

APPEAL NO. 002317-S

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 August 24, 2000. The hearing officer determined that the first certification of maximum medical improvement (MMI) and impairment rating (IR) assigned by Dr. B on October 21, 1999, did not become final under Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 130.5(e) (Rule 130.5(e)). The appellant (claimant) appealed the adverse determination contending that the respondent's (carrier) mailing of a dispute of Dr. B's initial certification of MMI and IR to the claimant (and receipt) did not satisfy the provisions of Rule 130.5(a) which he asserts required the carrier to file its dispute with the Texas Workers' Compensation Commission (Commission) in writing within 90 days of receipt of written notice of Dr. B's report. The claimant requested that the Appeals Panel reverse the adverse determination and render a decision that the certification became final.

The carrier replied that the evidence was sufficient to support the determination of the hearing officer that receipt by the claimant of its dispute within 90 days of the carrier's receipt of written notice of Dr. B's MMI and IR precluded the finality provision of Rule 130.5(e); that, in the alternative, an envelope containing its dispute properly addressed to the Commission with sufficient postage placed into a United States Postal Service (USPS) mailbox in conformity with its usual course of business established receipt by the Commission; and, finally, that there was no legal requirement for the carrier to file a dispute of an IR in writing with the Commission.

DECISION

Reversed and rendered that the first certification of MMI and IR assigned by Dr. B on October 21, 1999, became final under Rule 130.5(e).

The parties included as stipulations that the claimant sustained a compensable injury on _____, and that the certification of MMI and IR issued by Dr. B on October 21, 1999, was the first certification of MMI and IR. These stipulations do not appear as any of the stipulations listed by the hearing officer, but are included as findings of fact by the hearing officer which are consistent with the stipulations contained in the record.

On October 21, 1999, Dr. B completed a Report of Medical Evaluation (TWCC-69) certifying that the claimant reached MMI on October 21, 1999, with a 17% IR. This was the first certification of MMI and IR by a doctor. According to the Commission Dispute Resolution Information System Contact Data Log (DRIS notes), written notice of Dr. B's report certifying MMI on October 21, 1999, with a 17% IR was mailed to both the claimant and the carrier on November 8, 1999. The hearing officer found that the carrier received written notification of the first certification of MMI/IR issued by Dr. B on November 10, 1999. This finding was not appealed and has become final by operation of law. Section 410.169. Although not in issue or discussed by the hearing officer, the claimant was

deemed to have received the Commission notice five days after the date the notice was mailed. Rule 102.5(d).

On November 18, 1999, the carrier's adjuster, (Ms. L), prepared a Notice of [MMI]/[IR] Dispute (TWCC-32) to dispute the MMI date and IR certified by Dr. B in his report of October 21, 1999, and testified at the CCH that she mailed, via regular mail, a copy of the TWCC-32 to both the Commission and the claimant. The claimant testified that she received the TWCC-32 sent to her by the adjuster sometime in November or December, 1999. No Commission officially stamped copy of the TWCC-32 was offered or admitted into evidence at the CCH which would have proven receipt of the document by the Commission. Further, the Commission DRIS notes do not reflect an oral communication by anyone representing the interests of the carrier, such as an adjuster or attorney, to verbally dispute Dr. B's report.

On November 30, 1999, Ms. L prepared a Notification Regarding [MMI] and/or [IR] (TWCC-28) as notice to the claimant that the carrier was disputing a doctor's IR. None of the blanks identifying the doctor or what the IR was were filled in. The document simply provided notice that the carrier was disputing "the doctor's [IR] and has made a reasonable assessment of 10% impairment." The carrier offered a USPS Receipt for Certified Mail as proof that the document was mailed on November 30, 1999, to the claimant. The claimant testified at the CCH that she received the TWCC-28 on December 1, 1999. Her testimony was corroborated by a USPS green return-receipt card admitted into evidence reflecting that the claimant signed for the letter on December 1, 1999. Ms. L testified that she instructed her claims assistant to complete the TWCC-28 and to include a copy of the TWCC-69 with the TWCC-28 when she mailed it to the claimant. Ms. L contended at the CCH that she also told her assistant to send a copy of the TWCC-28 with the TWCC-69 to the Commission by regular mail. No Commission officially stamped copy of the TWCC-28 was offered as evidence at the CCH to prove receipt by the Commission.

On March 2, 2000, Ms. L called the Commission to inquire whether the Commission had received a TWCC-32 on November 16, 1999. According to the March 2, 2000, DRIS note the claim file was examined and no TWCC-32 was found. The Commission representative notified Ms. L that 90 days had elapsed and Dr. B's report was therefore final. As a result of the conversation, Ms. L completed a Request for Benefit Review Conference (TWCC-45) on March 2, 2000, which was filed with the Commission the same day.

