APPEAL NO. 950207

This appeal is brought 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 January 12, 1995, in (city), Texas, with (hearing officer) presiding as hearing officer. Addressing the disputed issues, he determined that the claimant's first impairment rating (IR) did not become final because it was not a valid certification and because the respondent (claimant herein) disputed it in a timely manner. The appellant (carrier herein) appeals these determinations arguing that they are not supported by sufficient evidence. The claimant replies that the decision and order of the hearing officer are supported by sufficient evidence and should be affirmed. In his response, the claimant also raises an evidentiary point of error. Although the response was timely filed as a response, it was not timely as an appeal and for this reason the alleged error will not be considered. *See* Texas Workers' Compensation Commission Appeal No. 93345, decided June 17, 1993.

DECISION

We affirm.

It was not disputed that the claimant sustained a compensable injury on (date of injury), or that on January 19, 1993, (Dr. L), an independent medical examination doctor, completed a Report of Medical Evaluation (TWCC-69) in which he certified that the claimant reached maximum medical improvement (MMI) on July 7, 1992, and assigned a zero percent IR. The parties agreed that this was the claimant's first certification of MMI and IR. In a finding of fact not appealed by either party and which has now become final, *see* Texas Workers' Compensation Commission Appeal No. 94588, decided June 20, 1994, the hearing officer also found that the claimant disputed this certification on September 28, 1994.

In a report accompanying Dr. L's TWCC-69, he stated:

> Based on a review of the patient's history and physical findings, I feel that we should not overlook a possible cervical disk problem. I recommend an MRI scan. If this is negative, I recommend the patient undergo functional capacity evaluation and [IR].

The claimant said that he believed he would be assigned an IR after this additional testing was done. It is clear that no such testing was ever done.

The claimant further testified that he was never informed of Dr. L's certification either orally or in writing until a discussion with a (city) field office representative of the Texas Workers' Compensation Commission (Commission) and that he disputed Dr. L's IR within 90 days of being made aware of it. The claimant said he hired an attorney (attorney A) in early February 1993 to represent him, and believed this attorney was going to ask for a change of treating doctors to (Dr. F) who would do the testing requested by Dr. L. The

claimant was incarcerated in the county jail from March 4 to March 25, 1993, and was not able to keep an appointment he said he had with Dr. F. While incarcerated, the claimant said Attorney A told him there was nothing he could do for him and withdrew from the case. According to the claimant, attorney A gave him no paperwork whatsoever associated with his case. The claimant was not sure when exactly attorney A ceased representing him. He said he received no medical treatment from the time he was incarcerated until August 4, 1994, when he went to see a chiropractor because his back "locked up." After talking with his chiropractor about the status of his case in the workers' compensation system, the claimant said he called the (city) field office.

Communication logs of the Commission in evidence reflect that the claimant called the (city) field office on September 15, 1994, and was reported as saying he got an IR and "now wants to dispute past 90 days." Commission records also reflect that he visited the (city) field office on September 28, 1994, to prepare for a benefit review conference (BRC). The claimant is reported as saying at this time that he first knew a TWCC-69 was prepared in his case on September 15, 1994, when he spoke with an adjuster.

The carrier took the position that whenever it receives a TWCC-69 it sends a form letter so advising a claimant. It also introduced into evidence two "Payment of Compensation or Notice of Refused/Disputed Claim" (TWCC-21) forms dated March 22, 1993, and April 17, 1993, respectively, on which the block is checked that says the forms were sent to the claimant and which lists as the claimant's address his mother's address which the claimant conceded is where he was getting his mail. These forms reflect that Dr. L certified MMI and IR. The claimant denied receiving either of these TWCC-21s or other documentation in the file which deals with his IR and which was sent to Attorney A.

(Mr. F), the carrier's representative at the November 17, 1994, BRC, testified that he recalled the claimant saying that he discussed Dr. L's IR with Attorney A while he was incarcerated, and reported the benefit review officer as saying if the attorney knew of the IR, the claimant could be charged with that knowledge.

The hearing officer made the following findings of fact and conclusions of law which have been appealed by the carrier:

FINDINGS OF FACT

5.On January 19, 1993, [Dr. L] examined the Claimant, at the Carrier's request. Based on this examination and limited, if any, medical records [Dr. L] prepared a Report of Medical Evaluation and certified that the Clement [sic] reached [MMI] on July 7, 1992, with a 0 percent [IR].

8.The failure to perform adequate diagnostic testing constitutes a significant error and inadequate medical treatment of the Claimant's injury and renders the purported certification of [MMI] invalid.

9.The evidence is insufficient to establish that the Claimant received a written communication informing him of [Dr. L's] certification of [MMI] and resulting [IR] more than 90 days prior to disputing [Dr. L's] findings.

