APPEAL NO. 002905-S

This appeal arises pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq*. (1989 Act). On November 28, 2000, a hearing was held. The hearing officer resolved the disputed issue by deciding that the first certification of maximum medical improvement (MMI) and impairment rating (IR) assigned by Dr. H on May 9, 2000, did not become final under Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 130.5(e) (Rule 130.5(e)). The appellant (carrier) appealed. No response was received from the claimant.

DECISION

The hearing officer's decision is affirmed.

The hearing officer did not err in determining that the first certification of MMI and IR assigned by Dr. H on May 9, 2000, did not become final under Rule 130.5(e).

The claimant sustained a compensable injury on _____. In a Report of Medical Evaluation (TWCC-69) dated May 9, 2000, Dr. H, who examined the claimant at the carrier's request, certified that the claimant reached MMI on May 2, 2000, with a 10% IR. Dr. H's report was the first certification of MMI and IR. In an EES-19 letter dated May 17, 2000, the Texas Workers' Compensation Commission (Commission) notified the claimant and the carrier that Dr. H had reported that the claimant reached MMI on May 2, 2000, with a 10% IR. In a Notice of MMI/IR Dispute (TWCC-32) which was received by the Commission on August 15, 2000, the claimant disputed the MMI date and IR certified by Dr. H.

Rule 130.5(e), as amended March 13, 2000, provides as follows:

> (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 to the parties, as evidenced by the date of the letter, unless based on compelling medical evidence the certification is invalid because of:
>
> (1) a significant error on the part of the certifying doctor in applying the appropriate AMA Guides and/or calculating the [IR];
>
> (2) a clear mis-diagnosis or a previously undiagnosed medical condition; or
>
> (3) prior improper or inadequate treatment of the injury which would render the certification of MMI or [IR] invalid.

The Commission's reasoned justification for the amendment to Rule 130.5 is set forth in the Texas Register at 25 TEX. REG. 2102-2106 (2000). In response to a comment regarding notice and other matters, the Commission stated at 25 TEX. REG. 2103:

> RESPONSE: The Commission agrees in part. Subsection (e) has been changed to clarify that the 90-day time period will begin when the Commission sends written notification to the parties that the [IR] has been assigned, as evidenced by the date of the letter notification. This provides a definite starting point for the 90-day period. The commentator's suggested language "actual or constructive notice" does not adequately clarify when the 90-day period for dispute begins. In addition, determining whether a person received actual or constructive notice presents more possible fact issues than a determination of whether and when a written notice of certification and [IR] was sent.

Rule 102.3(a)(1) provides as follows:

> (a) Due dates and time periods under this Act shall be computed as follows:
>
> (1) computing a period of days. In counting a period of time measured by days, the first day is excluded and the last day is included.

The 90th day after the date of the Commission's EES-19 letter of May 17, 2000, was August 15, 2000, which was the date the Commission received the claimant's TWCC-32 disputing Dr. H's certification of MMI and IR. The hearing officer found that the claimant gave timely notice of his dispute of the date of MMI and IR and that the claimant's notice (TWCC-32) was received (by the Commission) on the 90th day after the date of the EES-19 letter. The hearing officer concluded that the first certification of MMI and IR assigned by Dr. H on May 9, 2000, did not become final under Rule 130.5(e).

The carrier contends that the Commission's interpretation of amended Rule 130.5(e) omits the applicability of Rule 102.3(a)(1) because the Commission stated in the preamble that the 90-day time period "will begin" when the Commission sends written notification to the parties that the IR has been assigned and that the Commission has stated in the preamble that you start with the date of the letter now when counting the 90-day time period. The carrier concludes that if the date of the Commission's letter is counted in computing the 90-day time period, then the 90th day was August 14, 2000, and the claimant's dispute was filed on the 91st day.

We do not agree with the carrier's contention that the preamble to amended Rule 130.5 negates the application of Rule 102.3(a)(1) in computing the 90-day time period for disputing the first certification of MMI and IR because nowhere in the preamble is such an intention expressly stated. The preamble simply states that the 90-day time period will

begin when the Commission sends written notification to the parties that the IR has been assigned, as evidenced by the date of the letter notification, and that that provides a definite starting point for the 90-day period. Under Rule 102.3(a)(1), in counting a period of time measured by days, the first day is excluded and the last day is included, thus the date of the Commission's letter is excluded and the last day is included, which results in the 90th day being August 15, 2000.

In addition, the plain language of amended Rule 130.5(e) supports the hearing officer's computation of the 90-day period in this case because the rule provides that the first certification of MMI and IR is final if the certification of MMI and/or 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 . . ." (emphasis supplied). The 90th day "after" written notification was sent by the Commission to the parties, as evidenced by the Commission's EES-19 letter of May 17, 2000, was August 15, 2000; that is, 90 days after May 17, 2000, was August 15, 2000. Thus, the hearing officer did not err in determining that the claimant's notice (TWCC-32) was received (by the Commission) on the 90th day after the date of the EES-19 letter and that the claimant gave timely notice of his dispute.

The carrier contends in the alternative that the 90-day time period for disputing began on May 13, 2000, which is the day it contends the evidence shows that the claimant received the Notification Regarding MMI and/or IR (TWCC-28) with a copy of Dr. H's TWCC-69 that the carrier sent to the claimant. We disagree with the carrier's contention because amended Rule 130.5(e) provides that the first certification of MMI and IR is final if the certification of MMI and/or 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 . . ." (emphasis supplied).

The hearing officer's decision and order are affirmed.

Robert W. Potts
Appeals Judge

CONCUR:

Elaine M. Chaney
Appeals Judge

Kenneth A. Huchton
Appeals Judge