

APPEAL NO. 210405
FILED MAY 27, 2021

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 February 4, 2021, in (city), Texas, with (administrative law judge) presiding as the administrative law judge (ALJ). The ALJ resolved the disputed issues by deciding that: (1) the compensable injury of (date of injury), does not extend to a right-sided disc extrusion at L3-4 with inferior disc fragment and compression of the right L4 nerve spinal canal, a prominent L5-S1 central disc bulge and mild annular tear, lumbar arthritis/endplate formation, lumbar disc disease, or lumbar radiculopathy/radiculitis; and (2) the first certification of maximum medical improvement (MMI) and assigned impairment rating (IR) from (Dr. R) on April 22, 2019, did not become final under Section 408.123 and 28 TEX. ADMIN. CODE § 130.12 (Rule 130.12).

The appellant/cross-respondent (self-insured) appealed the ALJ's determination that the first certification of MMI/IR from Dr. R on April 22, 2019, did not become final. The appeal file does not contain a response from the cross-appellant/respondent (claimant) to the self-insured's appeal. The claimant appealed the ALJ's extent-of-injury determination. The claimant additionally appeals the ALJ's finding that none of the exceptions to Section 408.123(f) were established. The self-insured responded to the claimant's appeal urging affirmance of the issues appealed by the claimant.

DECISION

Affirmed in part and reversed and rendered in part.

The parties stipulated, in part, that the claimant sustained a compensable injury on (date of injury), in the form of a low back strain. The claimant testified that he was injured when a tent came loose and landed on him causing him to fall while he was carrying a table.

The ALJ is the sole judge of the weight and credibility of the evidence (Section 410.165(a)) and, as the trier of fact, resolves the conflicts and inconsistencies in the evidence. *Texas Employers Insurance Association v. Campos*, 666 S.W.2d 286 (Tex. App.-Houston [14th Dist.] 1984, no writ). As an appellate reviewing tribunal, the Appeals Panel will not disturb challenged factual findings of an ALJ absent legal error, unless they are so against the great weight and preponderance of the evidence as to be clearly wrong or manifestly unjust. *Cain v. Bain*, 709 S.W.2d 175, 176 (Tex. 1986); *In re King's Estate*, 150 Tex. 662, 244 S.W.2d 660 (1951).

EXTENT OF INJURY

The ALJ's determination that the compensable injury of (date of injury), does not extend to a right-sided disc extrusion at L3-4 with inferior disc fragment and compression of the right L4 nerve spinal canal, a prominent L5-S1 central disc bulge and mild annular tear, lumbar arthritis/endplate formation, lumbar disc disease, or lumbar radiculopathy/radiculitis is supported by sufficient evidence and is affirmed.

FINALITY

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, including IRs related to extent-of-injury disputes. The notice must contain a copy of a valid Report of Medical Evaluation (DWC-69), as described in Rule 130.12(c).

Section 408.123(f) provides, in part:

(f) An employee's first certification of [MMI] or assignment of an [IR] may be disputed after the period described by Subsection (e) if:

(1) compelling medical evidence exists of:

(A) a significant error by the certifying doctor in applying the appropriate American Medical Association guidelines or in calculating the [IR];

(B) a clearly mistaken diagnosis or a previously undiagnosed medical condition; or

(C) improper or inadequate treatment of the injury before the date of the certification or assignment that would render the certification or assignment invalid.

The ALJ found that the certification of MMI on April 22, 2019, with no permanent impairment from the treating doctor, Dr. R, was the first certification of MMI and assignment of impairment on this claim and was valid for purposes of Rule 130.12(c). Those findings are supported by sufficient evidence.

The ALJ also found that the claimant failed to establish that an exception to the 90-day finality rule would apply. This finding is supported by sufficient evidence.

Additionally, the ALJ found that the claimant disputed the certification of Dr. R on January 4, 2021, by requesting a benefit review conference. This finding is also supported by the evidence. However, the ALJ determined that Dr. R's certification of MMI and assigned IR on April 22, 2019, did not become final because it was not provided to the claimant by verifiable means.

In evidence is a Notice of [MMI] and No Permanent Impairment (PLN-3a) from the self-insured addressed to the claimant. The claimant verified that the address contained on the PLN-3a was his correct address. The PLN-3a states that the certification of MMI/IR from Dr. R was attached. The PLN-3a contains a United States Postal Service (USPS) tracking number. Further, in evidence is a USPS printout that confirms the same tracking number was delivered on May 15, 2019. We note that Dr. R's certification considered a low back strain.

In her discussion of the evidence the ALJ stated: ". . . although the PLN-3a itself correctly outlined [the] [c]laimant's name and address as verified by [the] [c]laimant, the tracking page did not have any address whatsoever to properly identify that the notice had been delivered to the same address as outlined in the notice. This presented an ambiguous interpretation." We disagree.

In Appeals Panel Decision (APD) 041985-s, decided September 28, 2004, we 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. 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. See *also* APD 091106, decided September 17, 2009, and APD 070533-s, decided May 21, 2007.

According to the facts presented in this case, Dr. R's certification of MMI and assignment of IR was delivered to the claimant on May 15, 2019, as evidenced by the PLN-3a addressed to the claimant's correct address in (city), Texas, stating that Dr. R's certification of MMI and assigned IR is attached with a (tracking number), and the printout from USPS bearing the same tracking number confirming delivery to (city), Texas. We therefore reverse the ALJ's determination that the first certification of MMI and assignment of IR from Dr. R was not delivered to the claimant through verifiable means. We hold that the first certification of MMI and assignment of IR from Dr. R was delivered to the claimant through verifiable means on May 15, 2019, a date

more than 90 days prior to the claimant filing his dispute of such certification of MMI and assignment of IR on January 4, 2021, as found by the ALJ. We reverse the ALJ's determination that the first certification of MMI and assigned IR from Dr. R on April 22, 2019, did not become final under Section 408.123 and Rule 130.12 as being against the great weight and preponderance of the evidence. We render a new decision that the first certification of MMI and assigned IR from Dr. R on April 22, 2019, did become final pursuant to Section 408.123 and Rule 130.12.

SUMMARY

We affirm the ALJ's determination that the compensable injury of (date of injury), does not extend to a right-sided disc extrusion at L3-4 with inferior disc fragment and compression of the right L4 nerve spinal canal, a prominent L5-S1 central disc bulge and mild annular tear, lumbar arthritis/endplate formation, lumbar disc disease, or lumbar radiculopathy/radiculitis.

We reverse the ALJ's determination that the first certification of MMI and assigned IR from Dr. R on April 22, 2019, did not become final under Section 408.123 and Rule 130.12 and render a new decision that the first certification of MMI and assigned IR from Dr. R on April 22, 2019, did become final pursuant to Section 408.123 and Rule 130.12.

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

**MAYOR GILBERT GOMEZ
101 EAST MAIN
ROBSTOWN, TEXAS 78380-3347.**

Margaret L. Turner
Appeals Judge

CONCUR:

Cristina Beceiro
Appeals Judge

Carisa Space-Beam
Appeals Judge