

APPEAL NO. 091106
FILED SEPTEMBER 17, 2009

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 24, 2009. With regard to the two issues before him, the hearing officer determined that: the first certification of maximum medical improvement (MMI) and assigned impairment rating (IR) from (Dr. R) on October 2, 2008, did not become final under Section 408.123, and the claimant had disability from January 12 through March 13, 2009.

The appellant (carrier) appealed the hearing officer's decision contending that the first valid certification of MMI/IR was provided to the respondent (claimant) by verifiable means and that the claimant did not have disability. The claimant responded, urging affirmance.

DECISION

Affirmed in part and reversed and rendered in part.

BACKGROUND INFORMATION

The parties stipulated that the claimant sustained a compensable injury on _____; that Dr. R made the first valid certification of MMI/IR on October 2, 2008; and that the claimant first disputed the certification of Dr. R on March 28, 2009. The hearing officer made unappealed findings of fact that at the time of his MMI/IR certification on October 2, 2008, Dr. R was acting upon referral of the treating doctor (which we interpret to mean was a doctor selected by the treating doctor acting in place of the treating doctor) and that the MMI/IR certification of Dr. R on October 2, 2008, was a valid rating pursuant to 28 TEX. ADMIN. CODE § 130.12(c) (Rule 130.12(c)). The claimant testified that she was a school custodian and sustained a neck, right shoulder, and thoracic spine injury on _____, operating a floor buffing machine.

DISABILITY

The hearing officer's determination that the claimant had disability from January 12 through March 13, 2009, is supported by sufficient evidence and is affirmed.¹

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 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

¹ We note that Section 408.101 provides that an employee is entitled to temporary income benefits (TIBs) if the employee has a disability and has not attained MMI. Therefore, a claimant may have disability as defined in Section 401.011(16) but not be entitled to TIBs if the employee has attained MMI.

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.

The hearing officer states in the Background Information section:

Carrier has produced a postal certification that a letter containing a PLN 3 notice of the [IR] and a copy of the DWC 69 was delivered to [c]laimant's postal zip code on October 31, 2008. The letter was not sent certified and there is no proof of receipt by [c]laimant. This evidence is insufficient to prove receipt by [c]laimant of notice of the MMI/IR certification by verifiable means.

The claimant testified that she received Dr. R's certification of MMI and IR on January 12, 2009, in an office visit with her then treating doctor.

In evidence is a United States Postal Service Track and Confirm form listing a certified mail number stating that the item had been delivered at 3:05 p.m. on October 31, 2008, in Carrollton, Texas 75007, which is the claimant's city and zip code. An exhibit described as the carrier's adjuster's notes, with a heading Claim History Caption Report, giving the carrier's claim number for this claim, shows a certified letter with the same certified mail number listed on the track and confirm printout containing a "DWC 69 & DWC PLN 3" was sent to the "EE [and] CC to EE REGULAR MAIL & CC TO FILE." There is no evidence that either the certified or regular mail letter was returned as undeliverable. The track and confirm printout receipt number correlates with the certified mail receipt number that was delivered at 3:05 p.m. on October 31, 2008, in Carrollton, Texas 75007.

APD 070533-s, decided May 21, 2007, is a very similar case where a track and confirm printout correlating the certified mail receipt number with the certified mail receipt constituted delivery by verifiable means. The hearing officer, in that case, found that it was not shown what the injured employee received. The Appeals Panel reversed and rendered a new decision that the adjuster's notes, the certified mail "green card" and track and confirm receipt show delivery by verifiable means.

Under the facts as presented in this case, the hearing officer's determination that the dispute of Dr. R's rating filed on March 28, 2009, was timely is not supported by the evidence. There is no indication in the record that the certified mailing and receipt, confirmed by the "Track and Confirm" document, did not include the required DWC-69. According to the facts, Dr. R's certification of MMI and IR was delivered to the claimant on October 31, 2008, as evidenced by the adjuster's notes which reflect that Dr. R's DWC-69 and a PLN-3 was sent by certified mail on October 23, 2008, and the "Track and Confirm" receipt document, which show delivery to the claimant on October 31, 2008. We reverse the hearing officer's determination that the first certification of MMI and assigned IR from Dr. R on October 2, 2008, did not become final under Section 408.123 as being against the great weight and preponderance of the evidence. We render a new decision that the first certification of MMI and assigned IR from Dr. R on October 2, 2008, did become final pursuant to Section 408.123.

SUMMARY

We affirm the hearing officer's determination that the claimant had disability from January 12 through March 13, 2009. We reverse the hearing officer's determination that the first certification of MMI and assigned IR from Dr. R on October 2, 2008, did not become final under Section 408.123 and render a new decision that the first certification of MMI and assigned IR from Dr. R on October 2, 2008, did become final under Section 408.123.

The true corporate name of the insurance carrier is **INDEMNITY INSURANCE COMPANY OF NORTH AMERICA** and the name and address of its registered agent for service of process is

**ROBIN M. MOUNTAIN
6600 CAMPUS CIRCLE DRIVE EAST, SUITE 300
IRVING, TEXAS 75063.**

Thomas A. Knapp
Appeals Judge

CONCUR:

Veronica L. Ruberto
Appeals Judge

Margaret L. Turner
Appeals Judge