

APPEAL NO. 042749
FILED DECEMBER 21, 2004

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 October 11, 2004. The hearing officer determined that the certification of maximum medical improvement (MMI) and impairment rating (IR) assigned by Dr. B on January 27, 2004, became final under Section 408.123.

The appellant (claimant) appeals, contending that Dr. B's first valid written certification of MMI and IR did not become final because it was not provided to the claimant by verifiable means and/or there was compelling medical evidence of a "clear misdiagnosis" (Section 408.123(e)(1)(B)) or prior improper or inadequate treatment (Section 408.123(e)(1)(C)). The respondent (carrier) responds that the hearing officer's decision is supported by the evidence and urges affirmance.

DECISION

Reversed and a new decision rendered.

The parties stipulated that the claimant sustained a compensable (low back) injury on _____, and that Dr. B's report of January 27, 2004, was the first certification of MMI and IR by a doctor. The issue at the CCH was "Did the certification of [MMI] and [IR] assigned by [Dr. B] on January 27, 2004, become final under TEX. LABOR CODE ANN. § 408.123?"

Section 408.123(d) states that:

Except as provided in Subsections (e), (f), and (g), the first valid certification of [MMI] and the first valid assignment of [IR] to an employee are final if the certification of [MMI] and/or the assigned [IR] is not disputed within 90 days after written notification of the [MMI] and/or assignment of [IR] is provided to the claimant and the carrier by verifiable means.¹

We view the key portion of that provision applicable to this case to be whether the written notification of MMI and assignment of IR was provided to the claimant "by verifiable means."

¹ We note that two different versions of Section 408.123(d) were enacted by the 78th Legislature, one to be effective June 18, 2003, and the second to be effective June 20, 2003. Upon careful review of the two different versions of subsection (d), we conclude that while the language used is slightly different in each, the meaning is the same. Both versions provide that an employee's first valid certification of MMI and first valid assignment of IR is final if not disputed within 90 days. See Texas Workers' Compensation Commission Appeal No. 041241-s, decided July 19, 2004.

It is undisputed that the claimant saw Dr. B on January 27, 2004, and it is relatively undisputed that Dr. B's MMI date and IR were not disputed until May 19, 2004. What is disputed is exactly when the claimant received Dr. B's report. The claimant's testimony on when she received the report was inconsistent and contradictory. On direct examination the claimant said she received the report three or four weeks or maybe two weeks after Dr. B's examination. In response to a question from the hearing officer the claimant said she thought she may have gotten the report before Valentine's Day (February 14, 2004). The carrier presented testimony from an adjuster who said the report, together with some forms, was sent to the claimant on February 6, 2004, along with a benefits check which was sent in a separate envelope by certified mail the same day. There is evidence the benefits check was received by the claimant on February 10, 2004. There is no evidence when the report and forms were received by the claimant. Based on the testimony the hearing officer found that the report was "received by the claimant no later than February 14, 2004." The question then is whether this testimony establishes that written notification was provided to the claimant by verifiable means. The carrier argues that the "technicality" of proof by verifiable means is not defined in Section 403.123 "nor the applicable Rule" Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 130.12 (Rule 130.12).²

In Texas Workers' Compensation Commission Appeal No. 042163-s, decided October 21, 2004, the Appeals Panel discussed whether the deemed receipt provision of Rule 102.4 was applicable and what is meant by "verifiable means." Appeal Nos. 041985-s, *supra*, and 042163-s, *supra*, both reference the preamble to Rule 130.12. The preamble provides that the 90-day period "begins when that party receives verifiable written notice of the MMI/IR certification." The preamble goes on to state:

Written notice is verifiable when it is provided from any source in a manner that reasonably confirms delivery to the party. This may include acknowledged receipt by the injured employee or insurance carrier, a statement of personal delivery, confirmed delivery by e-mail, confirmed delivery by facsimile, or some other confirmed delivery to the home or business address. The goal of this requirement is not to regulate how a system participant makes delivery of a report or other information to another system participant, but to ensure that the system participant filing the report or providing the information has verifiable proof that it was delivered. 29 Tex Reg 2331, March 5, 2004.

In this case the question becomes whether the claimant's inconsistent and contradictory testimony was "acknowledged receipt by the injured employee" and whether the carrier "has verifiable proof that [the report] was delivered." Fairly clearly the claimant acknowledged receipt of the report but equally clearly she did not know when she received it and was only speculating when the date was, nor does the carrier have "verifiable proof that [the first certification of MMI and IR] was delivered." We hold that

² Rule 130.12 was adopted by the Texas Workers' Compensation Commission (Commission) to be effective on March 14, 2004. Although it was not in effect at the time the claimant received [the] certification of MMI and assignment of IR, we have said that it is instructive as to the Commission's interpretation of how both versions of Section 408.123(d) can be read together. See also Texas Workers' Compensation Commission Appeal No. 041985-s, decided September 28, 2004.

the claimant's testimony in this case, does not amount to an acknowledged receipt by the claimant on a date certain sufficient to begin the 90-day period of Section 408.123(d) and Rule 130.12. Having so held we do not address the other grounds cited by the claimant why Dr. B's first certification may not have become final.

Accordingly, we reverse the hearing officer's decision that the certification of MMI and IR assigned by Dr. B on January 27, 2004, became final pursuant to Section 408.123 and render a new decision that the first certification of MMI and IR assigned by Dr. B on January 27, 2004, did not become final pursuant to Section 408.123 and Rule 130.12.

The true corporate name of the insurance carrier is **TEXAS MUTUAL INSURANCE COMPANY** and the name and address of its registered agent for service of process is

**RUSSELL RAY OLIVER, PRESIDENT
221 WEST 6TH STREET, SUITE 300
AUSTIN, TEXAS 78701.**

Thomas A. Knapp
Appeals Judge

CONCUR:

Robert W. Potts
Appeals Judge

Margaret L. Turner
Appeals Judge