APPEAL NO. 950319

This appeal arises pursuant to the Texas Workers' Compensation Act of 1989, TEX. LAB. CODE ANN. § 401.001 *et seq*. (1989 Act). On January 11, 1995, a hearing was held in (city), Texas, with (hearing officer) presiding. He determined that the first certification of maximum medical improvement (MMI) and impairment rating (IR) did not become final. Appellant (carrier) asserts that the great weight of the evidence shows that "the TWCC-69" was mailed to claimant by carrier and a signed return receipt card in evidence shows notice was perfected, from which time no dispute was made within 90 days. Respondent (claimant) replies that the decision should be affirmed.

DECISION

We affirm.

The only issue at this hearing was whether the first certification of MMI and IR by (Dr. H) became final. Claimant had worked for (employer) when she hurt her shoulder on (date of injury). Dr. H was her treating doctor. Claimant testified that she had a bad memory for dates but that she moved from Texas, with her family, to (city) in July 1992. She stated that she could not work at that time. Claimant indicated that she did not continue to be treated by Dr. H after leaving for (city), although she agreed that she had been sent by Dr. H to (Dr. B) who performed an impairment evaluation of her, finding one percent, for Dr. H.

Claimant testified that while she signed two return receipts dated November 30, 1992, and December 2, 1992, neither parcel contained a Report of Medical Evaluation (TWCC-69) or communication of an IR to her. She testified that one receipt was obtained for a check that came by itself and she could not recall what she received when giving the other receipt.

The carrier argued that the carrier received a TWCC-69 from Dr. H showing zero percent IR, which it sent to claimant. Carrier's position was "the record is clear that [claimant] received a TWCC 69 in December of 1992 with a 0 percent impairment." Carrier later in argument states, "there is a second TWCC 69 that comes, which clarifies the O to 1 percent . . . And in all likelihood, based upon procedure, it would have been sent to her maybe not by certified mail, since one was sent by certified mail, a few days prior."

Carrier called (PC), an adjuster, to testify. She stated that it was the carrier's procedure and her own to send a doctor's TWCC-69 to a claimant with a return receipt, and she did not recall ever receiving a TWCC-69 and not sending a copy to the claimant involved. She also testified that a TWCC-69 was received from Dr. H's office on December 2, 1992. She was questioned further:

Q.So you did not have this before December the 2nd?

A.There was another TWCC 69 in the file that had a 0 percent impairment, and it was kind of scribbled out, and you couldn't tell whether they were scribbling out the 0 to make a 1, or if it was part of the scribble. So there was another TWCC 69 that we had received prior to that, and we didn't know if it was a 0 percent impairment or 1 percent, that is --so--

Q.So you wanted clarification, because you --

A.I don't -- I don't really remember. I am just saying the dates on that might be on this one, but when I got the one that said 0 percent of it, I also sent that one out. So I -- I was notified before this 1 percent, that she had reached MMI, but it had a 0 percent on it.

Later, on redirect examination, PC stated that the first TWCC-69 she received showed 0 percent IR with an MMI date of October 13, 1992. She also stated on redirect examination in reply to a question of standard procedures upon receiving a corrected TWCC 69, " . . . maybe one didn't get sent out, I don't really know."

Carrier questioned claimant about questions she may have had when she stopped receiving payments in late 1992, and whether she drew any conclusions as to having reached MMI from that fact. In addition, a legal assistant from the law firm that claimant had hired testified that it did not receive a copy of a TWCC-69 prior to June 1993 and thereafter disputed the IR in July 1993.

Several prior Appeals Panel decisions address matters addressed at this hearing relevant to whether the first IR, found to be one percent, became final. Texas Workers' Compensation Commission Appeal No. 94354, decided May 10, 1994, states that the "communication" of MMI and IR under Tex W. C. Comm'n, 28 TEX. ADMIN. CODE § 130.5(e) requires a writing. Therefore any supposition from ceased checks, if shown in a claimant, would not qualify to start the 90-day period for disputing. (While language in the cited opinion cites other language addressing when a person is "aware" of a rating, the 90-day period has been held to begin from the date written notification was delivered to a party. *See* Texas Workers' Compensation Commission Appeal No. 94365, decided May 11, 1994, which found notification when a relative of claimant accepted delivery of a written communication of the initial IR. *See also* Texas Workers' Compensation Commission Appeal No. 94049, decided February 18, 1994, which refused to add a requirement of "understanding" when a claimant, who was not proficient in English, received written notification of an initial MMI and IR. *See also* Texas Workers' Compensation Commission Appeal No. 93644, decided September 8, 1993, in which a claimant's attorney received the notice.)

Appeal No. 93644, *supra*, held that notice to an attorney was also notice to the claimant. Texas Workers' Compensation Commission Appeal No. 931011, decided December 10, 1993, held that communication to a party's counsel is not necessary to start the running of

the 90-day period under rule 130.5(e). Therefore if the hearing officer had found that claimant was notified of the initial MMI/IR, the fact that her attorney did not receive notice would not prevent inception of the 90 days.

Whether notice occurred is a fact issue for the hearing officer to decide; Texas Workers' Compensation Commission Appeal No. 93308, decided June 4, 1993, affirmed a hearing officer's decision giving more weight to a claimant's statement that notice was not received than to a carrier's evidence of notice provided by mail. With claimant stating that she never received notice of an initial MMI/IR until June 1993 and with carrier unable to show evidence of what any return receipt it produced had forwarded to claimant - with its adjustor concluding that it was possible that one of the two certifications of MMI/IR was not sent, without stating which one may not have been sent, the conclusion of law that the initial IR did not become final is sufficiently supported by the evidence. However, Texas Workers' Compensation Commission Appeal No. 941137, decided October 10, 1994, stated that the only IR which can be subject to the 90-day period found in rule 130.5(e) is the "chronologically first" written certification of MMI or IR. With the evidence of PC and the position taken by carrier that was consistent with that evidence, that an IR of zero percent was assigned prior to the time the IR of one percent was assigned, the finding of fact by the hearing officer that Dr. H's IR of one percent was the first IR assigned is against the great weight and preponderance of the evidence.

Under Daylin, Inc. v. Juarez, 766 S.W.2d 347 (Tex App.-El Paso 1989, writ denied), the Appeals Panel has affirmed decisions of the hearing officer when capable of being sustained on any reasonable theory supported by the evidence. As stated, the evidence sufficiently supports that the first IR assigned did not become final since carrier acknowledged that it may not have been sent and claimant testified that she received no TWCC-69 within that time period. Finding that the decision and order as set forth at the end of the hearing officer's opinion are sufficiently supported by the evidence, we affirm. *See* In re King's Estate, 150 Tex. 662, 244 S.W.2d 660 (1951).

Joe Sebesta
Appeals Judge

CONCUR:

Robert W. Potts
Appeals Judge

Lynda H. Nesenholtz
Appeals Judge