APPEAL NO. 950141

On November 17, 1994, a contested case hearing was held in (city), Texas, with (hearing officer) presiding as the hearing officer. The hearing was held under the provisions of the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq*. (1989 Act). The issue at the hearing was whether the first certification of maximum medical improvement (MMI) and impairment rating (IR) assigned by (Dr. S) on May 19, 1993, became final under Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 130.5(e) (Rule 130.5(e)). The appellant (carrier) disagrees with the hearing officer's decision that Dr. S's certification of MMI and IR did not become final under Rule 130.5(e). The respondent (claimant) requests affirmance.

DECISION

Reversed and rendered.

The claimant testified that she was injured at work on (date of injury). According to a Report of Medical Evaluation (TWCC-69) dated May 19, 1993, Dr. S conducted an independent medical evaluation of the claimant on May 19, 1993, and he certified that the claimant reached MMI on May 19, 1993, with a zero percent IR. The narrative report attached to the TWCC-69 is addressed to the carrier's claims services company. Neither the TWCC-69 nor the narrative report indicates that copies were sent to the claimant or to the claimant's representative.

(Mr. M) testified that he is an attorney and that he attended a benefit review conference (BRC) as the carrier's representative in July 1994. A copy of the report of the July 1994 BRC was not in evidence. Mr. M said that at the July 1994 BRC he showed the claimant a copy of Dr. S's TWCC-69 and asked her if she had received it and the claimant said she had and that she had forwarded it to her attorney. He testified that he assumed that she had forwarded it to her prior attorney, (Ms. H). He testified that he could not recall the date the claimant said she received Dr. S's TWCC-69 but that he did recall that "they were outside of the 90 days of when they were disputing it. . . ." When Mr. M was asked by the carrier's attorney "the question of when [claimant] received the TWCC-69, if she forwarded it on to her attorney, who was then [Ms. H], it must have been prior to January 1994, is that right, since that's when that attorney quit representing [claimant], is that right?", Mr. M responded, "I assume, yes."

The claimant testified that she doesn't know what a TWCC-69 is and that Mr. M did not "hold up a piece of paper" at the July 1994 BRC and ask her if she had received it. She testified that at the July 1994 BRC she said that she had received "something in the mail" but that she did not know what it was and assumed it was from Dr. S. At this point the claimant's attorney showed the claimant Claimant's Exhibit No. 1 which is a letter from the Texas Workers' Compensation Commission's (Commission) (city) field office to the claimant and to (E Co.) (we cannot tell from the record what relationship, if any, E Co. had with the self-insured) dated February 28, 1994, in which the Commission advised the

claimant that it had received a report from Dr. S dated May 19, 1993, in which she was assigned a zero percent IR. The exhibit also states:

> Because you have an [IR] of 0%, you are not entitled to impairment income benefits. Your certification of [MMI] and your [IR] of zero may be considered final if not disputed by 8-19-94. If you do not agree that you have reached [MMI] or you do not agree with your zero percent [IR], you should immediately tell the insurance carrier and the Commission Field Office.

The claimant testified that Claimant's Exhibit No. 1 was what she was referring to at the BRC in regard to what she had received. The carrier objected to Claimant's Exhibit No. 1 on the grounds that it had not been exchanged and the hearing officer sustained the objection and did not admit it into evidence.

