

APPEAL NO. 000757

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 March 16, 2000. The hearing officer determined that the first certification of maximum medical improvement (MMI) and impairment rating (IR) assigned by Dr. M became final under Tex. W.C. Comm=n, 28 TEX. ADMIN. CODE ' 130.5(e) (Rule 130.5(e)). The appellant (claimant) appealed, asserting that the written notice of Dr. M=s IR, sent to her by the Texas Workers= Compensation Commission (Commission), was returned to the Commission due to an insufficient address, that she received the written notice on July 30, 1998, and that her dispute of the IR on September 23, 1998, was timely. The respondent (carrier) responded, asserting that the evidence is sufficient to support the hearing officer=s decision.

DECISION

Reversed and remanded.

The parties stipulated that claimant sustained a compensable injury on _____, and that on June 16, 1998, Dr. M certified that claimant reached MMI on June 12, 1998; assigned claimant a five percent IR; and was the first doctor to certify to MMI and assign an IR.

Claimant testified that she did not remember when she received written notice of Dr. M=s five percent IR; that she did not receive it when the Commission sent it on June 19, 1998, because "they sent it to the wrong address"; and that when she did receive it, she went to the Commission and "had them stamp it when [she] received it." She indicated that, in another envelope, she received a Commission envelope, which is in evidence, with a June 23, 1998, date on the metered postage stamp and also another date stamp on it of July 13th. Claimant further stated that her correct address, for the past five years, has been (address), with the space number referring to her trailer location. She also said she "thinks" she received directly from Dr. M=s office a copy of Dr. M=s report, which reflects her correct address, "maybe in September I think."

Claimant introduced into evidence with the above-described Commission envelope a Commission letter dated June 19, 1998, the "EES-19" letter, which is addressed to her at (address) and which advises, among other things, that Dr. M has determined that she reached MMI on June 12, 1998, with an IR of five percent and that she has 90 days to dispute it if she disagrees. This letter is in English on one side and Spanish on the other. On the Spanish-language side the letter bears a date stamp showing receipt by the Commission on July 21, 1998. However, the envelope claimant attached to this letter, as noted above, has a meter postage date of June 23, 1998, from Austin; another stamped date of July 13, 1998, with the partially legible words "Texas Work . . ."; and a stamp stating "Returned to Sender, Insufficient Address." As mentioned above, claimant said that when she received the EES-19 letter she took it to the Commission and had it stamped with the date she received it, to wit, July 21, 1998.

Also in evidence is a copy of the Commission's June 19, 1998, EES-19 letter sent to the carrier which reflects that it was received by the carrier's Austin agent on June 22, 1998; a copy of claimant's Notice of Maximum Medical Improvement/Impairment Rating Dispute (TWCC-32), dated "9-23-98," which states that claimant received the Report of Medical Evaluation (TWCC-69) on July 30, 1998, referring to Dr. M's narrative report which accompanied his TWCC-69 assigning the five percent IR; a Dispute Resolution Information System (DRIS) note of June 19, 1998, reflecting that an EES-41 letter was mailed on June 19, 1998, and returned due to an incorrect address; another DRIS note of June 19, 1998, reflecting that an EES-19 letter was mailed on June 19, 1998, with Dr. M's MMI date and IR; a DRIS note of July 21, 1998, reflecting that an EES-41 to claimant was returned for insufficient address and was remailed with the apartment number included; and another DRIS note of September 24, 1998, stating the following: "Review of file does not show EES19 was returned undelivered."

Claimant does not dispute a finding that she first contested Dr. M's certification of MMI and IR on September 23, 1998, which was not within 90 days after receipt of written notice. Claimant does, however, challenge the following findings:

FINDINGS OF FACT

2. On June 19, 1998, the Commission sent the Claimant an EES-19 letter informing the Claimant of [Dr. M's] certification of MMI and IR.
3. The Claimant was deemed to have received the EES-19 letter sent by the Commission on June 19, 1998 within five days of the date it was mailed pursuant to Rule 102.5(d).
4. The Claimant first received written notice of [Dr. M's] certification of MMI and IR on June 24, 1998.

In her discussion of the evidence the hearing officer states that claimant testified that she believes the EES-19 letter was in the envelope returned to the Commission due to an insufficient address and that it was re-sent in July 1998. However, the hearing officer also noted the Commission DRIS notes reflecting that it was an EES-41 letter that was returned and that the Commission had no record of the EES-19 letter being returned.

The version of Rule 130.5(e) in effect when Dr. M's five percent IR became final states 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. Rule 102.5(h), in effect in June 1998, and pertaining to written communications from the Commission, 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."

In Texas Workers=Compensation Commission Appeal No. 92199, decided June 26, 1992, the Appeals Panel, in discussing the application of Rule 102.5(h) to an appeal, noted that Rule 102.5(a) obliges the Commission to send the decision to the "last address supplied by that claimant"; that the hearing record was clear that the Commission did not comply with its rule in that case; and that the Commission "should not impose" its Rule 102.5(h), which deems a decision to be received unless it has complied with Rule 102.5(a) by using the address supplied by the claimant. We note that Hearing Officer's Exhibit No. 1 with the January 21, 2000, Commission letter forwarding the report of the benefit review conference was sent to claimant without the "A-40" in the (address) whereas the March 21, 2000, Commission letter transmitting the hearing officer-s decision does state "TRLR A40" after the address. We also note that June 19, 1998, was a state holiday and that the Commission envelope introduced by claimant was mailed from Austin and bore the postage metered date of June 23, 1998, not June 19, 1998. We further note that the DRIS notes state that both an EES-41 and an EES-19 were "mailed" by the Commission on June 19, 1998, and query whether both letters, if indeed they were mailed in separate envelopes from Austin, were postdated June 23, 1998.

Accordingly, we reverse the hearing officer-s Decision and Order and remand the case for the hearing officer to further develop the record concerning the precise address claimant had provided the Commission as of June 19, 1998, the mailing date of the EES-19 letter, and to make such further findings and conclusions as may be appropriate.

Pending resolution of the remand, a final decision has not been made in this case. However, since reversal and remand necessitate the issuance of a new decision and order by the hearing officer, a party who wishes to appeal from such new decision must file a request for review not later than 15 days after the date on which such new decision is received from the Commission-s Division of Hearings, pursuant to Section 410.202. See Texas Workers=Compensation Commission Appeal No. 92642, decided January 20, 1993.

Philip F. O'Neill
Appeals Judge

CONCUR:

Robert W. Potts
Appeals Judge

Susan M. Kelley
Appeals Judge