

APPEAL NO. 001299

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 May 5, 2000. The hearing officer determined that the first certification of maximum medical improvement (MMI) and impairment rating (IR) assigned by Dr. H on May 19, 1999, did not become final under Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 130.5(e) (Rule 130.5(e)). In so holding, he found that the first IR was timely disputed within 90 days after the respondent (claimant) received first written notification of the IR.

The appellant (carrier) appealed, and argues that the claimant should not be permitted to benefit from her refusal of the carrier's certified mailing. The carrier argues that the mailbox rule should be applied and the first IR should be considered as delivered to the claimant when mailed by the carrier. The appeals file does not contain a response from the claimant.

DECISION

We affirm the hearing officer's decision.

The claimant injured her back, neck, and knee in a fall on _____. Her treating doctor was Dr. H. The claimant had surgery on her knee on January 13, 1999. The claimant said that she recalled being examined by Dr. H on May 19, 1999, in what she understood was to be an assessment of her ability to return to work for four hours a day. However, as it turned out, Dr. H certified her as having reached MMI on that date, with a six percent IR which did not take into account her neck due to a dispute over its compensability at that time.

The claimant said that she never received a copy of this IR and Dr. H did not at the time discuss it with her. The claimant, who said her address did not change during this period, continued to receive an income benefits check which did not go down in amount from what had been her temporary income benefits (TIBs) payment. She further stated that she did not receive any document informing her that the payment was at any point considered as an impairment income benefits (IIBs) payment. This is borne out by the only two Payment of Compensation or Notice of Refused/Disputed Claim (TWCC-21) forms in evidence. The first is a December 30, 1998, form initiating payment of TIBs at \$268.80 per week. The second is a form which shows termination of a \$268.80 benefit effective September 22, 1999, described as IIBs. Neither form includes any mention about an MMI date or IR percentage.

The claimant said that she did not receive any copy of her Report of Medical Evaluation (TWCC-69) until she sought a copy in September 1999 from the Texas Workers' Compensation Commission. She said this came about when her check stopped, and she called her adjuster who told her that she had been certified as having reached MMI in May. She said that the adjuster told her that she had been mailed a copy of the

TWCC-69 in May. The claimant said she went to her branch of the United States Postal Service (USPS) and found out then that a certified letter had been returned to the carrier on June 25, 1999. The claimant denied that she had ever refused a certified mailing or received a "yellow" card in her mailbox indicating a delivery had been attempted.

The certified mail paperwork put into evidence by the carrier shows that the document was returned "unclaimed." A purported final notice is not completely filled out nor was it dated with "today's date." The current adjuster on the claim, Mr. A, who had not been involved with the file during pertinent times under review, stated that his investigation with USPS indicated that three attempts were made to deliver the letter and it was then returned. He said that the returned letter was not in the carrier's case file.

The claimant disputed the first IR on September 27, 1999, which she said was within a few days after she received a copy of the document. Since that assessment had been done, the claimant said that the carrier decided to accept liability for her neck injury and she had surgery for her neck on December 15, 1999

The version of Rule 130.5(e) that was in effect during pertinent parts of 1999 stated that the first IR assigned to an injured employee is considered final if not disputed within 90 days after assigned. However, the Appeals Panel early on held that the parties must receive notice, in writing, of the IR in order for the 90 days to begin. Texas Workers' Compensation Commission Appeal No. 94354, decided May 10, 1994. A writing which amounts to the functional equivalent of a TWCC-69 will suffice as adequate written notice. See Texas Workers' Compensation Commission Appeal No. 94222, decided April 7, 1994; Texas Workers' Compensation Commission Appeal No. 94229, decided April 11, 1994.

The hearing officer is the sole judge of the relevance, materiality, weight, and credibility of the evidence presented at the hearing. Section 410.165(a). The decision should not be set aside because different inferences and conclusions may be drawn upon review, even when the record contains evidence that would lend itself to different inferences. Garza v. Commercial Insurance Company of Newark, New Jersey, 508 S.W.2d 701 (Tex. Civ. App.-Amarillo 1974, no writ). The hearing officer need not have believed that unsuccessful attempts by the USPS to deliver certified mailings necessarily came about because of affirmative refusal by the claimant to accept the mailing, as opposed to her absence from home at these times. He could also consider that there was no evidence of notification through a TWCC-21 nor would an IR be implied by the payment amount, which did not apparently reduce to the IIBs amount after Dr. H's certification was received by the carrier.

The decision of the hearing officer will be set aside only if the evidence supporting the hearing officer's determination is so weak or against the overwhelming weight of the evidence as to be clearly wrong or manifestly unjust. Atlantic Mutual Insurance Company v. Middleman, 661 S.W.2d 182 (Tex. App.-San Antonio 1983, writ ref'd n.r.e.). We cannot agree that this was the case here, and affirm the decision and order.

Susan M. Kelley
Appeals Judge

CONCUR:

Thomas A. Knapp
Appeals Judge

Robert W. Potts
Appeals Judge