APPEAL NO. 061241
FILED AUGUST 3, 2006

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 8, 2006. The hearing officer resolved the disputed issue by deciding that the first certification of maximum medical improvement (MMI) and assigned impairment rating (IR) from Dr. B on October 24, 2005, did become final under Section 408.123. The appellant (carrier) appealed the hearing officer's finality determination. The appeal file does not contain a response from the respondent (claimant).

DECISION

Reversed and rendered.

The parties stipulated that the claimant sustained a compensable injury on _____. The evidence reflects that on October 11, 2004, the carrier filed a Request for Designated Doctor (DWC-32) to determine whether the claimant was at MMI, and if so, what was the IR. Dr. S was appointed as the designated doctor, he examined the claimant on November 9, 2004, and he certified that the claimant was not at MMI. On September 21, 2005, the carrier again filed a DWC-32 to determine the claimant's MMI and IR and Dr. S re-examined the claimant on November 7, 2005. Prior to scheduled examination with Dr. S, the claimant was examined by his treating doctor, Dr. B, on October 24, 2005, and he certified that the claimant reached statutory MMI on October 22, 2005, with a 12% IR. Thereafter, the designated doctor, Dr. S, examined the claimant on November 7, 2005, and he certified that the claimant reached statutory MMI on October 17, 2005, with a 0% IR.

The only issue in dispute was whether the first certification of MMI/IR from the treating doctor, Dr. B, on October 24, 2005, became final under Section 408.123. Review of the record indicates that the parties did not present any testimony, and that this case was decided on the documentary evidence admitted at the CCH. The claimant argued that the carrier did not dispute the first certification of MMI/IR on October 24, 2005, from the treating doctor, Dr. B, within 90 days after written notification of the MMI/IR as provided by verifiable means to the carrier. The claimant stated in her opening argument that the carrier received written notification of the first certification of MMI/IR on November 2, 2005. The carrier argued that it disputed the first certification of MMI because it requested the appointment of the designated doctor to determine MMI/IR on September 21, 2005, a date that was before the treating doctor certified MMI/IR on October 24, 2005. The carrier explained that it had requested the appointment of a designated doctor to determine MMI/IR prior to the date the treating doctor certified MMI/IR. It is undisputed that the first certification of MMI/IR was from Dr. B. We note that the parties did not stipulate as to when the carrier received written notification or acknowledged receipt of the first certification of MMI/IR by verifiable means necessary to trigger the 90-day time period.

Section 408.123(d) provides 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. 28 TEX. ADMIN. CODE § 130.12(b) (Rule 130.12(b)) provides, in part, that the first MMI/IR certification must be disputed within 90 days of delivery of written notice through verifiable means, including IRs related to extent-of-injury disputes. The notice must contain a copy of a valid Report of Medical Evaluation (DWC-69), as described in subsection (c).

The hearing officer stated in the Background Information section that "[I]t was not disputed that [Dr. B] had issued the first certification and that both parties received his report by verifiable means. Carrier received [Dr. B's] report on March 17, 2005.[1] See Claimant's Ex. 6, Pg. 1." We note that Claimant's Exhibit 6, Pg. 1, is a letter dated March 2, 2006, with a date stamped as received March 17, 2006 by "Ombudsman (City)." This letter was addressed to the claimant from the billing department of Dr. B's office, which states that:

> You requested the billing date and time of your [IR]. [Dr.B] performed the services on 10/24/05 at 3pm. The date this bill was sent out was on 10/28/05 at 5pm. It was received by UTICA on 11/02/05 and the bill was reviewed and paid, a check was sent to NIT-PA on 11/29/05. We received the check here on the 12/05/05 and posted to our files on 12/12/05. If you have any other questions about this date of service or any other dates please don't hesitate to ask any of our billing department.

The hearing officer's Finding of Fact No. 7 states that "[Dr. B's IR] was provided to the Carrier by verifiable means on March 17, 2006."

In Appeals Panel Decision 041985-s, decided on September 4, 2004, we noted that the preamble to Rule 130.12 stated that written notice is verifiable when it is provided from any source in a manner that reasonably confirms delivery to the party; that 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 transmission, or some other confirmed delivery to the home or business address. In the instant case, the evidence indicates that a billing statement was sent to the carrier on November 2, 2005, however there was no indication that attached to the billing statement was a copy of a valid DWC-69, from Dr. B that was provided to the carrier by verifiable means. The evidence is insufficient to support the hearing officer's finding that the first certification of MMI/IR from Dr. B was provided to the carrier by verifiable means on March 17, 2006. Additionally, it is not clear from the record whether a request for a benefit review conference (BRC) was made by the carrier to dispute the first certification of MMI/IR or whether the claimant requested a

[1] We note that the hearing officer made a typographical error noting the date as "2005" rather than "2006" based on (1) the Claimant's Exhibit No. 6, Page 1, does not contain a date of "March 17, 2005," however a date stamp reflects "March 17, 2006"; and (2) Finding of Fact No. 7 reflects a date of March 17, 2006.

BRC to dispute the designated doctor's MMI/IR certification; however, even assuming that the carrier received written notice of the first certification of MMI/IR by verifiable means with a copy of the DWC-69 on March 17, 2006, since the CCH was held on May 8, 2006, the 90-day period to dispute the first certification of MMI/IR had not expired as of the date of the CCH and thus the first certification of MMI/IR would not have been final as of the date of the CCH.

We reverse the hearing officer's determination that the first certification of MMI and IR from Dr. B on October 24, 2005, became final under Section 408.123 and render a new determination that the first certification of MMI and IR from Dr. B on October 24, 2005, did not become final under Section 408.123.

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

RICHARD A. MAYER
11910 GREENVILLE AVENUE, SUITE 600
DALLAS, TEXAS 75243-9332.

_____
Veronica L. Ruberto
Appeals Judge

CONCUR:

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Thomas A. Knapp
Appeals Judge

_____
Margaret L. Turner
Appeals Judge