10.The Claimant had actual knowledge of [Dr. L's] certification of [MMI] and [IR] on September 15, 1994, after speaking with a representative of the Carrier. The Claimant did not have sufficient knowledge of [Dr. L's] original certification of [MMI] and the resulting [IR] prior to September 15, 1994.

12.The designated doctor provisions of the Act have not been complied with. The Claimant's [IR] cannot be determined at this time. The issue is not ripe for resolution.

CONCLUSIONS OF LAW

3.There is no valid certification of [MMI], no valid [IR] and nothing to dispute.

4.The Claimant disputed the original certification of [MMI] and the resulting [IR] in a timely manner and in compliance with Rule 130.5(e).

Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 130.5(e) (Rule 130.5(e)) provides that the "first [IR] assigned to an employee is considered final if the rating is not disputed within 90 days after the rating is assigned." If the IR becomes final by virtue of this rule, so does the underlying certification of MMI. Texas Workers' Compensation Commission Appeal No. 92670, decided February 1, 1993. The Appeals Panel has also observed that "if an MMI certification or [IR] were determined, based on compelling medical or other evidence, to be invalid because of some significant error or because of a clear misdiagnosis, then a situation could result where the passage of 90 days would not be dispositive." Texas Workers' Compensation Commission Appeal No. 93489, decided July 29, 1993. Either relying on this principle or concluding that Dr. L's certification was conditional or tentative, *see* Texas Workers' Compensation Commission Appeal No. 941748, decided February 13, 1995, and Texas Workers' Compensation Commission Appeal No. 941098, decided September 29, 1994, the hearing officer, in his Statement of the Evidence, commented that Dr. L considered an MRI "necessary as a pre-requisite to determining possible [MMI]." Since this MRI was never done, reasoned the hearing officer, "the evidence does not support a certification of [MMI] under the facts of this case. . . ." Hence, he found Dr. L's certification invalid and Rule 130.5(e) inapplicable. The carrier appeals this determination, arguing among other things, that any failure to undergo MRI testing was the claimant's fault. Because there is another reasonable basis supported by the evidence on which to affirm the decision and order of the hearing officer, we need not address the question of whether Dr. L's certification was valid or not. *See* Texas Workers' Compensation Commission

Appeal No. 93502, decided August 4, 1993, and Texas Workers' Compensation Commission Appeal No. 91002, decided August 7, 1991.

The 90-day time period for disputing a first certification begins when the challenging party receives written notice of the certification. Texas Workers' Compensation Commission Appeal No. 94345, decided May 4, 1994. Whether, and if so, when, a dispute by a party has been made is a question of fact for the hearing officer to decide. Texas Workers' Compensation Commission Appeal No. 931170, decided February 3, 1994, and Texas Workers' Compensation Commission Appeal No. 931110, decided January 20, 1994. The hearing officer obviously believed the claimant's testimony that he never received a copy of Dr. L's certification around the time it was made or while he was incarcerated and that he received no other documentation from Attorney A or the carrier that Dr. L had certified MMI. Though the carrier maintained at the CCH that it routinely sent copies of such certifications to claimants, it presented no evidence that it followed its normal practice in this case. Curiously, the carrier's witness, Mr. F, stated such evidence was probably in the case file, but he did not bring the file with him to the hearing. The parties also disagreed as to whether the claimant conceded to his attorney at the BRC that he knew of Dr. L's certification some nine months before he disputed it. It was the responsibility of the hearing officer to resolve these inconsistencies and contradictions in the evidence and determine what facts have been established. Section 410.165(a). When reviewing a hearing officer's decision we will reverse such decision only if it is so contrary to the overwhelming weight of the evidence as to be clearly wrong and unjust. Cain v. Bain, 709 S.W.2d 175, 176 (Tex. 1986); Pool v. Ford Motor Company, 715 S.W.2d 629 (Tex. 1986). Having reviewed the record in this case, we are satisfied that the testimony of the claimant, found to be credible, was sufficient evidence to support the determination of the hearing officer that the claimant first knew of Dr. L's certification on September 15, 1994, and that he disputed it on September 28, 1994, well within the time limits of Rule 130.5(e). Absent agreement of the parties, the determination of the correct IR in this case must await the designated doctor process. *See* Section 408.125.

While not addressing the correctness of the hearing officer's determination that Dr. L's certification was invalid, we nonetheless affirm the decision and order of the hearing officer that the claimant timely disputed the first certification of MMI and IR and that the issue of the claimant's correct IR is not yet ripe for resolution.

Alan C. Ernst
Appeals Judge

CONCUR:

Philip F. O'Neill
Appeals Judge

Thomas A. Knapp
Appeals Judge