APPEAL NO. 141822
FILED OCTOBER 10, 2014

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 January 9, 2014, with the record closing on April 21, 2014, in Dallas, Texas, with [hearing officer] presiding as hearing officer. The hearing officer resolved the disputed issues by deciding that: (1) the compensable injury of [Date of Injury], does not extend to a disc protrusion at L3-4, L4-5, and L5-S1; (2) the first certification of maximum medical improvement (MMI) and assigned impairment rating (IR) from (Dr. S) on September 26, 2012, became final under Section 408.123 and 28 TEX. ADMIN. CODE § 130.12 (Rule 130.12); (3) the appellant (claimant) reached MMI on April 9, 2012; and (4) the claimant's IR is zero percent. The claimant appealed, disputing the hearing officer's determinations of the extent of the compensable injury, MMI, and IR as well as the determination that the first certification of MMI and IR from Dr. S on September 26, 2012, became final under Section 408.123 and Rule 130.12. The respondent (carrier) responded, urging affirmance of the disputed determinations.

DECISION

Affirmed in part and reversed and rendered in part.

The parties stipulated that on [Date of Injury], the claimant sustained a compensable injury, to include at least a lumbar sprain/strain. The claimant testified that she felt pain in her back when rising after bending down to put a coil on a pallet.

EXTENT OF INJURY

The hearing officer's determination that the compensable injury of [Date of Injury], does not extend to a disc protrusion at L3-4, L4-5, and L5-S1 is supported by sufficient evidence and is affirmed.

FINALITY UNDER SECTION 408.123

Dr. S, the designated doctor appointed by the Texas Department of Insurance, Division of Workers' Compensation for purposes of MMI and IR certified that the claimant reached MMI on April 9, 2012, with an IR of zero percent. The evidence establishes that the September 26, 2012, report from Dr. S is the first valid certification of MMI and the first valid assignment of IR. *See* Section 408.123.

Section 408.123(e) provides that except as otherwise provided by Section 408.123, 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 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; that the notice must contain a copy of a valid Report of Medical Evaluation (DWC-69), as described in Rule 130.12(c); and that the 90-day period begins on the day after the written notice is delivered to the party wishing to dispute a certification of MMI or an IR assignment, or both. In evidence is a Notification of [MMI]/First Impairment Income Benefit Payment (PLN-3) dated October 8, 2012, addressed to the claimant. There is no evidence to indicate if the forms were delivered to the claimant. There is no other evidence such as an affidavit, or adjuster notes to show when the forms were mailed or received. The preamble to Rule 130.12 provides that the 90-day period "begins when that party receives verifiable written notice of the MMI/IR certification." The preamble goes on to state:

> Written notice is verifiable when it is provided from any source in a manner that reasonably confirms delivery to the party. 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 goal of this requirement is not to regulate how a system participant makes delivery of a report or other information to another system participant, but to ensure that the system participant filing the report or providing the information has verifiable proof that it was delivered. 29 Tex Reg 2331, March 5, 2004.

The hearing officer stated in her discussion of the evidence that:

> Claimant testified that she received a copy of the DWC-69 and the medical narrative in October 2012. The evidence establishes that a copy of the certification was sent to claimant on or around October 8, 2012. Claimant would have been expected to receive the document around October 13, 2012. Because claimant acknowledged that she received the certification in October, 2012, the hearing officer finds that [c]laimant received written notification of the certification [of] MMI and assignment of IR by October 31, 2012. . . .

Appeals Panel Decision (APD) 042749, decided December 21, 2004, is a similar case. In that case, the injured worker gave inconsistent and contradictory testimony

about when she may have gotten written notice of the MMI/IR certification. The question is whether the claimant's testimony acknowledging receipt of the notice, but not on a specific date, constitutes acknowledged receipt by the injured employee and whether the carrier has verifiable proof that the documents were delivered. In this case, the hearing officer selected October 31, 2012, as the date that the certification of MMI and IR from Dr. S was provided to the claimant by verifiable means. The claimant never testified that she received the documents on October 31, 2012, and there is no evidence that October 31, 2012, is the date of receipt by verifiable means. In both the cited case and the instant case, the claimant acknowledged receipt of the report but equally clearly she did not know or testify to the specific date of receipt nor does the carrier have verifiable proof that the first certification of MMI and IR was delivered. We hold that the claimant's testimony in this case, does not constitute an acknowledged receipt by the claimant on a date certain sufficient to begin the 90-day period of Section 408.123(d) and Rule 130.12. *See also* APD 101033, decided September 22, 2010, and APD 110911, decided August 26, 2011.

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 determination that the first certification of MMI and IR assigned by Dr. S on September 26, 2012, became final pursuant to Section 408.123 is against the great weight and preponderance of the evidence. In the instant case, there is no documentary evidence or testimony that the certification of MMI/IR from Dr. S was delivered to the claimant by verifiable means on a certain date.

The hearing officer's finding that compelling medical evidence does not exist of improper or inadequate treatment of the injury before the date of the certification of assignment of MMI/IR is supported by sufficient evidence. We note that the fact that the claimant had continued treatment does not establish an exception to finality. To establish an exception to finality Section 408.123 requires compelling medical evidence to establish one of the stated exceptions. In the instant case, the *original* report from Dr. S did not establish that there had been improper or inadequate treatment of the injury before the date of the certification or assignment that would render the certification or assignment invalid.

We reverse the hearing officer's determination that the first certification of MMI and IR assigned by Dr. S on September 26, 2012, became final under Section 408.123 and Rule 130.12 and render a new decision that the first certification of MMI and IR

assigned by Dr. S on September 26, 2012, did not become final under Section 408.123 and Rule 130.12.

MMI/IR

Separate and apart from the finality determination, the hearing officer found that the April 9, 2012, date of MMI and zero percent IR certified by Dr. S is not contrary to the preponderance of the evidence. The hearing officer's determination that the claimant reached MMI on April 9, 2012, and that the claimant's IR is zero percent is supported by sufficient evidence and is affirmed.

SUMMARY

We affirm the hearing officer's determination that the compensable injury of [Date of Injury], does not extend to a disc protrusion at L3-4, L4-5, and L5-S1.

We affirm the hearing officer's determination that the claimant reached MMI on April 9, 2012, and that the claimant's IR is zero percent.

We reverse the hearing officer's determination that the first certification of MMI and IR assigned by Dr. S on September 26, 2012, became final under Section 408.123 and Rule 130.12 and render a new decision that the first certification of MMI and IR assigned by Dr. S on September 26, 2012, did not become final under Section 408.123 and Rule 130.12.

The true corporate name of the insurance carrier is **AMERICA FIRST LLOYDS 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.

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Margaret L. Turner
Appeals Judge

CONCUR:

Veronica L. Ruberto
Appeals Judge

Carisa Space-Beam
Appeals Judge