However, earlier in the hearing, the carrier's attorney had requested the hearing officer to take "judicial notice" of documents in the Commission's claim file "showing that the Commission received it's copy of [Dr. S's] TWCC-69." The claimant objected to the carrier's request on the basis that "no one had any idea of what she [claimant] received so I object to that." The hearing officer overruled the claimant's objection and stated "I will take official notice of the claim file to see when the Commission received, for example, and primarily, only to see when we received [Dr. S's] TWCC-69." The hearing officer then recessed the hearing to locate the claim file. When the hearing was reconvened the hearing officer noted that the claim file could not be located but that "once it is located, I will take official notice of it." She then stated "I overruled the claimant's objection, and I am going to take official notice of the file." When she made the last two announcements regarding taking official notice of the claim file without any limitation as to what was to be officially noticed therein, the carrier did not make any objection or express any disagreement that taking official notice of the entire claim file exceeded its original request for taking "judicial notice" of documents in the file showing Commission receipt of Dr. S's TWCC-69. In addition, prior to ruling on the carrier's objection to Claimant's Exhibit No. 1, the claim file was located and brought into the hearing room, and the hearing officer stated "this is the claim file and it's up here, any of the parties review, at any time." Thus, when the hearing officer excluded Claimant's Exhibit No. 1, she reminded the parties that she had taken official notice of the claim file and that "that was a Commission letter, it should be in the file." The carrier made no objection at the hearing to the hearing officer's considering the excluded document by having taken official notice of the claim file.

The claimant was asked "[a]t any time during that hearing [July 1994 BRC] did you say exactly you received notice or do you know exactly when you received notice of the zero percent [IR]," to which the claimant responded "No I did not say specifically when I received or what I received, no I don't, I don't know." The claimant was also asked how she determined what it was that she received from the Commission which indicated that she had received a zero percent IR, and the claimant answered that after the July 1994

BRC she went home and located the letter she had received from the Commission, and she indicated that that letter was Claimant's Exhibit No. 1, the February 28, 1994, letter from the Commission. She was not asked when she received that letter. Nor was she asked at the hearing when, if ever, she first received Dr. S's TWCC-69 or any other document which showed that she had been assigned a zero percent IR by Dr. S. She also testified that she really didn't know what the letter meant and forwarded it to her attorney, Ms. H. However, she also said that she hired her present attorney, (Ms. C) (Ms. C) in January 1994 (an agreement for Ms. C to represent the claimant in her workers' compensation claim is dated March 8, 1994). She also said that she didn't remember when Ms. H stopped representing her. The claimant also testified that when she received "that letter," apparently referring to the Commission's letter of February 28, 1994, she did not understand it, but that later, after it was explained to her by an unidentified person on some unspecified date, she understood that she had "until that date," apparently referring to the August 19, 1994, date in the Commission's letter, to dispute the zero percent IR.

Another BRC was held on September 21, 1994, and in the BRC report the benefit review officer (BRO) stated that according to Commission's records, Dr. S's report was received on May 24, 1993 (he does not say by whom), and that at the last BRC, "it appeared that the claimant had knowledge of the assignment of the [IR] by [Dr. S]. Based on the above information available at this Conference, the parties did not timely dispute the certification of [MMI] and the [IR] within 90 days and both have become final."

In the Decision and Order the hearing officer noted that she took official notice of the claim file and listed four documents in the file which were "relied upon" in reaching her decision. The documents are as follows:

1. A copy of a facsimile transmission from the Commission to Ms. C, the claimant's current attorney, dated January 25, 1994, which notes that the subject of the transmission is Dr. S's "final report." Attached to that document is Dr. S's TWCC-69 dated May 19, 1993, which, according to a date stamp, was received by the Commission on May 24, 1993; and a request for a BRC from Ms. H, the claimant's former attorney, dated January 3, 1994, which is date stamped as received by the Commission on January 7, 1994, in which Ms. H stated that the claimant had received a 19% IR in May 1992 and that the claimant had a second evaluation which had not been forwarded to her office (the parties represented that the claimant's treating doctor, (Dr. ST), had assigned the claimant an IR but had not certified MMI so they were treating Dr. S's report as the first IR assigned to the claimant);

2. A copy of the February 28, 1994, letter from the Commission to the claimant (the letter which was not admitted into evidence as Claimant's Exhibit No. 1), except that where the Claimant's Exhibit No. 1 states "may be

considered final if not disputed by 8-19-94," the copy taken official notice of has the last number of the year, the 4 in 94, partially blacked out;

3.A letter from Ms. C to the Commission dated April 11, 1994, asking whether "we have the authority to send [claimant] to another doctor for an evaluation;" and

4.A Commission Dispute Resolution Information System (DRIS) log dated May 17, 1994, which states that the "requester" is "attorney" and which contains the following text:

The clmt disputes the I.R. 90 days has passed to dispute the I.R. [Ms. C's] line was continuously busy. I left message for the adj that the case is being set for a BRC. File transferred to the (city) F.O for the BRC.

