APPEAL NO. 011284-S
FILED JULY 23, 2001

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 May 25, 2001. The hearing officer determined that the compensable injury of _____, does not extend to the appellant's (claimant) cervical spine; that the claimant did not have disability from June 12, 2000, to the date of the CCH; that the first certification of maximum medical improvement (MMI) assigned by Dr. P on June 14, 2000, 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 June 12, 2000, with a 5% impairment rating (IR). The claimant appealed, contending that the first certification did not become final. The respondent (carrier) urges affirmance. The determination that the claimant's compensable injury of _____, does not extend to the cervical spine has become final. Section 410.169.

DECISION

We reverse and render a new decision that the first certification of MMI/IR did not become final under Rule 130.5(e).

Rule 130.5(e), effective March 13, 2000, provides, in pertinent part, that the first certification of MMI and IR assigned to an employee is final if the certification is not disputed "within 90 days after written notification of the MMI and IR is sent by the [Texas Workers' Compensation Commission] (Commission) to the parties, as evidenced by the date of the letter. . . ." In accordance with the rule, the hearing officer determined that since the claimant did not dispute the certification within 90 days after the date the Commission sent the notice to the claimant, as evidenced by the July 11, 2000, date of the Commission's letter, it became final.

It is undisputed that the claimant sustained a compensable lumbar spine injury on _____. On June 14, 2000, Dr. P certified that the claimant reached MMI on June 12, 2000, with a 5% IR for impairment of her lumbar spine. The record contains a Commission "EES-19" letter addressed to the carrier with a notation that a copy was sent to the claimant. The letter, a Commission form letter, reflects that it was revised in June 1998. The letter, dated July 11, 2000, states that Dr. P certified MMI/IR and gives the following instruction, in bold print, for disputing the certification:

> If you do not agree with the certification of [MMI] or the percentage of [IR] assigned for any reason, you must dispute these issues by contacting the Commission within *90 days after you receive notice of this certification or rating*. For assistance, or if you have any question, call or write the field office handling your claim or call 1-800-252-7031. (Emphasis added.)

The claimant testified that she did not remember receiving the EES-19 letter, but recalled that she received something from the carrier regarding MMI. The evidence reflects that the carrier mailed a copy of the EES-19 letter, which it had received from the Commission, to the claimant, via certified mail, on July 10, 2000. As evidenced by her signature on the green card, the claimant received the EES-19 on July 12, 2000. The parties stipulated that the claimant disputed the report of Dr. P on October 10, 2000, which is the 90th day after the claimant received the EES-19 letter, but the 91st day after the EES-19 letter was sent by the Commission.

The claimant contends that because she detrimentally relied on the incorrect information supplied by the Commission on this EES-19 letter regarding her dispute deadline, her failure to dispute the certification in accordance with Rule 130.5(e) should be excused. The carrier states that "[p]resumably, the reason why Claimant was misinformed (if she was) in the EES-19 and the Carrier's notice was that the TWCC and Carrier simply failed to revise the form notice EES-19 letter after recent revisions to Rule 130.5(e)." The Appeals Panel has previously held that reliance on misinformation does not excuse the failure to dispute pursuant to the 90-day rule in cases where the Commission gave the claimant correct written advice about the application of Rule 130.5(e) in the form of the EES-19 letter. *See* Texas Workers' Compensation Commission Appeal No. 970305, decided April 7, 1997. However, the information supplied by the Commission on the EES-19 letter incorrectly advised that the dispute must be made within 90 days after "*you receive notice of the certification or rating*." (Emphasis added.)

In Texas Workers' Compensation Commission Appeal No. 94322, decided May 2, 1994 (Judge Knapp dissenting), the Appeals Panel reversed and remanded a hearing officer's decision that the first IR assigned to the claimant had become final under Rule 130.5(e). In that case, the Commission sent notice to the claimant and his attorney advising that the treating doctor had certified MMI and assigned an IR. The notice went on to state that the MMI/IR certification would be considered final if not disputed by "09-16-93," which was an incorrect deadline date. The claimant's attorney disputed the treating doctor's IR by hand-delivered letter dated September 16, 1993. The carrier contended at the hearing that the 90-day period, under the version of Rule 130.5(e) then in effect, expired on September 12, 1993, and therefore had become final. The hearing officer held that the claimant had not timely disputed the first IR. The Appeals Panel reversed the hearing officer's decision that the first IR became final under Rule 130.5(e) and remanded for a determination of the correct IR. We held that, under the particular facts of that case, the Commission was estopped from finding that the dispute was untimely where the dispute was filed within the time limits given in the Commission's notice. We stated:

> We stress that this ruling is a narrow one. The particular facts that persuade the majority that the Commission should, in this case, honor its written communication are that: 1) the communication involved a deadline set forth in a rule, rather than a statute; 2) the communication was written; 3) the communication emanated from a person cloaked with the apparent authority to do so; 4) it was issued

to both parties, who had equal benefit of the mistake; and, 5) it was relied upon, reasonably, by the party who sustained a detriment.

Applying the above-enumerated factors to the present case, we find that the hearing officer erred in determining that the MMI/IR certification became final because it was not disputed within 90 days after the date the Commission sent the EES-19 letter. Therefore, we reverse the hearing officer's determination that the MMI/IR became final and render a new decision that the MMI date and IR assigned by Dr. P did not become final under Rule 130.5(e).

Philip F. O'Neill
Appeals Judge

CONCUR:

Michael B. McShane
Appeals Judge

Robert W. Potts
Appeals Judge