

APPEAL NO. 000305

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 January 19, 2000. At issue was whether the first impairment rating (IR) assigned to the respondent (claimant) became final under 28 TEX. ADMIN. CODE § 130.5(e) (Rule 130.5(e)) because it was not disputed within 90 days.

The hearing officer determined that the first IR did not become final because it was timely disputed. The appellant (carrier) appeals, arguing that the evidence does not establish filing of a timely dispute, and asking that a presumption of regularity be accorded to the date stamp of the Texas Workers' Compensation Commission (Commission) showing that the dispute was filed on the 91st day. The carrier also argues that a finding that the claimant first received the IR on August 3, 1999 (all dates hereafter are 1999 unless otherwise stated), is erroneous, as the evidence indicates it was received the day before. The claimant responds that there is no reversible error if the date of receipt was the day before as the 90th day still would have fallen on a weekend. The claimant argues that the decision of the hearing officer is supported by sufficient evidence.

DECISION

We affirm.

The hearing officer has set out a detailed recitation of the facts but for purposes of this decision only, a brief fact summary is given. The claimant sustained an inhalation injury on _____. The first IR certified for the claimant was mailed out by the carrier (according to the adjuster) on July 28th to the claimant, the day after the adjuster received it from the certifying doctor. The record shows that the Commission mailed a copy of the first IR to the claimant and his attorney on July 29th. The claimant said he could not recall when he received it, but recalled discussing a dispute of that first rating with his attorney the first week of August.

The claimant's attorney testified that by oversight, his office did not file a Notice of Maximum Medical Improvement/Impairment Rating Dispute (TWCC-32) at that time. It was not until he was speaking with the claimant on November 1st (a Monday), that he looked in the file and found that a TWCC-32 had not been filed. The attorney testified he computed quickly and saw that the dispute was due that day.

He prepared a TWCC-32 and personally filed it with the field office of the Commission between 4:30 and 4:45 on November 1st. The attorney said he handed it to the receptionist and neither took a duplicate copy nor waited to watch her stamp it. It was not until later that the attorney discovered that the Commission date-stamped its copy on November 2nd.

The attorney's fee application filed by the attorney on November 18th showed a charge for speaking with his client and preparing and filing documents on November 1st. However, a charge for receipt and review of documents was also made for November 2nd. The evidence was that the adjuster and the attorney spoke on November 2nd. The attorney said he was passing along the information that his client had been incarcerated for child support arrearage, which incarceration could impact temporary income benefits. The adjuster testified that she believed that the 90th day was November 1st and based her actions on this assumption. She consulted her diary notes and agreed that the attorney for the claimant called on November 2nd and left a message that he had done a TWCC-32 "yesterday." However, she said November 10th was the first recorded conversation about incarceration.

The hearing officer was correct in applying Rule 102.5(h) in deeming the date of receipt by the claimant. However, even if the claimant received the document on the same day as his attorney (August 2nd), the 90th day would fall on the weekend and, by virtue of the Government Code, the due date would carry over to November 1st. (These provisions are repeated in Rule 102.3.)

Even were presumptive weight to be given to the date stamp of the Commission, we would regard the presumption as rebuttable. The hearing officer could believe both that the claimant's attorney filed the document at the end of the day on November 1st, yet the document was not date stamped by the field office of the Commission until the next morning. When a timely dispute has been found by the trier of fact to have been made, then Rule 130.5(e) does not apply to finalize the first certification.

We affirm the hearing officer's decision and order.

Susan M. Kelley
Appeals Judge

CONCUR:

Thomas A. Knapp
Appeals Judge

Alan C. Ernst
Appeals Judge