APPEAL NO. 070913
FILED JULY 2, 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 (CCH) was held on April 5, 2007. With regard to the sole issue before her, the hearing officer determined that the first certification of maximum medical improvement (MMI) and impairment rating (IR) assigned by Dr. A on December 1, 2004, did not become final under Section 408.123.

The appellant (carrier) appeals, contending that the "written notice" and certification were provided to the respondent (claimant) by verifiable means based on the claimant's testimony and that the claimant "cannot avoid receipt by avoiding certified mail." The claimant responded, urging affirmance and alleging that she "was misdiagnosed and Section 409.123(e) applies to [her] case."

The hearing officer's determination that compelling medical evidence does not exist of a clearly mistaken diagnosis or a previously undiagnosed medical condition was not timely appealed and therefore became final pursuant to Section 410.169. The claimant's response, while timely as a response, was not timely as an appeal. The claimant's deemed date of receipt of the hearing officer's decision was April 30, 2007, and an appeal was due no later than May 21, 2007. The claimant's response, asserting an exception under Section 408.123(f), was filed by facsimile transmission on May 24, 2007. *See* Section 410.202(a) and 28 TEX. ADMIN. CODE §§ 102.5(d) and 143.3 (Rules 102.5(d) and 143.3). The claimant's response urges affirmance that Dr. A's certification was not provided/delivered by verifiable means.

DECISION

Reversed and rendered.

The claimant was employed by a parcel delivery service and testified how on _____, a coworker dropped a box on her left wrist. The parties stipulated that the claimant sustained a compensable injury on _____. The early medical records diagnose a left wrist sprain. The claimant was examined by Dr. A, the stipulated designated doctor, on December 1, 2004. Dr. A certified the claimant at clinical MMI on December 1, 2004, with an 8% IR. Dr. A diagnosed a left wrist sprain and tenosynovitis and assessed the 8% IR based on loss of range of motion (ROM).

FINALITY UNDER SECTION 408.123

Section 408.123(e) provides that, except as otherwise provided by this section, an employee's first valid certification of MMI and first valid assignment of 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 claimant 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; that the notice must contain a copy of a valid Report of Medical Evaluation (DWC-69), as described in subsection (c); and that the 90-day period begins on the day after the written notice is delivered to the party wishing to dispute the certification.

The carrier contends that it sent a Notification of MMI/First Impairment Income Benefit Payment (PLN-3) together with Dr. A's DWC-69 certifying MMI on December 1, 2004, and assigning a whole body IR of 8%, and Dr. A's narrative report, to the claimant on December 17, 2004. The carrier's case manager testified regarding the procedures on mailing a first certification of MMI/IR and that he spoke with the claimant at sometime after December 17, 2004, regarding what the certification meant. The hearing officer, in the Background Information comments:

> Carrier asserted that notice was delivered by verifiable means; however, Claimant refused to take delivery of the certified mail. Carrier provides as support for its position, a copy of the return receipt, which shows Claimant's correct address; an unsigned green card, which shows Claimant's correct address and small notations indicating "TWCC-69 and PLN 3;" and lastly, a copy of what appears to be a portion of an envelope, which shows a postmarked date of December 17, 2004, and the word "Returned" stamped across the face. The envelope also has a written notation, which appears to state, "notified," but the other portions of the note are illegible. The envelope, however, does not show Claimant's address nor does it show the date in which the envelope was returned.

In evidence is a U.S. Postal Service Certified Mail Receipt dated December 17, 2004, showing mailing to the claimant at the address the claimant used on the CCH sign-in sheet. Also in evidence is what purports to be a copy of the envelope the PLN-3 and certification was mailed in (showing the certified mail receipt number) indicating "Notified" and a stamped notation "Returned to Sender." The carrier asserts that the hand written date under the notation "Notified" is "12-21-04." Our review of the partial copy of the envelope would support that the date is December 21, 2004. Also in evidence is a copy of an unsigned U.S. Postal Service Return Receipt Requested form or "green card" which has the certified mail receipt number, the claimant's correct address and small handwritten notations "TWCC 69/PLN3" and "12/17/04."

The claimant testified that she was out of town in (City 1), Texas, from December 10 until December 30, 2004, due to her daughter's pregnancy and that her son would pick up her mail. The carrier offered evidence that the claimant had an (second) MRI performed in (City 2), Texas, on December 17, 2004, and a progress note from a clinic in Brownsville on December 29, 2004, as an indication that the claimant was not in (City 1) during the time she claimed.

The carrier contends that the evidence is clear that delivery was attempted but that the claimant "was aware of the letter and did not pick it up or have it picked up." Rule 130.12 provides that the 90-day period to dispute the first certification of MMI/IR "begins on the day after the written notice is delivered to the party" wishing to dispute the certification of MMI/IR. The preamble to Rule 130.12 discusses how written notice is verifiable and goes on to state at 29 Tex. Reg. 2331, March 5, 2004:

> …a party may not prevent verifiable delivery. For example, a party who refuses to take personal delivery or certified mail has still been given verifiable written notice.

In this case the PLN-3 and DWC-69 were mailed to the claimant's correct address by certified mail, return receipt requested. There is evidence that delivery was attempted on December 21, 2004, and the "green card" indicates that the DWC-69 and PLN-3 were included. The hearing officer comments that the copy of the envelope "does not show Claimant's address nor does it show the date in which the envelope was returned." We note however that the U.S. Postal Service Certified Mail Receipt form, the copy of the partial envelope and the unsigned return receipt requested form or "green card" all have the same certified mail number. The date of the attempted notification was December 21, 2004. Under these circumstances we hold that the claimant was given verifiable written notice of the first certification of MMI/IR on December 21, 2004. It is undisputed that the claimant did not dispute the first certification MMI/IR within 90 days after December 21, 2004.

Accordingly, we reverse the hearing officer's determination that the first certification of MMI and IR assigned by Dr. A on December 1, 2004, did not become final under Section 408.123 as being so against the great weight and preponderance of the evidence as to be clearly wrong and unjust. We render a new decision that the first certification of MMI and IR assigned by Dr. A on December 1, 2004, became final pursuant to Section 408.123 and Rule 130.12.

The true corporate name of the insurance carrier is **LIBERTY INSURANCE CORPORATION** and the name and address of its registered agent for service of process is

CT CORPORATION SYSTEMS
350 NORTH ST. PAUL, SUITE 2900
DALLAS, TEXAS 75201.

_____
Thomas A. Knapp
Appeals Judge

CONCUR:

_____
Veronica L. Ruberto
Appeals Judge

_____
Margaret L. Turner
Appeals Judge