The carrier disagrees with the following findings of fact and conclusions of law:

FINDINGS OF FACT

8.[Ms. C's] request, as described in Finding of Fact No. 7 above, was received by the (city) Field Office of the Texas Workers' Compensation Commission on January 13, 1994. On January 25, 1994, Mary Loza (Ms. L) of the (city) Field Office apparently faxed a copy of [Dr. S's] TWCC-69 form to [Ms. C's] office.

9.The evidence is insufficient to establish that the claimant received, either personally or through her legal representative, [Dr. S's] TWCC-69 form dated May 19, 1993 prior to January 25, 1994.

10.On February 28, 1994, the (city) Field Office of the [Commission] sent to the claimant and the self-insured, but not to [Ms. C], a letter informing of the Commission's receipt of [Dr. S's] certification of MMI and IR dated May 19, 1993. The letter informed the claimant that [Dr. S's] certification may be considered final if the claimant did not dispute it by August 19, 1994.

11.While the Commission letter described in Finding of Fact No. 10 was erroneous to the extent that if informed the claimant that she had until as late as August 19, 1994 to dispute [Dr. S's] May 19, 1993 certification, it was not unreasonable for the claimant to rely upon such information being provided by the Commission.

CONCLUSIONS OF LAW

4.The certification by [Dr. S], which was the first complete certification of MMI and IR in this case, did not become final under Rule 130.5(e).

The carrier does not dispute the hearing officer's finding that Dr. S's certification was disputed by the claimant, through her attorney, on May 16, 1994.

The carrier contends that the hearing officer erred in taking official notice of the claim file. In a previous decision, Texas Workers' Compensation Commission Appeal No. 93103, decided March 22, 1993, we observed that a hearing officer should not take official notice of entire claim files and recommended that a hearing officer make hearing officer exhibits of relevant documents which are in the claim file instead of taking official notice of them. The carrier states that it "requested that the Hearing Officer take official notice of the date-stamped TWCC-69 from [Dr. S] dated May 19, 1993, but did not request the Hearing Officer to take official notice of any other documents." The carrier's statement is not entirely accurate, because what it requested was that the hearing officer take "judicial notice of the documents in the file, in the Commission's file, showing that the Commission received its copy of [Dr. S's] TWCC-69." This is a much broader request than is stated in the carrier's appeal and it can reasonably be concluded that the copy of the Commission's fax transmission to Ms. C dated January 25, 1994, forwarding Dr. S's report to her; the Commission's date-stamped copy of Dr. S's TWCC-69; the Commission's letter of February 28, 1994, to the claimant which indicates that the Commission received Dr. S's report; and the DRIS log of May 17, 1994, which indicates that the Commission was aware that the claimant had been assigned an IR, all come within the Carrier's request. Since the carrier requested the hearing officer to take "judicial notice" of documents in the claim file which showed receipt of Dr. S's report, we will not hear the carrier complain of such action on appeal.

In regard to the other documents which were officially noticed and are listed in the decision, which are the request for a BRC and Ms. C's letter of April 11, 1994, to the Commission, we note that the hearing officer stated more than once that she was taking "official notice of the file," indicating the entire file, and the carrier did not object to such action. It has been held that evidence which is admitted without objection can not be complained of on appeal. Dicker v. Security Insurance Company, 474 S.W.2d 334 (Tex. Civ. App.-Waco 1971, writ ref'd n.r.e.).