On April 27, 2000, the Commission appointed Dr. K as designated doctor for the purposes of determining whether the claimant had reached MMI and, if so, the percentage of impairment, if any. Notice of the designation was sent to the parties and Dr. K subsequently examined the claimant certifying that she reached MMI on October 21, 1999, with a 12% IR.

The hearing officer found that the "Commission records do not reflect receipt of the TWCC-32 (mailed 11/18/99) nor the TWCC-28 (mailed 11/30/99)." This finding was not

appealed and has become final by operation of law. Section 410.169. The hearing officer also found that “[t]he notice of a dispute of MMI/IR from the Carrier to the Claimant constituted sufficient notice despite the absence of a showing of ‘expeditious’ filing with the Commission.” The claimant appealed this finding, contending that the hearing officer erred and that the finding should be reversed.

Rule 130.5(e), prior to its amendment on March 13, 2000, provided 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.” The 90-day time period for disputing the first IR runs from the date the party received written notice of the rating. Texas Workers’ Compensation Commission Appeal No. 94365, decided May 11, 1994; Texas Workers’ Compensation Commission Appeal No. 960249, decided March 25, 1996.

After receiving written notice of Dr. B’s certification of MMI and IR, the carrier had the obligation to dispute the IR within 90 days in order to preclude the finality of the IR. Both the carrier and the claimant were under the same obligation and we do not controvert the carrier’s assertion that we have previously applied Rule 130.5(e) equally to both parties. See Texas Workers’ Compensation Commission Appeal No. 92542, decided November 30, 1992; Texas Workers’ Compensation Commission Appeal No. 93200, decided April 14, 1993. Whether the carrier “disputed” the IR was a question of fact for the hearing officer to resolve and the carrier had the burden of proof.

In Appeal No. 93200 the Appeals Panel noted that we have not held that a claimant must register his dispute in writing with the Commission to preclude finality under the provisions of Rule 130.5(e), although subsections Rule 130.5(a) through (c) specifically applying only to carriers, state that a carrier desiring to dispute a rating “shall file with the Commission” a statement concerning disputed impairment income benefits. As pointed out by the carrier, Rule 130.5(b) and (c) only direct the carrier as to when the statement of disputed impairment income benefits must be filed in order to preclude a regulatory sanction (administrative violation). Rule 130.5(a)-(c) do not address the finality of the rating which is the specific regulatory function assigned to subsection (e). We reject the claimant’s assertion that Rule 130.5(a) restricts a carrier to a written dispute of the initial certification of MMI and IR and we do not preclude the filing by the carrier of such dispute through verbal communication to the Commission as we have not required the claimant to do so. However, it is incumbent upon either party who wishes to dispute an initial certification of MMI and IR to affirmatively prove that such verbal communication with the Commission took place and was evidenced in the Commission’s records.

We do, however, agree that the carrier’s dispute of the IR, whether verbal or written, must be received by the Commission in order to preclude finality of the IR. It is the carrier, the entity that administers and has the duty to pay the benefits, which would be most affected with a dispute being filed, and the Commission’s responsibility to initiate the designated doctor process in this case under the provisions of Section 408.125(a) did not accrue until receipt of such dispute from the carrier.

Where there is evidence of a mailing, electronic filing, or oral communication from a carrier within the prescribed time limit, together with additional evidence that the document or oral communication was actually received by the Commission, we consider the initial certification of MMI and IR to have been “disputed” by the carrier as required by Rule 130.5(e) on the day of receipt of the document or communication from the carrier by the Commission. Rule 102.3(e) provides that, “[u]nless otherwise specified by rule, any written or telephonic communications required to be filed by a specified time will be considered timely only if received prior to the end of normal business hours on the last permissible day of filing.”

The carrier, in urging an affirmance, has cited several Appeals Panel decisions discussing when service is completed through deposit into the USPS and whether receipt may be established through circumstantial evidence of mailing. To the extent that those cases conflict with our decision in this case specifically dealing with Commission receipt of a carrier’s dispute of an initial certification of MMI and IR, we decline to follow them and anticipate that the reasoning set forth in this decision will be followed by all panels in the future.

The hearing officer found that the Commission’s records do not reflect receipt of the TWCC-32 or the TWCC-28 and this finding has become final by operation of law. Therefore, the carrier failed to sustain its burden of proving that it disputed Dr. B’s certification of MMI and IR within 90 days of November 10, 1999, as the only communication of such dispute contained in the record (DRIS note dated March 2, 2000) from the carrier did not occur until March 2, 2000, when the carrier’s adjuster telephonically contacted the Commission to inquire about receipt of such documentation and to register its dispute. Accordingly, we reverse the determination of the hearing officer and render a decision that the first certification of MMI and IR assigned by Dr. B on October 21, 1999, did become final under Rule 130.5(e).

Kathleen C. Decker
Appeals Judge

CONCUR:

Gary L. Kilgore
Appeals Judge

Judy L. Stephens
Appeals Judge