

APPEAL NO. 000169

Following a contested case hearing held on December 8, 1999, pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act), the hearing officer resolved the disputed issue by concluding that the first certification of maximum medical improvement (MMI) and the impairment rating (IR) assigned by Dr. F on December 18, 1998, did not become final under Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 130.5(e) (Rule 130.5(e)). The appellant (carrier) requests review of that conclusion and several findings of fact, asserting evidentiary insufficiency. The respondent (claimant) urges in her response that the evidence is sufficient to support the hearing officer's conclusion.

DECISION

Reversed and a new decision rendered that Dr. F's MMI date and IR became final.

Not appealed are findings that claimant sustained a compensable injury on \_\_\_\_\_, while working as a flight attendant (when she pulled a heavy food and beverage cart up the aircraft aisle); that after receiving extensive conservative treatment from several medical providers and undergoing extensive diagnostic testing, she changed treating doctors to Dr. C in August 1998; that she was later referred to Dr. F for an impairment evaluation; that in a narrative report of December 15, 1998, Dr. F certified that claimant reached MMI as of December 15, 1998, with an IR of four percent (for a cervical spine injury) and that this was the first certification of MMI and assignment of an IR in this case; and that on January 20, 1999, claimant received a copy of Dr. F's narrative report advising of Dr. F's findings and recommendations.

Claimant testified that on January 21, 1999, when she went to Dr. C's office for a follow-up visit, she took Dr. F's report with her and learned that Dr. C had also received a copy of Dr. F's narrative report. She said she and Dr. C discussed Dr. F's report and that both of them disagreed with it because they felt she had not reached MMI. Claimant further stated that Dr. C indicated that a Report of Medical Evaluation (TWCC-69) was also required from Dr. F; that the TWCC-69 was supposed to be provided to him as the treating doctor within seven days; and that he told her to call Dr. F's office and request the TWCC-69 and that he would take care of stating their disagreement. Responding affirmatively to various questions, claimant indicated that Dr. C said he would act on her behalf in disagreeing with Dr. F's report and that she need do nothing more about it.

Dr. C testified that when he saw claimant on January 21, 1999, she had Dr. F's report with her and they discussed it; that they both disagreed with the report; and that he dictated a rebuttal of Dr. F's report in her presence. This document, dated "1/21/99," states that he, Dr. C, feels that Dr. F minimizes the MRI finding of a bulge at C5-6; that he disagrees with Dr. F's statement that the bulge at C5-6 is not likely related to claimant's symptoms; that he disagrees with Dr. F's statement expressing doubt that cervical epidural injections would be helpful; and that Dr. F contradicts himself by asserting both that

claimant has reached MMI and that she may continue treatment with Dr. C and receive appropriate physical therapy. Dr. C further wrote that Dr. F stated in his report that claimant could appeal his opinion to the Texas Workers' Compensation Commission (Commission) "within 90 days of being referred to a designated doctor evaluation" but yet failed to send him (Dr. C) a TWCC-69; that neither he nor claimant had received a TWCC-69; and that he explained to claimant that Dr. F is obligated to send a TWCC-69 within seven days of his examination so that he (Dr. C), as the treating doctor, can respond to it. Dr. C further wrote as follows: "[Claimant] is going to contact the carrier to see if they received a TWCC-69 form and/or what they plan to do pursuant to this evaluation. This note today from me would be considered my formal rebuttal as I strongly disagree with him. She is not at [MMI]." Dr. C testified that his January 21, 1999, rebuttal is not addressed to anyone but shows "cc" to Mr. A, a carrier representative, to Ms. C, an employer representative, and to claimant. Dr. C stated that he did not personally mail this letter, did not think it was sent to the Commission, and could not say that it was sent to the Commission. The copy of this document in evidence bears a date stamp reflecting receipt by the Commission on September 13, 1999, and fax transmission data with the same date. Claimant adduced no evidence to prove that this document was received by the carrier.

