APPEAL NO. 001662

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 13, 2000. The hearing officer concluded that the appellant's (claimant) compensable injury of _____, extended to the low back; that the first certification of maximum medical improvement (MMI) and impairment rating (IR) assigned by Dr. H on September 29, 1999, became final under Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 130.5(e) (Rule 130.5(e)); and that the claimant reached MMI on July 12, 1999, with a zero percent IR. The claimant appeals the latter two conclusions as well as a finding that he did not timely dispute Dr. H's September 29, 1999, certification that he reached MMI on July 12, 1999, with a zero percent IR. The respondent (carrier) filed a response, urging the sufficiency of the evidence to support the challenged finding. The extent-of-injury determination, not having been appealed, has become final. Section 410.069.

DECISION

Reversed and a new decision rendered.

The parties stipulated that on September 29, 1999, Dr. H certified that the claimant reached MMI on July 12, 1999, with an IR of zero percent and was the first doctor to do so, and that the claimant disputed Dr. H's September 29, 1999, certification on January 12, 2000.

Concerning the appealed issue, in evidence is a September 29, 1999, letter signed by Dr. H and addressed to "Dear Sirs," which traces the history of Dr. H's treatment of the claimant's right groin and leg pain, and which states the following: "On 7-08-99 patient stating he is still having too much pain to work. On 07-12-99 patient is released to full duties. 0% whole body impairment. No long term disability from this injury. Has reached MM [sic]." Also in evidence is Dr. H's unsigned Report of Medical Evaluation (TWCC-69) dated "09/29/1999" stating that the claimant reached MMI on "07/12/1999" with an IR of "0%." The claimant was asked when he received Dr. H's September 29, 1999, letter with the MMI date and IR and he responded through a Spanish language translator, "I don't remember, no." Asked whether he recalled receiving the letter the claimant responded, "No." The record contains no evidence that either Dr. H's September 29, 1999, letter or his unsigned TWCC-69 was mailed or otherwise given to the claimant.

The claimant introduced Claimant's Exhibit No. 14, a January 12, 2000, letter addressed to the Texas Workers' Compensation Commission (Commission) from the legal assistant to the claimant's attorney. This letter encloses a Notice of Maximum Medical Improvement/Impairment Rating Dispute (TWCC-32) signed by the attorney on January 12, 2000, which states that the TWCC-69 was received on "12 Jan 2000" and that the claimant disputes the MMI date and IR of treating doctor, Dr. H. This letter also states that the claimant advised that he has never seen these documents, referring to Dr. H's letter and TWCC-69.

The claimant contended in his closing statement that Claimant's Exhibit No. 14 shows that he received Dr. H's letter at the benefit review conference (BRC) and disputed it as soon as he could. However, in evidence is a BRC report reflecting that a BRC was held on April 18, 2000. In his request for review, the claimant states that "[a]ppellant, through his testimony stated that he received [Dr. H's] report of [MMI] and [IR] in October 1999." This averment is not consistent with the claimant's testimony.

The version of Rule 130.5(e) in effect when Dr. H's IR became final provides that "[t]he first [IR] assigned to an employee is considered final if the rating is not disputed within 90 days after the rating is assigned." Neither party urges that the amendment to Rule 130.5(e), effective March 13, 2000, applied to Dr. H's IR.

The claimant had the burden to prove that he timely disputed Dr. H's IR. The issue presented the hearing officer with a question of fact to resolve. 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)). As an appellate reviewing tribunal, the Appeals Panel will not disturb a challenged factual finding of a hearing officer unless it is 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).

Our decision in Texas Workers' Compensation Commission Appeal No. 992419, decided December 16, 1999, a decision written after the decision was issued in Rodriguez v. Service Lloyds Insurance Company, 997 S.W.2d 248 (Tex. 1999), sets out a number of Appeals Panel holdings concerning the application of the version of Rule 130.5(e) applicable to this case. We stated in Appeal No. 992419 that "for purposes of the 90-day rule, the certification must be in writing and signed by the certifying doctor"; that "[t]he 90 days does not begin to run until the disputing party has written notice of the certification, which may be either the TWCC-69 itself or the 'functional equivalent'"; that "[w]hether and when written notice of the IR is received is a question of fact for the hearing officer to decide"; and that "receipt may be proved by circumstantial evidence."

In the case we consider, the claimant's testimony that he did not receive written notice of Dr. H's IR before January 12, 2000, is unrefuted in the record. The record contains no evidence of proof of mailing of written notice of the IR to the claimant nor is there any Commission document or carrier record document which would reasonably support an inference that the claimant received written notice of Dr. H's IR. With the evidence in this state, we find the hearing officer's factual finding that the claimant did not timely dispute Dr. H's September 29, 1999, certification that the claimant reached MMI on July 12, 1999, with a zero percent IR to be against the great weight of the evidence. Having so found, the legal conclusion that the claimant reached MMI on July 12, 1999, with a zero percent IR cannot stand and must also be reversed.

The decision and order of the hearing officer is reversed and a new decision is rendered that the first certification of MMI and IR assigned by Dr. H on September 29, 1999, did not become final under Rule 130.5(e).

Philip F. O'Neill
Appeals Judge

CONCUR:

Kathleen C. Decker
Appeals Judge

Alan C. Ernst
Appeals Judge