APPEAL NO. 062175
FILED DECEMBER 27, 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 September 15, 2006. The hearing officer decided that the appellant/cross-respondent (claimant) had disability resulting from the compensable injury from September 16, 2005, through May 7, 2006, and that the first certification of maximum medical improvement (MMI) and impairment rating (IR) assigned by Dr. F, the treating doctor, on April 12, 2005, became final under 28 TEX. ADMIN. CODE § 130.12 (Rule 130.12). The claimant appealed the finality determination on sufficiency grounds. The respondent/cross-appellant (self-insured) responded, urging affirmance. The self-insured also filed a conditional appeal disputing the determination of the period of disability. The appeal file does not contain a response from the claimant.

DECISION

Reversed and a new decision rendered.

**FACTUAL SUMMARY**

The parties stipulated that the claimant sustained a compensable injury on _____. It was undisputed that the treating doctor's (Dr. F's) report of April 12, 2005 was the first certification of MMI and IR and that Dr. F certified the claimant at MMI on that same date with a zero percent IR and that the claimant did not dispute Dr. F's rating with the Texas Department of Insurance, Division of Workers' Compensation until November 22, 2005.

The claimant testified that she was not aware that Dr. F rated her at zero percent IR in April of 2005. The claimant further testified that Dr. F never sent her a copy of the Report of Medical Evaluation (DWC-69) and that she had never seen a copy of the DWC-69 showing that she had a zero percent IR.

The self-insured's adjuster testified that she had a telephone conversation with the claimant on April 20, 2005. The conversation was in Spanish such that there was no language barrier between them. The adjuster testified that the claimant indicated to her that she did not agree with Dr. F's release to return to work full duty and his "assessment of medical improvement of 0%." The adjuster further testified that the claimant told her she had "paperwork releasing her to full duty and assessment of 0 impairment disability." The adjuster's recollection at the CCH was that the claimant told her that she received a copy of the "report" from Dr. [F] certifying her as reaching MMI with a zero percent IR. The self-insured contends that the claimant acknowledged receipt of Dr. F's MMI/IR certification by verifiable means verbally. The claimant contends that she did not acknowledge receipt.

## FINALITY OF THE FIRST CERTIFICATION OF MMI AND IR

The Appeals Panel has discussed the application of Rule 130.12 and Section 408.123 in Appeals Panel Decision (APD) 041985-s, decided September 28, 2004. Except as otherwise provided in Section 408.123, an employee's first valid certification of MMI and first valid assignment of IR is final if not disputed within 90 days after the date that written notification of the certification or assignment is provided to the employee and the carrier by verifiable means. Section 408.123(e). Rule 130.12(b) provides that a first MMI/IR certification must be disputed within 90 days of delivery of written notice through verifiable means. The notice must contain a copy of a valid Form DWC-69, as described in subsection (c). In APD 050031-s, decided March 3, 2005, the Appeals Panel 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 email, confirmed delivery by facsimile transmission, or some other confirmed delivery to the home or business address.

The hearing officer's Finding of Fact No. 6 states that "[c]laimant acknowledged verifiable receipt of the certification when she spoke to her adjuster disliking the rating on April 20, 2005." The hearing officer's determination is reversed because, in her testimony, the claimant did not acknowledge the receipt of the required DWC-69 and the adjuster did not testify that the claimant acknowledged to her the receipt of the DWC-69, only receipt of paperwork or a report assessing IR. No other evidence was presented to indicate that the written notification was provided/delivered to the claimant by verifiable means. There was no signature card, or any other verifiable evidence, indicating when the alleged notification with the DWC-69 was provided/delivered to the claimant. Although the hearing officer finds that the claimant had actual knowledge of the first certification of MMI and IR from Dr. F during the telephone conversation with the adjuster, this is not the issue. Rather, the issue is whether the 90-day rule's clock was triggered. We conclude it was not because the self-insured has not shown that there was provision/delivery of written notice through verifiable means. We reverse the hearing officer's Finding of Fact No. 6, because the requirements of Rule 130.12(b) were not met. Therefore, we reverse the hearing officer's Conclusion of Law No. 4 and decision that the first certification of MMI and IR from Dr. F on April 12, 2005, became final under Rule 130.12 and render a new decision that the first certification of MMI and IR from Dr. F on April 12, 2005, did not become final under Rule 130.12.

## DISABILITY

It is undisputed that the parties agreed to amend the disability issue to cover the period from November 11, 2005 (rather than from September 16, 2005) through May 7, 2006. In Finding of Fact No. 3, the hearing officer made a determination of disability from November 11, 2005, through May 7, 2006, although his Conclusion of Law No. 3 states that the claimant had disability resulting from the compensable injury beginning September 16, 2005 through May 7, 2006. The evidence in the record supports the

hearing officer's Finding of Fact No. 3 of disability from November 11, 2005 through May 7, 2006, and is consistent with the issue to be decided. However, the hearing officer's Conclusion of Law No. 3 and decision are legally incorrect because they are inconsistent with the amended issue. We reverse the hearing officer's Conclusion of Law No. 3 and decision and render a new decision that the claimant had disability from November 11, 2005 through May 7, 2006.

We reverse the hearing officer's determination that the first certification of MMI and IR from Dr. F on April 12, 2005, became final under Rule 130.12 and render a new decision that the first certification of MMI and IR from Dr. F on April 12, 2005, did not become final under Rule 130.12.

We reverse the hearing officer's determination that the claimant had disability from the compensable injury from September 16, 2005 through May 7, 2006, and render a new decision that the claimant had disability from November 11, 2005, through May 7, 2006.

Accordingly, because the claimant has prevailed on the disputed issues, we reverse the hearing officer's order, which states, "[t]he [self-insured] is not liable for the benefits at issue in this hearing. The claimant remains entitled to medical benefits for the compensable injury in accordance with Section 408.021" and render a new order that the self-insured is ordered to pay benefits in accordance with this decision, the Texas Workers' Compensation Act, and Division's Rules.

The true corporate name of the insurance carrier is **(a certified self-insured)** and the name and address of its registered agent for service of process is

**JT**
**(ADDRESS)**
**(CITY), TEXAS (ZIP CODE)**.

_____
Cynthia A. Brown
Appeals Judge

CONCUR:

_____
Thomas A. Knapp
Appeals Judge

_____
Margaret L. Turner
Appeal Judge