Dr. C further testified that he told claimant to contact Dr. F's office about providing a TWCC-69 and that he would note his disagreement on the TWCC-69 when he received it. He stated that claimant asked what else she needed to do and that he told her she need do nothing more as his disagreement would constitute their disagreement and that it would then be the carrier's obligation to pursue the matter further. He further stated that he told claimant that he would "send in" the TWCC-69 reflecting disagreement with Dr. F's certification and that until they heard from the carrier or the Commission, there was nothing else they needed to do. Dr. C also said that claimant indicated she would contact the carrier's adjuster to see what action the carrier was going to take. He further testified that when he received Dr. F's TWCC-69, he checked off his disagreement with the MMI date and IR on the bottom of the form and that "it was sent back out." In evidence is a copy of Dr. F's TWCC-69, dated "12-18-98," certifying that claimant reached MMI on "12/15/98" with an IR of "4%." A note on the bottom of this form states that it was received at "[back clinic]" on "2-1-99." Dr. C stated that he practiced at the back clinic. The TWCC-69 reflects that Dr. C signed it on "2-2-99" and checked boxes reflecting his disagreement with Dr. F's certification of MMI and assigned IR. Dr. C stated that when he sent in the TWCC-69 stating his disagreement, he was acting in claimant's behalf and with her involvement. A date stamp on this exhibit reflects receipt by the Commission on September 13, 1999. The exhibit also bears fax transmission data with dates of February 2 and September 13, 1999.

Dr. C said that he was testifying at the hearing because he felt some responsibility in the matter, having told claimant she need not act on Dr. F's TWCC-69 and that his action on it was all that was necessary to rebut it; that about 50% to 60% of the patients he and 16 other doctors see at the back clinic are workers' compensation patients; that he is a designated doctor who has attended three training courses; and that he has signed off on TWCC-69 forms many times, is familiar with "the rules," and thought he followed them.

In evidence is a Commission letter dated February 9, 1999, addressed to the carrier and reflecting that a copy was sent to claimant. This letter advises that the Commission received a report from Dr. F stating that claimant reached MMI on December 15, 1998, with an IR of four percent, and that if the recipient of the letter disagreed with the MMI certification or IR, such must be disputed by contacting the Commission within 90 days after receiving notice of the certification or IR. Also in evidence is a Commission Dispute Resolution Information System (DRIS) note of February 9, 1999, stating that an "EES19 letter" was printed and mailed on that date, referring to Dr. F's MMI date and IR.

Also in evidence is the carrier's Payment of Compensation or Notice of Refused or Disputed Claim (TWCC-21) dated August 9, 1999, stating that the MMI date and IR from Dr. F are "final"; that the carrier converted temporary income benefits (TIBS) to impairment income benefits; and that the carrier will credit "overpayment of \$12,492.00 toward any future payment." Also in evidence are DRIS notes of August 13, 1999, stating that claimant called and was very upset because she had just been told she would no longer be receiving benefits because she did not dispute the MMI date and IR; that claimant thought her doctor had disputed this for her; and that the Commission's file did not contain a letter she said Dr. C wrote in January 1999 when they discussed Dr. F's report.

Dr. C wrote a letter dated August 13, 1999, addressed to Mr. C at the Texas Workers' Compensation Insurance Fund, which stated, among other things, that he had disputed the carrier-selected independent medical examination (IME) doctor's four percent IR and "sent in the appropriate TWCC-69 Form with [his] disagreement"; that the "[p]revious policy of abiding by the treating physician's agreement or disagreement with the Carrier-selected IME until such time as the Carrier disputed the agreement saved the patient from the obligation of disputing the Carrier-selected IME opinion"; and that when he disputed the IME report in January, he was acting on behalf of the patient who was not at MMI and is still not at MMI.

Dr. C wrote as follows on October 26, 1999: "I was acting as her agent in January when I filed the dispute"; that "never prior to this case have I been told that the patient had to file a dispute separately from my dispute"; and that "[a]lways prior to this case, if I as the treating physician and as her agent filed a dispute, this was adequate notice to the Carrier and to the Commission that the IME was being disputed." Dr. C further wrote that he found Dr. F's opinion to be "indefensible, ludicrous, and incompetent." Dr. C goes on to state that the carrier must have decided not to act on Dr. F's IR because the carrier continued to pay TIBS into August and that this action denied claimant "due process" in being able to dispute because her 90-day period had expired. Dr. C further stated that "when the Commission changes the rules and does not notify us of these rule changes, we cannot appropriately advise the patients, and the patients should not be penalized for this."

Rule 130.5(e) provides that the first IR assigned to an employee is considered final if not disputed within 90 days after it is assigned. The Appeals Panel has held that a treating doctor may dispute the first assigned IR for a claimant with the "involvement" of the

claimant in the dispute. See Texas Workers' Compensation Commission Appeal No. 941195, decided October 20, 1994.