The carrier contends that it was never permitted to see or given the opportunity to rebut the February 28, 1994, letter from the Commission to the claimant. This is not correct. First, although the hearing officer excluded Claimant's Exhibit No. 1, which is a copy of the February 28th letter, when she did so she reminded the parties that she had already taken official notice of the claim file and that since it was a Commission letter "it should be in the file." This was a clear indication that she would be taking official notice of

the letter as part of the claim file and the carrier made no objection to such action. In addition, the claim file was brought into the hearing room and the hearing officer told the parties they could review it at any time. Furthermore, as previously mentioned, the February 28th letter, which informs the parties of the receipt of Dr. S's report, clearly comes within the request of the carrier for the hearing officer to take "judicial notice" of documents in the claim file showing receipt of Dr. S's report.

While we do not endorse the taking of official notice of a claim file, under the particular circumstances of this case where the taking of official notice of documents was instigated by the party complaining of such action on appeal, where the complaining party on appeal made no objection to the taking of official notice of the claim file at the hearing, where the claim file was made available to the parties during the hearing for their inspection, and where the hearing officer specifically listed in her decision which documents from the claim file she relied upon, we cannot conclude that the carrier has demonstrated reversible error on the part of the hearing officer in relying on the officially noticed documents she listed in her decision.

Rule 130.5(e) provides 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." We have held that if the first IR becomes final, so does the underlying finding of MMI. Texas Workers' Compensation Commission Appeal No. 92670, decided February 1, 1993. We have also held that the certification of MMI and IR, and the communication of those findings to the parties under Rule 130.5(e), require a writing. Texas Workers' Compensation Commission Appeal No. 94354, decided May 10, 1994. In addition, we have stated that an attorney employed to represent a claimant before the Commission is the agent of the claimant and that such attorney's actions or inaction within the scope of his or her employment is attributable to the claimant. Texas Workers' Compensation Commission Appeal No. 94379, decided May 12, 1994.

At the hearing the carrier objected to the hearing officer placing the burden of proof on it to show that the first IR became final under Rule 130.5(e). On appeal, the carrier contends that the hearing officer's decision "must be reversed" because of an "improper apportionment of the burden of proof." In Texas Workers' Compensation Commission Appeal No. 93111, decided March 29, 1993, the issue was whether the carrier had timely disputed the first IR issued by the treating doctor. In affirming the hearing officer's decision that the carrier had timely disputed the first IR we stated "[t]he hearing officer properly declared at the opening of the hearing that the burden of proof was on the carrier in this case since it was attempting to meet the conditions for timely disputing an [IR] under Rule 130.5." We also observe that in an unpublished decision, Texas Workers' Compensation Commission Appeal No. 941212, decided October 20, 1994 (unpublished), where the issue was whether the first certification of the claimant's MMI and IR became final under Rule 130.5(e), we affirmed the hearing officer's decision that they had become final, and in doing so we stated "[c]laimant had the burden of proving that he disputed the first

assigned IR within 90 days to the self-insured or the Commission." As previously noted, the issue in the instant case was whether the first certification of MMI and IR assigned by Dr. S on May 19, 1993, became final under Rule 130.5(e). Under the above-cited Appeals Panel decisions it would appear that we have placed the burden of proof on the party who asserts that the first IR did not become final to prove that it timely contested the first IR. However, the placement of the burden of proof is not what causes us to reverse the hearing officer's decision. Rather, it is the failure of the claimant to dispute Dr. S's IR within 90 days and the fact that the evidence in this case does not fit within our holding in Texas Workers' Compensation Commission Appeal No. 94322, decided May 2, 1994, which causes us to reverse and render.

In Appeal No. 94322, *supra*, (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 first IR was assigned by the treating doctor and the claimant received written notice of it on June 14, 1993. On July 28, 1993, a disability determination officer sent the claimant and his attorney a notice that the treating doctor had stated that the claimant had reached MMI with a nine percent IR. The notice went on to state that "[y]our certification of [MMI] and your [IR] may be considered final if not disputed by 09-16-93." The claimant's attorney disputed the treating doctor's IR by a hand-delivered letter dated September 16, 1993. The carrier contended at the hearing that the 90-day period under Rule 130.5(e) expired on September 12, 1993, which was 90 days from the date the claimant received written notice of the first IR. The hearing officer held that the claimant had not timely disputed the first IR. We 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 the 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 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.

