APPEAL NO. 001542

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 June 5, 2000. The hearing officer determined that the respondent's (claimant) first certification of maximum medical improvement (MMI) and impairment rating (IR) assigned by Dr. R on February 9, 1999, did not become final under Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 130.5(e) (Rule 130.5(e)). The appellant self-insured ("carrier" herein) appealed on sufficiency grounds. The claimant replies that the decision is supported by sufficient evidence and that the Appeals Panel should affirm it.

DECISION

We affirm.

Carrier contends the hearing officer erred in determining that the first certification did not become final. The version of Rule 130.5(e) in effect at all times pertinent to this case provided that the first certification of an IR is considered final if not disputed within 90 days. The 90 days begin to run from the date the disputing party receives written notice of the certification.

The issue in this case is when the claimant received written notice of the first certification, which would begin the 90-day period. Claimant testified that he had three addresses, that he sometimes uses his mother's address for mail, that he does not live with his mother, and that he did not receive written notice of the first certification. There was evidence that carrier attempted a registered mail delivery at claimant's mother's house, but claimant's mother did not sign for or take delivery of the letter.[1] Claimant's attorney received notice of the first certification in June 1999 and disputed it a few days later. The hearing officer determined that claimant never received notice of the first certification.

Whether and when written communication of the first certification of a date of MMI and an IR is made are questions of fact. *See* Texas Workers' Compensation Commission Appeal No. 941433, decided December 8, 1994. The 1989 Act provides that the hearing officer is the sole judge of the weight and credibility of the evidence. Section 410.165(a). Where there are conflicts in the evidence, the hearing officer resolves the conflicts and determines what facts the evidence has established. As an appeals body, we will not substitute our judgment for that of the hearing officer when the determination is not so against the overwhelming weight of the evidence as to be clearly wrong or manifestly unjust. Cain v. Bain, 709 S.W.2d 175, 176 (Tex. 1986); Texas Workers' Compensation Commission Appeal No. 950456, decided May 9, 1995.

[1]Notice of the first certification was also sent to claimant by "regular" mail, but claimant's dispute was within 90 days of any possible receipt.

The hearing officer found claimant credible in his testimony that he never received written notice of the first certification. The hearing officer's determinations are not so against the great weight and preponderance of the evidence as to be clearly wrong or manifestly unjust. Cain, *supra.* Accordingly, the 90 days did not begin to run and claimant's first certification did not become final. Texas Workers' Compensation Commission Appeal No. 990408, decided April 12, 1999 (Unpublished). Carrier complains that a claimant should not benefit where he has refused to pick up registered mail. However, in this regard, we would note that there was nothing to show which was the last address claimant had given to the Commission and whether carrier sent the notice to that address. Evidence in this regard was not developed at the hearing.

We affirm the hearing officer's decision and order.

Judy L. Stephens
Appeals Judge

CONCUR:

Gary L. Kilgore
Appeals Judge

CONCUR IN RESULT:

There is considerably more to this case than recited in the majority decision. One particularly disconcerting comment by the hearing officer in the Statement of the Evidence is that;

> It was fairly apparent from the evidence that Claimant had been advised of the [carrier's registered] letter and simply refused to pick it up. It was not established however, that he was aware of the contents.

This appears to me to say that the hearing officer believed that notice of the registered letter had been given to the claimant and the claimant "simply refused to pick it up." I want to completely disassociate myself with any concept that an addressee can frustrate delivery by refusing to accept, or retrieve, certified mail after receiving notice from the post office or by refusing to read the letter and thereby claim to be "unaware of the contents."

I am concurring in the result in this case because: (1) I believe the intent of the 1989 Act is better served by having a designated doctor ascertain maximum medical improvement (MMI) and the impairment rating (IR), rather than through default to a required medical examination doctor; and (2) that matters of this nature will eventually be largely obviated through the implementation of the amended Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 130.5(e) (Rule 130.5(e)) effective March 13, 2000, which states:

> (e) The first certification of MMI and [IR] assigned to an employee is final if the certification of MMI and/or the [IR] is not disputed within 90 days after written notification of the MMI and IR is sent by the Commission [Texas Workers' Compensation Commission] to the parties, as evidenced by the date of this letter[.]

Thomas A. Knapp
Appeals Judge