

APPEAL NO. 002657

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 October 23, 2000. The issue at the CCH was whether the first impairment rating (IR) assigned to the appellant (claimant) by Dr. T became final because it was not disputed within 90 days.

The hearing officer held that the first IR had not been disputed within 90 days and therefore became final.

The claimant appeals, arguing that she should have relief because of confusion surrounding a required medical examination (RME) in which her entire IR was to be assessed. The respondent (carrier) argues facts in support of the hearing officer's decision.

DECISION

We affirm the hearing officer's decision, although we reverse and render on some findings of fact ancillary to the decision.

The claimant tripped and fell at work on _____, and said she injured her upper extremities, in addition to her knee. It was brought out that the claimant had several injury claims prior to this particular accident. The claimant had undergone arthroscopic surgery on her left knee. While she complained of shoulder pain, an MRI of her left shoulder and her left elbow showed no abnormalities and only mild degenerative changes. On September 20, 1999, Dr. T issued a Report of Medical Evaluation (TWCC-69) which assessed an eight percent IR, and an maximum medical improvement date of September 20, 1999. While the attached short narrative indicates that this is an IR for the knee, the narrative does not convey the impression that Dr. T is intending to give only a partial IR. The claimant testified that she received this in either the last few days of September or the first few days of October 1999.

There was considerable testimony about whether claimant's adjuster, Ms. L, sought to have claimant assessed by an RME doctor for a second opinion or a second IR. The claimant agreed that she had never discussed Dr. T's IR with Ms. L. It was apparent that after the claimant agreed to the RME, an appointment was never set; the claimant discovered this herself when she called the RME doctor's office. However, she did not dispute the completeness of Dr. T's IR pending any examination by the RME doctor. The claimant found out in December 1999 that Ms. L was no longer working for the carrier's local office. The claimant asserted she repeatedly made unreturned phone calls to Ms. L to ask why an appointment with the RME doctor was never set up.

The Dispute Resolution Information System (DRIS) notes are in evidence; they show that the Texas Workers' Compensation Commission (Commission) sent out Dr. T's

first IR to the claimant on September 27, 1999, and that the claimant first came in person to dispute that IR on January 13, 2000.

Ms. L testified that when she received a TWCC-69, she would forward it to the injured worker and start impairment income benefits. Had she been called by an injured worker who expressed disagreement with the IR, she would document that phone call. Ms. L said that when she first requested a RME, she was not then aware that Dr. T had rendered a first IR, but when she became aware, she did not move forward to set the RME appointment. She did not recall ever discussing Dr. T's IR with the claimant and said that she would not have failed to return phone calls. Ms. L was transferred in December 1999 to another office of the carrier.

The claimant's contention was that Dr. T's IR was understood by her to be only a partial IR. We first note that an IR is given only if an injury results in "impairment" as defined by Section 401.011(23). Only if an injury results in a permanent anatomical or physical loss is an IR given. The objective testing in this case showed that the shoulder and elbow had no abnormalities and it is by no means clear that an additional IR was in order for either region. The hearing officer's statement that the completeness of the first IR is a matter to be disputed in 90 days was correct. Texas Workers' Compensation Commission Appeal No. 941519, decided December 29, 1994.

Although the hearing officer found that the claimant disputed her first IR on March 15, 2000, this is plainly in error. The DRIS notes clearly record a dispute made in person by the claimant at the field office the Commission on January 13, 2000, and March notes in DRIS refer to a dispute already having been filed. Therefore, we reverse the finding of fact that claimant made a dispute on March 15, 2000, and render a decision that the claimant first disputed Dr. T's IR on January 13, 2000.

We have emphasized the importance when timely dispute deadlines are in issue of the finding of finding of the date that the written notice of the first IR is received. Texas Workers' Compensation Commission Appeal No. 94654, decided July 6, 1994. The hearing officer failed to do this, noting instead that the claimant received Dr. T's IR "some time in the latter part of September, beginning of November 1999." The latter portion of this finding is likely a typographical error, because the claimant testified that she received the IR in September or the first part of October (not November) 1999. In the interests of precision, however, we will render a specific date in line with the undisputed evidence.

The DRIS notes show that the Commission mailed the claimant a copy of Dr. T's IR on September 27, 1999. Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 102.5(d) (Rule 102.5(d)) states that the "deemed" date of receipt of a communication mailed from the Commission shall be the fifth day after the date of sending. Consequently, the deemed date of receipt of the first IR was October 2, 1999. Ninety days after this date was December 31, 1999. Therefore, a dispute made to the Commission on January 13, 2000, was not made within 90 days, and the first IR of Dr. T became final.

Subject to the reversals and renderings of findings of fact as to the date of receipt of the first IR and the date a dispute was first made, we affirm the hearing officer's decision that the first IR became final because it was not disputed within 90 days.

Susan M. Kelley
Appeals Judge

CONCUR:

Kenneth A. Huchton
Appeals Judge

Robert W. Potts
Appeals Judge