In the instant case there is sufficient evidence to support the hearing officer's finding that the claimant did not receive notice of Dr. S's IR prior to January 25, 1994, when the field office faxed a copy of Dr. S's report to the claimant's attorney. Ninety days from January 25, 1994, was April 25, 1994. The claimant, through her attorney, did not dispute the first IR until May 16, 1994, which was after the 90-day period for disputing the IR, but before the August 19, 1994, date stated in the Commission's letter to the claimant. The

carrier asserts that there is no evidence that the claimant relied on the February 28, 1994, letter from the Commission. While the hearing officer finds that "it was not unreasonable for the claimant to rely upon such information being provided by the Commission," meaning the information that she had until August 19, 1994, to dispute Dr. S's certification of MMI and assignment of a zero percent IR, we conclude that such finding is so contrary to the overwhelming weight of the evidence as to be clearly wrong and unjust.

According to the evidence, Dr. S's TWCC-69 was sent by the Commission to the claimant's attorney, Ms. C, on January 25, 1994. The letter from the Commission, dated February 28, 1994, allows for almost six months to dispute the MMI and IR of Dr. S from the date of the letter. The claimant testified that she forwarded the letter to her former attorney Ms. H. There is no evidence that Ms. C, to whom the Commission sent Dr. S's report on January 25, 1994, was aware of the Commission's letter of February 28th before disputing Dr. S's IR on May 16, 1993. The Commission's letter is addressed to the claimant, but not to Ms. C. Ms. C did not dispute Dr. S's IR until May 16, 1994, which was well after 90 days after she received written notice of the IR. There is no evidence that Ms. C, in delaying more than 90 days in disputing the IR, relied on the Commission's letter to the claimant of February 28th. As previously noted, a claimant's attorney's actions or inactions within the scope of his or her employment are attributable to the claimant. Appeal No. 94379, *supra*. Moreover, had Ms. C been aware of the Commission's letter of February 28th, we question whether reliance on such letter in delaying disputing Dr. S's IR would be reasonable inasmuch as the letter allows for almost six months to file the dispute from the date of the letter whereas Rule 130.5(e) provides for a 90-day dispute period. Since there is no evidence of reasonable reliance on the Commission's letter of February 28, 1994, in delaying disputing Dr. S's IR until after the 90-day dispute period expired, we conclude that our holding in Appeal No. 94322, *supra*, is not applicable and that Dr. S's certification of MMI on May 19, 1993, and assignment of a zero percent IR became final under Rule 130.5(e).

The carrier also asserts that the hearing officer and the claimant's attorney engaged in improper *ex parte* communications after the hearing was concluded. The claimant's attorney denies improper *ex parte* communications and asserts that she had a conversation with the hearing officer regarding "submitting two copies of Request For Attorney's Fees." The carrier states:

> After the CCH was concluded, I left the attorney alone. I returned to the Hearing Room when the Claimant's attorney remained with the Hearing Officer for five minutes or more. As I entered the room, the Claimant's attorney seemed to be discussing the instant claim. As soon as they stopped talking and the Claimant's attorney left. This communication may have improperly prejudiced the Hearing Officer against the Carrier.

We find the carrier's allegation to be too vague and speculative to constitute an assertion of improper *ex parte* contacts under Section 410.167 and Rule 142.3.

The hearing officer's decision and order are reversed and a decision is rendered that the May 19, 1993, certification of MMI and assignment of a zero percent IR by Dr. S became final under Rule 130.5(e).

Robert W. Potts
Appeals Judge

CONCUR:

Joe Sebesta
Appeals Judge

Alan C. Ernst
Appeals Judge