

APPEAL NO. 070533-s
FILED MAY 21, 2007

This appeal arises pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act). A contested case hearing was held on February 13, 2007. The hearing officer resolved the disputed issues by deciding that the first certification of maximum medical improvement (MMI) and assigned impairment rating (IR) from Dr. A on September 30, 2005, did not become final under Section 408.123. The appellant (carrier) appealed the hearing officer's finality determination arguing that it provided delivery of the first certification of MMI and IR by verifiable means. The respondent (claimant) responded, urging affirmance.

DECISION

Reversed and rendered.

The parties stipulated that in a report dated September 30, 2005, Dr. A, the Texas Department of Insurance, Division of Workers' Compensation (Division)-selected designated doctor, certified that the claimant reached MMI on September 30, 2005, with a 10% IR; that Dr. A's certification was the first certification of MMI and IR; and that Dr. A's certification was a valid certification for purposes of 28 TEX. ADMIN. CODE § 130.12(c) (Rule 130.12(c)). The date that the claimant disputed Dr. A's certification of MMI and IR, September 20, 2006, was not disputed by the parties.

Section 408.123(e) provides that except as otherwise provided by this section, an employee's first valid certification of MMI and the first valid assignment of an IR is final if the certification or assignment is not disputed before the 91st day after the date written notification of the certification or assignment is provided to the employee and the carrier by verifiable means. 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 Rule 130.12(c).

In Appeals Panel Decision (APD) 041985-s, decided September 28, 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, and 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 APD 041241-s, decided July 19, 2004, we held that where there is no verifiable evidence to establish when the notification of the MMI/IR was provided/delivered to the claimant, the hearing officer may rely on the testimony of the claimant to determine the date the notice was provided/delivered and "[h]ad there been a signature card in evidence indicating the date of receipt, the issue would have been more easily resolved." In the instant case, the claimant testified that he recalled

receiving a letter from the carrier in October 2005, but he did not acknowledge receipt on a date certain. The evidence shows an adjuster's note dated October 13, 2005, at 3:23 pm, listing the subject as Notification of MMI/First Impairment Income Benefit Payment form (PLN 3), that states "Sending to I/W with copy of [DWC-69] from designated doctor & copy of report by certified mail." Another adjuster's note also dated October 13, 2005, at 3:26 pm, listing subject as Notification of Change in Amount of Indemnity Benefit Payment (PLN 8), states "Copy mailed to I/W by certified mail with PLN 3 & [DWC-69]." Also, in evidence is a copy of a United States postal service certified mail return receipt form or "green card" with the claimant's name, address, signature, and date-stamped "2005 OCT 21." A track and confirm printout correlates with the certified mail receipt number on the green card and states that the certified mail was "delivered at 3:05 pm on October 21, 2005 in (City), TX (Zip Code)."

The hearing officer's states in the Background Information section that "[t]he adjuster notes showed that the [c]arrier sent [c]laimant the DWC-69 from [Dr. A] by certified mail on October 13, 2005" and that there "was a "green card" and a "track and confirm" document which showed [c]laimant received some correspondence by certified mail on October 21, 2005, however it was not shown that what he received that day was [Dr. A's] certification." Under the facts as presented in this case, the hearing officer's determination that Dr. A's certification was not delivered to the claimant through verifiable means, is against the great weight and preponderance of the evidence. There is no indication in the record that any of the certified mailings did not include the required DWC-69. According to the facts, Dr. A's certification of MMI and IR was delivered to the claimant by verifiable means on October 21, 2005, as evidenced by the adjuster's notes both of which reflect that Dr. A's DWC-69 was sent by certified mail on October 13, 2005, and the "green card" and the "track and confirm receipt" document, which show delivery to the claimant on October 21, 2005.

As previously mentioned, there was no dispute of the date that the claimant disputed Dr. A's certification of MMI and IR. Given that the claimant did not dispute Dr. A's certification of MMI and IR within 90 days after written notification by verifiable means on October 21, 2005, Dr. A's certification of MMI and IR became final pursuant to Section 408.123. Consequently, the hearing officer's determination that the first certification of MMI and assigned IR from Dr. A on September 30, 2005, did not become final under Section 408.123 is reversed and a new decision is rendered that the first certification of MMI and assigned IR from Dr. A on September 30, 2005, became final under Section 408.123.

The true corporate name of the insurance carrier is **NATIONAL FIRE INSURANCE COMPANY OF HARTFORD** and the name and address of its registered agent for service of process is

**CT CORPORATION SYSTEM
350 NORTH ST. PAUL STREET
DALLAS, TEXAS 75201.**

Veronica L. Ruberto
Appeals Judge

CONCUR:

Thomas A. Knapp
Appeals Judge

Margaret L. Turner
Appeals Judge