

APPEAL NO. 071250
FILED AUGUST 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 June 4, 2007. 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. I on May 16, 2005, became final under Section 408.123. The appellant (claimant) appealed the hearing officer's finality determination, arguing that the respondent (carrier) did not provide delivery of the first certification of MMI and IR by verifiable means. The carrier responded, urging affirmance.

DECISION

Reversed and rendered.

The parties stipulated that the claimant sustained a compensable injury on _____; the Texas Department of Insurance, Division of Workers' Compensation (Division)-selected designated doctor, Dr. I, certified that the claimant reached MMI on May 16, 2005, with a 10% IR; and Dr. I was the first doctor to certify MMI and assign an IR. The claimant testified that he never received Dr. I's certification of MMI/IR, however he did receive an impairment income benefits (IIBs) check from the carrier in May 2005. The claimant testified that he became aware of Dr. I's certification of MMI/IR when he contacted the Division in December 2005, to inquire why he was not receiving an IIBs check. The evidence reflects that the claimant disputed Dr. I's certification of MMI/IR on December 19, 2005.

A sworn affidavit from the adjuster states that she mailed to the claimant a Notification of MMI/First Impairment Income Benefit Payment form (PLN-3), a Report of Medical Evaluation (DWC-69), and the first IIBs check. The adjuster states that she mailed the PLN-3, DWC-69, and IIBs check via "United States Postal Service" and that although she did not have a "greencard" confirming delivery, "the check for IIBs that was sent at the same address along with the [PLN-3] of the same date was actually cashed." There was no evidence presented regarding the date the check was cashed. The adjuster states that she has "no doubt that [the claimant] received both [PLN-3 and DWC-69] and the first IIBs check of May 26, 2005, on or about 5 days from the mailing same, i.e. May 31, 2005." The hearing officer found that the evidence was sufficient to reasonably confirm delivery of Dr. I's certification of MMI/IR to the claimant's address of record sent by the adjuster on May 26, 2005, and that the claimant received Dr. I's certification of MMI by verifiable means, on or about May 31, 2005.

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. 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 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 the Background Information section of the decision, the hearing officer states that:

Although there is no “green card” in evidence showing proof that the Claimant received the certification, the credible evidence is that the certification was sent by the doctor’s office and the adjuster to the Claimant’s address of record in May 2005, that the Claimant received the notice on or about May 31, 2005, . . . and he did not dispute [Dr. I’s] certification within the 90-day period.

In APD 050031-s, decided March 3, 2005, there was no evidence as to what date the notifications of the certified mail was delivered to the claimant or the date the certified mail was returned to the carrier. The Appeals Panel held that since the carrier failed to provide evidence of a date certain, sufficient to begin the 90-day period of Section 408.123 and Rule 130.12, the hearing officer’s determination that the first certification of MMI/IR became final under Section 408.123 was in error. *Also see* APD 042163-s, decided October 21, 2004 (the deemed receipt provision of Rule 102.4 does not constitute notice of a first valid MMI/IR certification for finality after 90 days. Deemed receipt is not the required “provided” or “delivery” by verifiable means required under Section 408.123 and Rule 130.12.)

Under the facts as presented in this case, the hearing officer’s determination that Dr. I’s certification was delivered to the claimant through verifiable means on or about May 31, 2005, is against the great weight and preponderance of the evidence. There is no evidence that Dr. I’s certification of MMI/IR was delivered to the claimant by verifiable means on May 31, 2005. The PLN-3 in evidence contains a copy of a United States Postal Service “Delivery Confirmation” Receipt with the handwritten words “[claimant’s name],” “TWCC-69,” and “PLN3”; however there is no date or address listed on this receipt to confirm delivery of the certification of MMI/IR to the claimant. Additionally, the adjuster states in her affidavit that she mailed the PLN-3, DWC-69, and IIBs check on May 26, 2005, that the IIBs check was “actually cashed,” and that the claimant should have received the PLN-3, DWC-69, and IIBs check “on or about 5 days from the mailing” on May 31, 2005. A “Financial Inquiry” statement lists the claimant’s name, check number, and the date the check was issued, however there is no evidence of when the check identified in the Financial Inquiry was delivered to or cashed by the

claimant. With regard to what the doctor mailed to the claimant, the adjuster states in her affidavit that Dr. I's office informed her that "the report of [Dr. I] was copied to [the claimant] to his correct address as of the date of the report of May 16, 2005." In evidence is a statement from an employee of Dr. I's office regarding "Protocol for sending reports" that states:

On 5-16-05, the above injured worker was evaluated by [Dr. I]. On 5-18-07, report was completed. Per office protocol a report is sent to the following parties: . . . Examinee-via mail.

This statement does not indicate when written notice of Dr. I's certification of MMI/IR was provided to the claimant to confirm delivery by verifiable means. There is no evidence of a date certain when the certification of MMI/IR was delivered to the claimant by verifiable means by either the carrier or Dr. I's office. Consequently, the hearing officer's determination that the first certification of MMI and assigned IR from Dr. I on May 16, 2005, became final under Section 408.123 is reversed as being so against the great weight and preponderance of the evidence as to be clearly wrong and unjust, and we render a decision that the first certification of MMI and assigned IR from Dr. I on May 16, 2005, did not become final under Section 408.123.

The true corporate name of the insurance carrier is **ST. PAUL FIRE & MARINE INSURANCE COMPANY** and the name and address of its registered agent for service of process is

**CORPORATE SERVICE COMPANY
701 BRAZOS STREET, SUITE 1050
AUSTIN, TEXAS 78701-3232.**

Veronica L. Ruberto
Appeals Judge

CONCUR:

Thomas A. Knapp
Appeals Judge

Margaret L. Turner
Appeals Judge