received "written notice from the TWCC-69 [Report of Medical Evaluation], the TWCC-21 [Payment of Compensation or Notice of Refused/Disputed Claim], and the EES-19." Carrier contends that the first certification from Dr. T "had long since become final," and requests that we reverse the hearing officer's decision and render a decision in its favor. Claimant responds, citing applicable Appeals Panel decisions, and urges affirmance.

DECISION

Affirmed.

Claimant testified that he sustained a compensable neck injury on \_\_\_\_\_, that his treating doctor was Dr. T and that he had lost no time from work. In evidence is a TWCC-69 dated April 25, 1996, certifying MMI on April 17, 1996, with a four percent IR. Claimant denies that he received a copy of that report prior to August 12, 1999. Claimant testified that he spoke with carrier's adjuster some time in 1996 and that he was told that he was being paid for "damage to [his] neck." Claimant denied receiving any written notification of an MMI date or that he had been assessed an IR. Claimant did concede that he may have received a TWCC-21 but could not specifically recall it.

In evidence is a TWCC-21 dated May 7, 1996, denying temporary income benefits (TIBS), but accepting liability for medical benefits. Also in evidence is an EES-19 letter dated May 3, 1996, addressed to claimant, giving Dr. T's name, MMI date, IR and containing the notice that if claimant did not agree with the MMI date or IR, he had 90 days to dispute the notice of certification and IR. It appears undisputed that the EES-19 letter was sent to an incorrect address. In evidence is a letter dated May 30, 1996, from the carrier to the Texas Workers' Compensation Commission (Commission) advising the Commission that its EES-19 letter to the claimant was sent to an incorrect address and the address the Commission had used was actually the address for another unrelated insurance company. There is no evidence that another EES-19 letter was sent. Also in evidence is another TWCC-21 dated July 11, 1996 (the TWCC-21 which carrier asserts gave claimant written notice of Dr. T's report). That TWCC-21 lists block 25 "Reason for

Termination" "4% IRMPT PAID OUT" the date of the last payment, "weeks 12" and the amounts paid:

Indemnity	4,032.00
Medical	5,442.43

The TWCC-21 does not state the doctor's name or give an MMI date. Apparently, at some time in July or August 1999, claimant retained an attorney and the attorney wrote a representation letter dated August 6, 1999, to the carrier. Carrier advised the attorney of Dr. T's 1996 certification of MMI, the four percent IR and that "additional indemnity benefits are not applicable." Claimant's attorney then obtained a copy of Dr. T's 1996 report from the Commission's claim file and disputed Dr. T's first certification of MMI and the IR on September 14, 1999. Claimant contends that he first received written notice of Dr. T's first certification of MMI and IR through carrier's letter to his attorney on August 12, 1999, and disputed that certification within 90 days on September 14, 1999.

The hearing officer, in her Discussion, comments:

Although the TWCC 69 completed by [Dr. T] in April of 1996 certainly would constitute adequate notice of the [MMI] and [IR] Certification disputed herein, the record of the [CCH] is utterly devoid of any evidence to indicate that Claimant received a copy of that document prior to August of 1999, well within ninety days of the time he disputed that certification. The only other document contained in the record which might constitute adequate notice of Claimant's four percent [IR] Certification is Claimant's Exhibit No. 3, the TWCC 21 dated July 11, 1996, which indicates that Claimant was paid twelve weeks of Impairment Income Benefits [IIBS]. Although, in some cases, a TWCC 21 might constitute the "functional equivalent" of a TWCC 69 which the Appeals Panel indicated in Decision No. 941433 [Texas Workers' Compensation Commission Appeal No. 941433, decided December 8, 1994] is necessary to commence the beginning of the ninety-day disputing period, it does not appear that the TWCC 21 which constitutes Claimant's Exhibit No. 3 contains sufficient information to put Claimant on notice that he had, in fact, been certified by his treating doctor as having reached [MMI] with a four percent [IR], since the TWCC 21 states only that a four percent [IR] had been paid, and lists the amount of benefits paid and the time over which those benefits had been paid in this case.

Carrier, in its appeal, contends that claimant had actual and constructive notice of Dr. T's certification. Carrier further contends that the Appeals Panel decisions only require that claimant become "aware of the rating" to start the 90-day period in which to dispute the rating. Carrier also argues that the July TWCC-21 gave claimant written notice of the rating.

We disagree with virtually all of carrier's contentions and have addressed most of them early on. In Texas Workers' Compensation Commission Appeal No. 93501, decided August 2, 1993, the Appeals Panel held:

We have noted before that the 90 day deadline for disputing an [IR] does not run from the date a doctor issues a report, but from the date the parties become aware of the rating. We noted that it is hard to envision that one could dispute something of which one is not aware. See Texas Workers' Compensation Commission Appeal No. 92693, decided February 8, 1993. Our decisions involving the 90 day rule have all used some form of written notice as the point at which the 90 day period began. Arguably, notice of an [IR] is best conveyed through a written report. A written report by the evaluating doctor could raise colorable disputes that a verbal notice would not.

In Texas Workers' Compensation Commission Appeal No. 950456, decided May 9, 1995, we commented that sending claimant a copy of the TWCC-69, while not absolutely necessary, was desirable and cited Texas Workers' Compensation Commission Appeal No. 94354, decided May 10, 1994, for the proposition that the certification of MMI and impairment and the communication of such to the parties under Rule 130.5(e) require a writing. Written communication of the IR to the parties was to reduce confusion and controversy over the content of the communication. Rule 130.1(c) states that all reports made under Rule 130.1 shall be on a Commission-prescribed form and it enumerates the information it shall contain. As regards the use of such form, however, the Appeals Panel has previously determined that a writing which amounts to the functional equivalent of the TWCC-69 form will suffice. See, e.g., Texas Workers' Compensation Commission Appeal No. 94222, decided April 7, 1994; Texas Workers' Compensation Commission Appeal No. 94229, decided April 11, 1994. As in Appeal No. 950456, *supra*, whether a TWCC-21 amounts to sufficient written notice to begin the 90-day period for Rule 130.5(e) we cited Appeal No. 941433, *supra*, which involved a TWCC-21 much like the TWCC-21 in this case (which was never conclusively proven to have been received by claimant) where the Appeals Panel held that a check and accompanying TWCC-21 were not the functional equivalent of a TWCC-69. In that case, the Appeals Panel held that the language used, "Payment of IIBS 2% [IR] – paid 6 weeks \$1295.82 less \$330.57 TIBS overpayment = \$965.25" was ambiguous and did not inform claimant that his treating doctor had certified IR. The TWCC-21 in the instant case is even more ambiguous in that it only has "4% IRMPT PAID OUT" without any reference to an IR or IIBS. The hearing officer, as quoted above, spelled out in some detail why she determined that claimant had not received written notice and even if claimant had received the July 1996 TWCC-21 why that document did not provide adequate written notice to claimant. The hearing officer, as the sole judge of the relevance, materiality, weight and credibility of the evidence (Section 410.165(a)) determined that claimant had not received written notice of Dr. T's certification of MMI and IR until August 1999 and disputed that rating within 90 days on September 14, 1999.

Upon review of the record submitted, we find no reversible error and we will not disturb the hearing officer's determinations unless they are so against the great weight and preponderance of the evidence as to be clearly wrong or unjust. In re King's Estate, 150 Tex. 662, 244 S.W.2d 660 (1951). We do not so find and, consequently, the decision and order of the hearing officer are affirmed.

Thomas A. Knapp  
Appeals Judge

CONCUR:

Alan C. Ernst  
Appeals Judge

Dorian E. Ramirez  
Appeals Judge