APPEAL NO. 070655
FILED JUNE 15, 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 (CCH) was held on February 22, 2007.

The disputed issues with regard to Docket No. 1, were:

1. Did appellant 2, Ace American Insurance Company (Carrier A) or appellant 1, Liberty Mutual Insurance Company (Carrier L) provide workers' compensation insurance for the employer on _____?

2. Did the respondent (claimant) sustain a compensable injury on _____?

3. Did the claimant have disability resulting from an injury sustained on _____, and if so for what periods?

With regard to those issues the hearing officer determined that: (1) Carrier A did not provide workers' compensation insurance to the employer on _____; (2) Carrier L provided workers' compensation insurance for the employer on _____; (3) the claimant sustained a compensable injury on _____; and (4) the claimant had disability due to the _____, injury beginning on December 28, 2005, and continuing through July 16, 2006.

The sole disputed issue with regard to Docket No. 2, which pertained to the claimant's compensable injury of (date of injury for Docket No. 2), was:

1. Did the first certification of maximum medical improvement (MMI) and impairment rating (IR) assigned by Dr. E on June 16, 2005, become final under [28 TEX. ADMIN. CODE § 130.12 (Rule 130.12)]?

With regard to that issue the hearing officer determined that the first certification of MMI and IR assigned by Dr. E on June 16, 2005, did not become final under Rule 130.12. *See also* Section 408.123.

Carrier L appealed, contending that Dr. E's first certification of MMI and IR had become final; that the _____, back injury had no nexus to the employment and was "a spontaneous idiopathic incident;" and that because the claimant had not sustained a compensable injury on _____, the claimant did not have disability due to that injury. Carrier L also asserts that the hearing officer should have noted a stipulation that Carrier A "did not provide *statutory* workers' compensation insurance" for

the employer and that Carrier A is not subject to the jurisdiction of the Texas Department of Insurance, Division of Workers' Compensation (Division). Carrier A also appealed, contending that the claimant's _____, injury was not in the course and scope of his employment. The determination that Carrier L provided workers' compensation insurance for the employer was not appealed and has become final. Section 410.169.

The claimant responded to the appeals, urging affirmance. Regarding the finality issue, the claimant contends that he never received Dr. E's certification and that even if he had, one or more of the exceptions in Section 408.123 would apply.

DECISION

Affirmed in part and reversed and rendered in part.

The claimant was a "core analyst trainer" analyzing core cylinders of rock obtained in drilling in the United States and overseas. The parties, including the claimant, stipulated that the claimant sustained a compensable (low back) injury on (date of injury for Docket No. 2). The claimant also sustained another injury, while overseas, to his low back on _____. The parties agreed on the record that Carrier L provided "statutory" workers' compensation coverage for the employer and that Carrier A is not subject to the jurisdiction of the Division. The parties also agreed that if Carrier L is required to make payments under the 1989 Act for the _____, injury, Carrier A would reimburse Carrier L in accordance with an international commercial insurance policy.

WHETHER CARRIER A PROVIDED WORKERS' COMPENSATION INSURANCE COVERAGE FOR THE EMPLOYER

The hearing officer's determination that Carrier A did not provide workers' compensation coverage for the employer on _____, is supported by the evidence and is affirmed.

COMPENSABLE INJURY AND DISABILITY UNDER DOCKET NO. 1

The hearing officer's determinations that on _____, the claimant sustained a compensable injury and that the claimant had disability due to the _____, injury beginning on December 28, 2005, and continuing through July 16, 2006, are supported by the evidence and are affirmed.

FINALITY UNDER DOCKET NO. 2

The claimant sustained his compensable (date of injury for Docket No. 2), injury working on a heavy rock cylinder and began treating with Dr. E on (date of injury for Docket No. 2). The claimant was diagnosed with a lumbar strain, taken off work for two days, and then returned to work at light duty through June 6, 2005. Dr. E reported that

the claimant was able to resume his regular duties by June 7, 2005, and on June 16, 2005, was given a full release with no restrictions on his activities. In a Report of Medical Evaluation (DWC-69) and narrative, both dated June 16, 2005, Dr. E certified the claimant at MMI on that date with a 0% IR. The IR was assessed as a Diagnosis-Related Estimate Lumbosacral Category I: Complaints and Symptoms, applying the Guides to the Evaluation of Permanent Impairment, fourth edition (1st, 2nd, 3rd, or 4th printing, including corrections and changes as issued by the American Medical Association prior to May 16, 2000). It is undisputed that Dr. E's certification was the first certification of MMI and IR for the (date of injury for Docket No. 2), injury.

Carrier L contends that a Notification of [MMI]/First Impairment Income Benefit Payment Form (PLN-3) with Dr. E's DWC-69 and report was mailed to the claimant, at the claimant's address, by certified mail, return receipt requested, on July 15, 2005. In evidence is a PLN-3 dated July 15, 2005, addressed to the claimant in which it states: "We have received a report from [Dr. E] (copy attached) certifying that you have reached MMI on 06/16/2005 and have been assigned a whole body IR of 0%." Also in evidence is a certified mail receipt, indicating the correspondence was sent to the claimant at the address where he was receiving all his mail at the time, on July 15, 2005. A copy of a United States Postal Service certified mail return receipt requested form or "green card" shows an individual, who the parties agree is the claimant's grandmother, signed for the correspondence on July 25, 2005 (although that date could be read to be July 15, 2005, a date which is highly unlikely in that the correspondence was mailed on July 15, 2005, at a city several hundred miles away from the address where it was delivered). It is undisputed that the claimant was overseas at the time, and the claimant contends that he never received the certification or report.

