APPEAL NO. 011397
FILED AUGUST 8, 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 18, 2001. 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 July 15, 1999, became final pursuant to Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 130.5(e) (Rule 130.5(e)). The appellant (claimant) appealed and the respondent (self-insured) responded.

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 July 15, 1999, became final under Rule 130.5(e). The parties stipulated that the claimant sustained a compensable injury on _____. Dr. H examined the claimant at the self-insured's request on July 13, 1999, and in a Report of Medical Evaluation (TWCC-69) dated July 15, 1999, certified that the claimant reached MMI on July 13, 1999, and assigned the claimant a nine percent IR. The parties stipulated that Dr. H was the first doctor to certify an MMI date and an IR for the claimant. It is undisputed on appeal that in August 1999 the Texas Workers' Compensation Commission (Commission) mailed an EES-19 form, which provides notice of Dr. H's certification of MMI and IR and advises of the 90-day dispute period, to the claimant at the claimant's correct address. The claimant testified that he did not recall receiving the EES-19 form and that he first received written notice of Dr. H's certification of MMI and IR approximately 95 days after July 15, 1999, which would be around October 18, 1999, and that he went to a Commission field office in late October 1999 and disputed the IR. The Commission's Dispute Resolution Information System contact data in evidence reflect that the claimant first disputed Dr. H's certification of MMI and IR on April 13, 2000 (the self-insured's claims adjustor also testified that there was no dispute of the first IR until April 2000). The hearing officer applied the Commission's five-day deemed receipt rule (formerly Rule 102.5(h); now Rule 102.5(d)) and found that on August 9, 1999, the claimant received written notification of the first IR assigned to him. The hearing officer further found that the claimant did not dispute the first IR assigned to him until April 2000. The hearing officer concluded that the first certification of MMI and IR assigned by Dr. H on July 15, 1999, became final pursuant to Rule 130.5(e).

The version of Rule 130.5(e) which is applicable to the time period under consideration, and which was effective January 25, 1991 provided:

> The first [IR] assigned to an employee is considered final if the rating is not disputed within 90 days after the rating is assigned.

The Appeals Panel has held that if the IR becomes final under Rule 130.5(e), then so

does the underlying finding of MMI. Texas Workers' Compensation Commission Appeal No. 92670, decided February 1, 1993. In Rodriguez v. Service Lloyds Insurance Company, 997 S.W.2d 248, 254 (Tex. 1999), the Supreme Court of Texas held that the above-cited version of Rule 130.5(e) "has no exceptions and that an [IR] is final if not disputed within ninety days." There is conflicting evidence in this case. The hearing officer is the sole judge of the weight and credibility of the evidence. Section 410.165(a). As the finder of fact, the hearing officer resolves the conflicts in the evidence and determines what facts have been established from the evidence presented. The appealed findings of fact and conclusion of law are supported by sufficient evidence and are not so against the great weight and preponderance of the evidence as to be clearly wrong and unjust.

We note, as does the claimant, that the above-cited version of Rule 130.5(e) was declared invalid by the Third Court of Appeals in Fulton v. Associated Indemnity Corporation, 2001 WL 359622 (Tex. App.-Austin, April 12, 2001). On April 23, 2001, the Acting Executive Director of the Commission issued Advisory 2001-05, which states that the Fulton decision "should not be considered as precedent at least until it becomes final upon completion of the judicial process." At this time, we understand that the judicial process in that case has not been completed. Accordingly, we are following the Commission's Advisory 2001-05.

We further note that Rule 130.5(e) was amended effective March 13, 2000, and as amended contains certain exceptions; however, Rule 130.5(f) provides: "This rule applies to certifications of MMI and [IRs] that have not become final prior to the effective date of this rule." Since the first certification of MMI and IR in this case did become final prior to the effective date of amended Rule 130.5(e), the amended rule would not apply.

The hearing officer's decision and order are affirmed.

Robert W. Potts
Appeals Judge

CONCUR:

Robert E. Lang
Appeals Panel
Manager/Judge

Thomas A. Knapp

Appeals Judge