

APPEAL NO. 080745
FILED JULY 25, 2008

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 15, 2008. The hearing officer decided that: (1) the first certification of maximum medical improvement (MMI) and impairment rating (IR) assigned by Dr. S on March 28, 2007, did not become final under Section 408.123; and (2) the respondent (claimant) sustained disability from January 23, 2008, through the date of the CCH, April 15, 2008. The appellant (carrier) appealed the hearing officer's adverse determination on finality under Section 408.123. The appeal file contains no response from the claimant. The hearing officer's determination on the issue of disability was not appealed and has become final pursuant to Section 410.169.

DECISION

Reversed and rendered.

It is undisputed that the claimant, a food service employee, was injured on _____, when she slipped and fell on a wet surface at work. The claimant testified that her treating doctor was Dr. S. In a Report of Medical Evaluation (DWC-69) dated March 28, 2007, Dr. S certified that the claimant reached MMI on March 28, 2007, and that the claimant does not have any permanent impairment as a result of her compensable injury. It is undisputed that the March 28, 2007, DWC-69 from Dr. S was the first valid certification of MMI and first valid assignment of an IR.

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. 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; that the notice must contain a copy of a valid 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 on April 10, 2007, it sent to the claimant a Notification of MMI/First Impairment Income Benefit Payment (PLN-3) together with Dr. S's DWC-69 certifying MMI on March 28, 2007, without any permanent impairment and his narrative report. The carrier's current claim representative, Ms. R, testified that a review of the claim file showed that the PLN-3 together with Dr. S's DWC-69 and narrative report was mailed on April 10, 2007, to the claimant by certified mail, return receipt requested, from their claims administrative service (CAS) field office. In evidence is a U.S. Postal Service Certified Mail Receipt postmarked April 10, 2007, showing mailing to the claimant. Also in evidence is what purports to be a copy of the envelope that the PLN-3

and DWC-69 were mailed in (showing the certified mail receipt number) postmarked April 10, 2007, with a hand written notation (to the right of claimant's name and address) of "NRLN 4-12-07 (claim number)" and a computer-generated note of "Return To Sender Unclaimed Unable To Forward." Ms. R testified that "NRLN" and "4-12-07," was written on the envelope by the U.S. Postal Service and it meant "no response, left notice" on April 12, 2007. She further testified that she went into the U.S. Postal Service web site and entered the certified mail receipt number and found that the certified letter (mailed to the claimant) was returned to sender, the CAS field office, in June of 2007. The carrier contended this evidence showed that the U.S. Postal Service had the certified letter from April 10, 2007, until June of 2007, and had tried to deliver it until it was returned to sender. In addition, the envelope (to the left of the claimant's name and address) was stamped with "Unclaimed" "Name," "1st Notice," "2nd Notice," "Return," with blank spaces to the right of each.

The claimant testified at the CCH that the address shown on the envelope and certified mail receipt was her current address as well as her address in April of 2007. The claimant further testified that during April of 2007 she was at work during the time period which the mail would have been delivered but that her adult daughter would have been at her address to receive any certified mail. The claimant testified that she did not receive any certified mail from the carrier in March or April of 2007 and did not know about Dr. S's certification until February of 2008 when the claimant called Ms. R about not receiving income benefits after being taken off work.

Rule 130.12(b) 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 the Background Information of her decision, the hearing officer wrote that "[o]n April 10, 2007, [CAS] mailed to Claimant a certified letter that contained Dr. [S's] certification and finding of no permanent impairment." It is therefore clear that the hearing officer believed that the written notification of the certification of MMI/IR included Dr. S's DWC-69, and was sent to the claimant by certified mail. However, the hearing officer found that Dr. S's IR was not provided to the claimant by verifiable means, and concluded that the first certification of MMI and IR assigned by Dr. S did not become final under Section 408.123. Under the facts of this case, the PLN-3 and DWC-69 were mailed to the claimant's acknowledged correct address by certified mail, return receipt requested. There is evidence that delivery was attempted on April 12, 2007, irrespective of the hearing officer's comments in the Background Information that the "envelope was stamped unclaimed; stamped with lines for 1st notice and 2nd notice, and returned Nothing was written in the blank spaces to show if and when a 1st or 2nd notice was given to Claimant. In addition, nothing showed when the envelope was

returned to the sender. Since there was insufficient evidence of the dates of attempted delivery by the postal service, there was insufficient evidence to show when the 90 day period began for Claimant to dispute Dr. [S's] determinations." We disagree. There is no requirement under Rule 130.12, other than proof of the date of delivery of written notice to the party wishing to dispute a certification of MMI/IR, to establish the dates of all attempted deliveries of the written notification and the return date of the written notification to the sender.

In Appeals Panel Decision (APD) 070913, decided July 2, 2007, the Appeals Panel reversed the hearing officer's determination that the first certification of MMI/IR did not become final under Section 408.123 and rendered a decision that the first certification of MMI/IR became final pursuant to Section 408.123 and Rule 130.12. In that case, the PLN-3 and DWC-69 were mailed to the injured worker's correct address by certified mail, return receipt requested; delivery of the certified mail was attempted per the notation of the date on the envelope; and the "green card" indicated that the PLN-3 and DWC-69 were included. The Appeals Panel held that the injured worker was given verifiable written notice of the first certification of MMI/IR and it was undisputed that the injured worker did not dispute the certification within 90 days.

As in APD 070913, *supra*, the claimant in the instant case was given verifiable written notice on April 12, 2007, the date notification was attempted (as evidenced by the PLN-3 and DWC-69 that were mailed to the claimant's address by certified mail, return receipt requested and the April 12, 2007, attempted delivery date on the envelope). It was undisputed that the claimant did not dispute the first certification of MMI/IR within 90 days after April 12, 2007.

Accordingly, we reverse the hearing officer's determination that the first certification of MMI and IR assigned by Dr. S on March 28, 2007, 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. S on March 28, 2007, became final pursuant to Section 408.123 and Rule 130.12.

The true corporate name of the insurance carrier is **WEST TEXAS EDUCATIONAL INSURANCE ASSOCIATION** and the name and address of its registered agent for service of process is

**GENE WEIGEL
REGION XIX SERVICE CENTER
6611 BOEING DRIVE
EL PASO, TEXAS 79997.**

Cynthia A. Brown
Appeals Judge

CONCUR:

Veronica L. Ruberto
Appeals Judge

Margaret L. Turner
Appeals Judge