The carrier challenges findings that on January 21, 1999, claimant was involved in a lengthy discussion with her treating doctor regarding the MMI date and IR assigned by Dr. F and authorized her treating doctor to dispute the IR on her behalf; that Dr. C's "progress notes" of January 21, 1999, reflect in detail the medical reasons for Dr. C's disagreement with Dr. F's MMI date and IR and mention the discussion of the report with claimant; that on February 1, 1999, Dr. C received a copy of the TWCC-69 from Dr. F, annotated the bottom portion of the form reflecting disagreement with the MMI date and IR, and signed the form on February 2, 1999; that Dr. C asked his office staff to mail the annotated TWCC-69 back to the carrier and the Commission; that on February 2, 1999, the treating doctor "mailed" to the carrier and to the Commission the annotated TWCC-69 disputing Dr. F's MMI date and IR; that by Commission letter (form EES-19, dated 2/9/99) claimant was advised of the MMI date and IR assigned by Dr. F; that on February 2, 1999, the treating doctor (acting on claimant's behalf and with her involvement and authorization) filed a timely dispute of the first certification of the MMI date and IR issued by Dr. F; that "[u]nder Rule 102.5 it is presumed that the Commission received notice of the dispute to the first certification (filed by [Dr. C] on Claimant's behalf) on February 7, 1999. (Five days after the date it was mailed.)"; that by Commission letter (form EES-19, dated 2/9/99) claimant was advised of the MMI date and IR assigned by Dr. F; and that Dr. C acted as claimant's agent (and with claimant's involvement and authorization) when he submitted a disagreement of the TWCC-69 and sufficiently disputed the IR and MMI date assigned by Dr. F.

The hearing officer is the sole judge of the weight and credibility of the evidence (Section 410.165(a)) and, as the trier of fact, resolves the conflicts and inconsistencies in the evidence (Garza v. Commercial Insurance Company of Newark, New Jersey, 508 S.W.2d 701 (Tex. Civ. App.-Amarillo 1974, no writ)). The Appeals Panel, an appellate reviewing tribunal, will not disturb the challenged factual findings of a hearing officer unless they are so against the great weight and preponderance 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).

We determine that Findings of Fact Nos. 21 and 22 are against the great weight of the evidence. These findings state that on February 2, 1999, the treating doctor "mailed" to the carrier and the Commission the annotated TWCC-69 disputing the MMI date and IR assigned by Dr. F, and that on that date the treating doctor "filed" a timely dispute of the first certification of MMI and the IR issued by Dr. F. There is no proof of mailing in the record to establish that the TWCC-69 which Dr. C signed on February 2, 1999, noting his disagreement with Dr. F's MMI date and IR were mailed to and received by either the carrier or the Commission within 90 days of claimant's receipt on January 20, 1999, of Dr. F's narrative report of December 15, 1998. Not only was there no affidavit of mailing but Dr. C did not even identify the person in his office who may have mailed the TWCC-69 to the carrier and the Commission. Nor is there any evidence of receipt by the carrier of the

annotated TWCC-69 before September 13, 1999, well after the 90-day period provided for in Rule 130.5(e).

We further determine that Finding of Fact No. 23 is legally incorrect. This finding states as follows: "Under Rule 102.5 it is presumed that the Commission received notice of the dispute to the first certification (filed by [Dr. C] on Claimant's behalf) on February 7, 1999. (Five days after the date it was mailed)." Rule 102.5(h), which was in effect in February 1999, provides that "[f]or purposes of determining the date of receipt for those notices and other written communications which require action by a date specific after receipt, the Commission shall deem the received date to be five days after the date mailed." The Appeals Panel has construed Rule 102.5(h), the so-called "deemed receipt rule," as applying to documents sent by the Commission and not to documents sent to the Commission. See Texas Workers' Compensation Commission Appeal No. 992910, decided February 3, 2000. Because claimant failed to prove that the TWCC-69 with Dr. C's stated disagreement (on her behalf) was mailed to and received by either the carrier or the Commission within 90 days of her receipt of written notice of Dr. F's MMI date and IR, she has failed to prove that she timely disputed the first assigned IR pursuant to Rule 130.5(e).

We reverse the decision and order of the hearing officer and render a new decision that the four percent IR assigned by Dr. F became final pursuant to Rule 130.5(e).

Philip F. O'Neill  
Appeals Judge

CONCUR:

Thomas A. Knapp  
Appeals Judge

Dorian E. Ramirez  
Appeals Judge