On this issue, in the Background Information, the hearing officer writes:

> . . . the evidence does not establish that claimant received written notice as required in [Rule 130.12(b)] through verifiable means. On July 15, 2005 carrier prepared a PLN-3 stating it received a report from [Dr. E] certifying a date of MMI and an IR. The notice letter recites that the report is attached, however the evidence does not establish that the [DWC-69] and narrative report were in fact attached to the PLN-3 mailed to claimant's address. The evidence does establish that carrier mailed the PLN-3 to claimant's address, certified mail return receipt requested, that was signed for by the claimant's grandmother. Claimant testified that he did not receive [Dr. E's] certification. Under Rule [130.12(b)] and relevant AP decisions a date certain cannot be established on which to calculate the 90 days as running against 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 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. 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 hearing officer, in the Background Information cited above, apparently believed that the carrier mailed the PLN-3 to the claimant's address by certified mail return receipt requested and that the certified mail was signed for by the claimant's grandmother, but that the claimant did not receive Dr. E's certification. In a long line of Appeals Panel Decisions, we have held that when a certification of MMI/IR is mailed to the claimant's correct address by certified mail, return receipt requested, but signed for by someone else other than the claimant, the MMI/IR certification has been delivered to the claimant. *See* Appeals Panel Decision (APD) 960335, decided April 5, 1996; APD 94365, decided May 11, 1994; and APD 992013, decided October 27, 1999. *See also* APD 992419, decided December 16, 1999, where the Appeals Panel held that the fact that the certified mail may actually be signed for by someone at the correct address other than the claimant does not as a matter of law establish nonreceipt by the claimant. We hold, in this case, that the written notice of the certification of MMI/IR by Dr. E was provided to the claimant by verifiable means. The hearing officer states that a date certain cannot be established on which to calculate the 90 days as "running against the claimant." We disagree. Although the claimant testified that he did not get Dr. E's certification of MMI/IR until "the first hearing," the 90-day period began to run on the day after written notice of Dr. E's certification of MMI/IR was delivered to the claimant's address by verifiable means with a copy of Dr. E's DWC-69, and signed for by the claimant's grandmother, which was on July 25, 2005 (as explained above). It is undisputed that the claimant did not dispute Dr. E's certification within 90 days of July 25, 2005.

The hearing officer also seems to indicate that he believes the PLN-3 was mailed and was signed for by the grandmother but that "the evidence does not establish that the DWC-69 and narrative report were in fact attached to the PLN-3 mailed to claimant's address." The PLN-3 references Dr. E's report, states a "copy attached" and states the MMI date and IR. The claimant acknowledged that his grandmother signed for the certified mail sent by the carrier and that it was sent to the address where he received all of his mail. There is no evidence that Dr. E's DWC-69 and narrative were not attached as the PLN-3 states. The claimant only testified that he did not receive the certification, although conceding that his grandmother had actually signed for the certified mail.

Lastly, the claimant generally contends, in his response, that even if he had received the certification, an exception would apply under Section 408.123(f) that "he had a previously undiagnosed condition and or improper and inadequate treatment for the compensable injury at the time of the certification." The claimant does not cite any "compelling medical evidence" nor is there any in the record (*see* Section 408.123(f)(1)) to support his bare assertion. The hearing officer, in the Background Information, comments that the finality "'issue' as phrased and tried by the parties was only whether

the certification became final as to the claimant by operation of the 90 day rule." We hold that it did as explained above.

Accordingly, we reverse the hearing officer's determinations that the claimant did not receive written notice by verifiable means of Dr. E's June 16, 2005, certification of MMI and IR, and that the first certification of MMI and IR assigned by Dr. E on June 16, 2005, did not become final under Rule 130.12, 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 on June 16, 2005, and 0% IR assigned by Dr. E became final under Section 408.123 and Rule 130.12.

SUMMARY

With regard to Docket No. 1, we affirm the hearing officer's determinations that Carrier A did not provide workers' compensation insurance to the employer on _____; that the claimant sustained a compensable injury on _____; and that the claimant had disability due to the compensable _____, injury from December 28, 2005, continuing through July 16, 2006. With regard to Docket No. 2, we reverse the hearing officer's determination that the first certification of MMI and IR assigned by Dr. E on June 16, 2005, did not become final under Rule 130.12 and render a new decision that the first certification of MMI and IR assigned by Dr. E on June 16, 2005 (for the (date of injury for Docket No. 2) injury) became final pursuant to Section 408.123 and Rule 130.12.

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

CT CORPORATION SYSTEMS
350 NORTH ST. PAUL, SUITE 2900
DALLAS, TEXAS, 75201.

The true corporate name of insurance carrier A is **ACE AMERICAN INSURANCE COMPANY** 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