APPEAL NO. 002301

This appeal arises pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act). A contested case hearing (CCH) was held on September 5, 2000. With regard to the only issue before her, the hearing officer determined that the first certification of maximum medical improvement (MMI) and impairment rating (IR) assigned by Dr. B on October 12, 1999,[1] did not become final pursuant to Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 130.5(e) (Rule 130.5(e)).

The appellant (carrier) appealed, contending that the respondent (claimant) "had received notice" of Dr. B's assignment of MMI and IR no later than November 12, 1999, when the claimant contacted the Texas Workers' Compensation Commission (Commission) and that the claimant did not dispute Dr. B's certification until March 27, 2000, thereby making her dispute untimely. The carrier requests that we reverse the hearing officer's decision and render a decision in its favor. The appeals file does not contain a response from the claimant.

DECISION

Affirmed.

There was no live testimony at the CCH and the case was submitted by stipulation, documentary evidence, and argument. The parties stipulated that the claimant sustained a compensable injury on _____, and that on October 12, 1999, Dr. B certified that the claimant had reached MMI on that date with a 6% IR and that Dr. B "was the first doctor to do so." (That report is not in evidence.) A Dispute Resolution Information System (DRIS) note in evidence indicates that on November 12, 1999, the claimant contacted the Commission. The DRIS note of that date states:

> clmt asked what happens now that RME dr has given 6% and her TD is not sure if he agrees with [Dr. B].

Subsequently, the Commission sent the claimant an EES-19 letter dated December 22, 1999, received by the claimant on December 27, 1999, advising the claimant of Dr. B's certification and the need to dispute that rating within 90 days if the claimant did not agree with it. The claimant asserts that December 27, 1999, was the date of first written notice necessary to start the 90-day period to dispute and that the claimant's dispute sent by facsimile transmission (fax) on March 27, 2000, was timely. The carrier's position was, and is, that the 90 days start running when the claimant has knowledge of the first certification from whatever source, oral or written, and cites cases which purport to support that contention.

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[1]Finding of Fact 1.E indicates October 12, 1999. Conclusion of Law No. 3 and the Decision portion indicate October 29, 1999.

The hearing officer discusses both the "old" Rule 130.5(e) and the "new" Rule 130.5(e) effective March 13, 2000, and concludes that the decision in this case under either rule would be the same. We do not agree that the decision would be the same under either rule.

The hearing officer summarized the rules as follows:

> Rule 130.5 (e) effective prior to March 15, 2000 provided that the first IR assigned to an injured worker is considered final if the rating is not disputed within 90 days after it is assigned. New Rule 130.5 (e) applies to certifications of MMI and IRs that have not become final prior to March 15, 2000. The new rule provides that the first certification of MMI improvement 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 to the parties, as evidenced by the date of the letter.
>
> Regardless of which rule, the old or new, is used in this case, the decision would be the same. The practical effect of the decision is that the first certification of MMI and IR did not become final prior to March 15, 2000 and thus the new rule prevails. In theory, the effect of the decision would have been the same under the old rule had it still been in effect.

The carrier appeals, contending that the claimant clearly had notice of Dr. B's report when she contacted the Commission on November 12, 1999, and that the "rationale behind the concept of written notification is to protect the Claimant from allegations of imputed knowledge based upon conversations that may have occurred during or immediately after the evaluation process by the doctor." We totally disagree.

We disagree with the hearing officer that the "new" Rule 130.5(e) effective March 13, 2000, is applicable. We hold that the old rule in effect on December 22, 1999, when the EES-19 letter was mailed, and on December 27, 1999, when the EES-19 letter was received, is applicable. Either rule, however, requires written communication, contrary to the carrier's assertions to the contrary. The first Appeals Panel decision setting out that principle was Texas Workers' Compensation Commission Appeal No. 94354, decided May 10, 1994. That decision discussed the rationale of requiring a writing and concluded:

> We hold that the certification of MMI and impairment and the communication of such to the parties under Rule 130.5(e) require a writing. Written communication of the IR to the parties should reduce confusion and controversy over the content of the communication.

We have followed that position without exception. In Texas Workers' Compensation Commission Appeal No. 991517, decided August 30, 1999 (Unpublished), the only decision cited by the carrier after Appeal No. 94354, *supra*, there was no dispute that the

employee in that case had received a copy of the doctor's report on a certain date and the Appeals Panel merely recited that the "90-day period starts to run from the date the parties became aware of the rating" and pointed out that the fact that a party was not aware of the 90-day rule or that further treatment was needed did not mean that the first certification cannot be final. That case is not to be read as saying that a written communication is not necessary. There being no evidence that the claimant had received a written communication of Dr. B's report prior to December 27, 1999, we hold that the hearing officer's decision is supported by the evidence. The DRIS note of November 12, 1999, evidencing that the claimant had some knowledge of Dr. B's 6% IR does not constitute a written communication to the party.

Upon review of the record submitted, we find no reversible error. We will not disturb the hearing officer's determinations unless they are so against the great weight and preponderance of the evidence as to be clearly wrong or unjust. In re King's Estate, 150 Tex. 662, 244 S.W.2d 660 (1951). We do not so find and, consequently, the decision and order of the hearing officer are affirmed.

Thomas A. Knapp
Appeals Judge

CONCUR:

Susan M. Kelley
Appeals Judge

Gary L. Kilgore
Appeals Judge