

APPEAL NO. 121814
FILED DECEMBER 10, 2012

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 August 13, 2012, in [City], Texas, with [hearing officer] presiding as hearing officer. The hearing officer resolved the disputed issues by deciding that: (1) the first maximum medical improvement (MMI) certification and assigned impairment rating (IR) issued by [Dr. Pk] on December 6, 2011, did not become final; and (2) the respondent (claimant) has a nine percent whole body IR as a result of his compensable injury of [date of injury].

The appellant (self-insured) appeals the hearing officer's determinations. The appeal file does not contain a response from the claimant.

DECISION

Reversed and rendered, as reformed.

It was undisputed that the claimant sustained a compensable injury on [date of injury]. The hearing officer made the following unappealed findings of fact: (1) on December 6, 2011, Dr. Pk certified the claimant as having reached MMI as of November 17, 2011, and assigned the claimant a zero percent IR; (2) Dr. Pk's certification of MMI and IR was the first such certification issued with respect to the claimant's compensable injury of [date of injury]; and (3) Dr. Pk's certification of MMI and IR was valid. The record reflects that the parties agreed that the claimant reached MMI on November 17, 2011, which is the same date listed on Dr. Pk's and the designated doctor's, [Dr. P], Report of Medical Evaluation (DWC-69).

We note that in unappealed Finding of Fact No. 4, Conclusion of Law No. 3 and in the Decision, the hearing officer refers to Dr. Pk's certification of MMI and IR on December 6, 2011. The evidence reflects that Dr. Pk examined the claimant on December 8, 2011, the DWC-69 was signed on December 8, 2011, and Dr. Pk's narrative report is dated December 8, 2011. We reform the hearing officer's Finding of Fact No. 4, Conclusion of Law No. 3 and Decision to reflect that Dr. Pk's certification and narrative was on December 8, 2011, not December 6, 2011, to conform to the evidence.

Section 408.123(e) provides 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 certification of MMI and IR 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). 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. See Appeals Panel Decision (APD) 041985-s, decided September 28, 2004,

The hearing officer noted in the Discussion section of her decision that “. . . the postal documentation shows that notice of certified mail was left at [the] [c]laimant’s residence, but that the item, itself, was not left at that location.” The hearing officer found that Dr. Pk’s certification of MMI and IR was “not provided in writing to [the] [c]laimant by verifiable means more than [90] days before his Benefit Review Conference request of May 31, 2012,” and therefore determined Dr. Pk’s certification issued on December 8, 2011, did not become final. In doing so, the hearing officer determined that a delivery notice of the certified letter did not constitute delivery by verifiable means. However, the Appeals Panel has held that evidence of attempted delivery and the date notification was attempted can constitute written notice through verifiable means. See APD 100316, decided May 7, 2010, and APD 080745, decided July 25, 2008.

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 this case, the self-insured presented evidence that it sent the claimant, via certified mail, a Notification of [MMI]/First Impairment Income Benefit Payment (PLN-3) dated December 21, 2011, and Dr. Pk’s DWC-69 and narrative report. The PLN-3 in evidence lists the claimant’s address and the certified mail number, which is the same number contained on a track and confirm document in evidence showing notice of the self-insured’s certified letter was left at the claimant’s city and zip code on December 24, 2011. A second track and confirm document in evidence listing the same certified mail number as the PLN-3 shows delivery of the certified letter was attempted on

December 24, 2011, at 9:44 a.m. to the claimant's city and zip code, and that a notice of delivery was left for the claimant. 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 PLN-3 and DWC-69. Rather, the hearing officer based her determination of finality on the fact that only the notice of attempted delivery was "left" at the claimant's address.

Dr. Pk's certification of MMI and IR and PLN-3 were sent to the claimant, as evidenced by the adjuster's notes, on December 21, 2011, and the track and confirm receipt printout shows attempted delivery to the claimant on December 24, 2011. We reverse the hearing officer's determination that the first certification of MMI and assigned IR issued by Dr. Pk on December 8, 2011, did not become final under Section 408.123 and Rule 130.12. We render a new decision that the first certification of MMI and assigned IR from Dr. Pk on December 8, 2011, did become final pursuant to Section 408.123 and Rule 130.12.

The hearing officer determined that the first certification of MMI and IR issued by Dr. Pk on December 8, 2011, did not become final and therefore, adopted the IR assigned by the designated doctor, Dr. P. Because we have reversed the hearing officer's finality determination, we also reverse the hearing officer's determination that the claimant's IR is nine percent as certified by Dr. P and render a new decision that the claimant's IR is zero percent as certified by Dr. Pk.

SUMMARY

We reverse the hearing officer's determination that the first certification of MMI and assigned IR issued by Dr. Pk on December 8, 2011, did not become final under Section 408.123 and Rule 130.12, and render a new decision that Dr. Pk's December 8, 2011, certification of MMI and IR became final pursuant to Section 408.123 and Rule 130.12.

We reverse the hearing officer's determination that the claimant has a nine percent IR as a result of his compensable injury of [date of injury], and render a new decision that the claimant has a zero percent IR pursuant to Dr. Pk's December 8, 2011, MMI and IR certification.

The true corporate name of the insurance carrier is **STATE OFFICE OF RISK MANAGEMENT (a self-insured governmental entity)** and the name and address of its registered agent for service of process is

For service in person the address is:

**JONATHAN D. BOW, EXECUTIVE DIRECTOR
STATE OFFICE OF RISK MANAGEMENT
300 W. 15TH STREET
WILLIAM P. CLEMENTS, JR. STATE OFFICE BUILDING, 6TH FLOOR
AUSTIN, TEXAS 78701.**

For service by mail the address is:

**JONATHAN D. BOW, EXECUTIVE DIRECTOR
STATE OFFICE OF RISK MANAGEMENT
P.O. BOX 13777
AUSTIN, TEXAS 78711-3777.**

Thomas A. Knapp
Appeals Judge

CONCUR:

Cynthia A. Brown
Appeals Judge

Margaret L. Turner
Appeals Judge