APPEAL NO. 101033
FILED SEPTEMBER 22, 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 June 28, 2010. The hearing officer resolved the disputed issue by deciding that the first certification of maximum medical improvement (MMI) and impairment rating (IR) assigned by (Dr. P) on March 5, 2009, became final under Section 408.123.

The appellant (claimant) appealed, disputing the hearing officer's determination that the first certification of MMI and IR assigned by Dr. P on March 5, 2009, became final under Section 408.123. The respondent (carrier) responded, urging affirmance.

DECISION

Reversed and rendered.

The parties stipulated that the claimant sustained a compensable injury on _____, and that "Dr. [P] assigned an [IR] and first certification of [MMI] on March 5, 2009." The assistant to the adjuster for the carrier testified at the CCH. She testified that she mailed the Notification of MMI/First Impairment Income Benefit Payment (PLN-3) and Report of Medical Evaluation (DWC-69) via the United States Postal Service (USPS) with delivery confirmation. The assistant further testified that she had confirmed the delivery of the PLN-3 and DWC-69 to the claimant at his address on March 28 2009, through the USPS website. The hearing officer noted in her discussion that the testimony establishes that the notice was sent to the claimant by verifiable means.

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 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 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 DWC-69, as described in Rule 130.12(c).

In Appeals Panel Decision (APD) 041985-s, decided September 28, 2004, the Appeals Panel 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.

In APD 050031-s, decided March 3, 2005, there was no evidence as to what date the notification of the certified mail was delivered to the claimant or the date the certified mail was returned to the carrier. The Appeals Panel held that since the carrier failed to provide evidence of a date certain, sufficient to begin the 90-day period of Section 408.123 and Rule 130.12, the hearing officer's determination that the first certification of MMI/IR became final under Section 408.123 was in error. *See also* APD 042163-s, decided October 21, 2004 (the deemed receipt provision of Rule 102.4 does not constitute notice of a first valid MMI/IR certification for finality after 90 days. Deemed receipt is not the required "provided" or "delivery" by verifiable means required under Section 408.123 and Rule 130.12) and APD 071250, decided August 21, 2007.

The hearing officer noted that the evidence established that the notice was sent to the claimant by verifiable means. However, Rule 130.12 provides that notice is verifiable when it reasonably confirms delivery to the party. The assistant to the adjuster testified that she checked the USPS website and that it showed delivery on March 28, 2009, of the documents sent to the claimant on March 25, 2009. The printout of the confirmation of the delivery was not offered or admitted into evidence.

In reviewing a "great weight" challenge, we must examine the entire record to determine if: (1) there is only "slight" evidence to support the finding; (2) the finding is so against the great weight and preponderance of the evidence as to be clearly wrong and manifestly unjust; or (3) the great weight and preponderance of the evidence supports its nonexistence. *See* Cain v. Bain, 709 S.W.2d 175 (Tex. 1986). Under the facts as presented in this case, the hearing officer's finding that Dr. P's certification of MMI and assigned IR were "provided" to the claimant by verifiable means on March 28, 2009, is against the great weight and preponderance of the evidence. There is no documentary evidence that Dr. P's certification of MMI/IR was delivered to the claimant by verifiable means on March 28, 2009. In evidence are notes from the adjuster which reference the PLN-3 and DWC-69 and contain a copy of the USPS "delivery confirmation number;" however, there is no date or address listed on this receipt to confirm delivery of the certification of the MMI/IR to the claimant. Although there was testimony regarding the date of delivery there was no evidence of the date of delivery by verifiable means. Consequently, the hearing officer's determination that the first certification of MMI/IR assigned by Dr. P on March 5, 2009, became final under Section 408.123 is reversed as being so against the great weight and preponderance of the evidence as to be clearly wrong and manifestly unjust, and we render a new decision that the first certification of MMI/IR assigned by Dr. P on March 5, 2009, did not become final under Section 408.123.

The true corporate name of the insurance carrier is **FIDELITY AND GUARANTY INSURANCE COMPANY** and the name and address of its registered agent for service of process is

CORPORATION SERVICE COMPANY
211 EAST 7TH STREET, SUITE 620
AUSTIN, TEXAS 78701-3232.

_____
Margaret L. Turner
Appeals Judge

CONCUR:

_____
Cynthia A. Brown
Appeals Judge

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Thomas A. Knapp
Appeals Judge