

APPEAL NO. 100316  
FILED MAY 7, 2010

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 February 16, 2010. The hearing officer decided that the first certification of maximum medical improvement (MMI) and impairment rating (IR) assigned by (Dr. S) did not become final under Section 408.123. The appellant (carrier) appealed the hearing officer's finality determination. The respondent (claimant) responded, urging affirmance.

DECISION

Reversed and rendered.

The parties stipulated that: (1) on \_\_\_\_\_, the claimant sustained a compensable right shoulder and lumbar injury while in the course and scope of his employment with the employer; (2) the first certification of MMI and IR was issued by Dr. S, a referral doctor acting in place of the treating doctor; (3) the claimant disputed Dr. S' certification of MMI/IR on December 11, 2008; and (4) the claimant's address that is reflected on the envelope that is admitted into evidence as part of Carrier's Exhibit D has been his correct address at all time relevant hereto, including on the date that the envelope was mailed to the claimant.

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 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 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 [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 of MMI or an IR assignment, or both.

In evidence is the original envelope sent by the U.S. Postal Service Certified Mail Return Receipt Requested post marked July 2, 2008, showing it was mailed to the claimant at his correct address. The original envelope shows that it was stamped "Unclaimed," "1st Notice" on "7-5," "2nd Notice" on "7-10-08," and "Returned" on "7-20-08." Additionally, the original envelope contains a yellow sticker dated July 30, 2008, that states "Return to Sender," "Unclaimed," and "Unable to Forward." Attached to the back of the original envelope is the original "green card" that contains the claimant's name and correct address. The original envelope contains: (1) the Notification of [MMI]/First Impairment Income Benefit Payment (PLN-3) dated June 30, 2008; (2) a DWC-69 dated June 5, 2008, from Dr. S, certifying that the claimant reached MMI on

June 5, 2008, with an eight percent IR; (3) Dr. S's narrative report dated June 5, 2008, including a worksheet showing how the impairment was assessed; and (4) Work Status Report (DWC-73) dated June 5, 2008.<sup>1</sup>

The claimant testified that he did not receive the first certification of MMI/IR from Dr. S by certified mail, but that he received first written notice of Dr. S's certification of MMI/IR on December 8, 2008, when he went in person to Dr. S' office. The claimant testified that he has had problems receiving his mail from the U.S. Postal Service for approximately three years, and that there have been occasions that mail addressed to him at his correct address had been delivered to another address that contains the same street number as his street number. In the Background Information section of the decision, the hearing officer states that "[t]he [c]laimant's testimony and other evidence tends to show that mail addressed to him at his address (**15906** (Street 1), (City), TX (Zip Code)) has on occasion been delivered to the address belonging to (SH) (**15906** (Street 2), (City), TX (Zip Code)), and vice versa." The hearing officer states that although the "[c]arrier was diligent in its attempt to send written notice of [Dr. S'] certification of MMI/IR to the [c]laimant by certified mail, the evidence supports a finding that the [c]laimant did not receive the mail or any notice thereof from the [U.S. Postal Service]."

In Appeals Panel Decision (APD) 080745, decided July 25, 2008, 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 claimant's acknowledged correct address by certified mail, return receipt requested. There is evidence that delivery was attempted 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). The Appeals Panel held that it was undisputed that the claimant did not dispute the first certification of MMI/IR within 90 days after April 12, 2007. See *also* APD 070913, decided July 2, 2007.

As in APD 080745, *supra*, the claimant in the instant case was given written notice through verifiable means of Dr. S' first certification of MMI/IR on July 5, 2008 (the attempted delivery date on the envelope). The hearing officer found that the claimant disputed the first certification of MMI/IR on December 11, 2008, and this finding is supported by the evidence. There is no evidence to show that the claimant disputed the first certification of MMI/IR within 90 days after July 5, 2008.

Accordingly, we reverse the hearing officer's determination that the first certification of MMI and IR assigned by Dr. S did not become final under Section 408.123 as being so against the great weight and preponderance of the evidence as to

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<sup>1</sup> At the CCH the carrier's attorney opened the sealed original envelope, which was addressed to the claimant at his correct address, and read the contents inside of the envelope. The envelope and the contents of the envelope were admitted and marked as Carrier's Exhibits D-3 through D-10.

be clearly wrong and unjust. We render a new decision that the first certification of MMI and IR assigned by Dr. S on June 5, 2008, became final pursuant to Section 408.123 and Rule 130.12.

The true corporate name of the insurance carrier is **SENTRY INSURANCE, A MUTUAL COMPANY** and the name and address of its registered agent for service of process is

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

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Veronica L. Ruberto  
Appeals Judge

CONCUR:

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Carisa Space-Beam  
Appeals Judge

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Margaret L. Turner  
Appeals Judge