APPEAL NO. 041241-s
FILED JULY 19, 2004

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 24, 2004. The hearing officer determined that the first certification of maximum medical improvement (MMI) and impairment rating (IR) assigned by the respondent's (claimant) treating doctor on July 22, 2003, did not become final under Section 408.123; that the only date of injury is _____; and that the appellant (carrier) waived the right to contest compensability of the claimed injury by not timely contesting the injury in accordance with Sections 409.021 and 409.022. The carrier appealed the hearing officer's determination that the first certification of MMI and IR did not become final. The appeal file does not contain a response to the carrier's appeal from the claimant. The hearing officer's determinations regarding date of injury and carrier waiver have not been appealed and have become final. Section 410.169.

DECISION

Affirmed.

The hearing officer did not err in determining that the first certification of MMI and IR issued by the claimant's treating doctor on July 22, 2003, did not become final under Section 408.123. It is undisputed that on July 22, 2003, the claimant's treating doctor certified that the claimant had reached MMI on that date with a five percent IR. According to Texas Workers' Compensation Commission (Commission) dispute resolution information system (DRIS) records, the claimant contacted the Commission on November 20, 2003, stating that he wanted to dispute the above-mentioned certification. Because the claimant was unrepresented at the time he contacted the Commission, pursuant to Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 141.1(c) (Rule 141.1(c)), this Commission contact was sufficient to constitute a dispute and request for a benefit review conference. What is in dispute, and is critical to the resolution of the issue before us, is the date that the claimant received written notice, along with a copy of the Report of Medical Evaluation (TWCC-69), of the MMI and IR certification.

In the instant case, the claimant's first certification of MMI and IR occurred after Section 408.123 was amended. Applicable to this case is Section 408.123(d). We note that two different versions of Section 408.123(d) were enacted by the 78th Legislature one to be effective June 18, 2003, and the second to be effective June 20, 2003. Upon careful review of the two different versions of subsection (d), we conclude that while the language used is slightly different in each, the meaning is the same. Both versions provide that an employee's first valid certification of MMI and first valid assignment of IR is final if not disputed within 90 days after the date that written notification of the certification or assignment is provided to the employee and the carrier by verifiable means.

Rule 130.12 was adopted by the Commission to be effective on March 14, 2004. Although it was not in effect at the time the claimant received his first certification of MMI and assignment of IR, we find it instructive as to the Commission's interpretation of how both versions of Section 408.123(d) can be read together. Rule 130.12(b) provides in pertinent part:

> A first MMI/IR certification must be disputed within 90 days of delivery of written notice through verifiable means, including IRs related to EOI disputes. The notice must contain a copy of a valid [TWCC-69], as described in subsection (c). 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.

We note that in the Statement of the Evidence portion of her decision, the hearing officer wrote:

> The Commission notified [c]laimant, in writing, of the first certification on August 13, 2003. The DRIS entries show that [c]laimant knew about the [IR] in August, 2003, (under Commission Rules he is deemed to have received the Commission's notice no later than August 18, 2003). However, the only evidence that [c]laimant actually received a valid certification (TWCC-69 that did not contain a prospective MMI date, did contain an impairment determination and a signature of the certifying doctor) from [treating doctor] was [c]laimant's testimony that he received it around September 1, 2003. Claimant disputed the rating when he called the Commission on November 20, 2003.

Our review of the record in this matter indicates that the above-mentioned notification did not come from the Commission, but instead was sent by the carrier. Therefore it is inappropriate to apply, or discuss, the deemed receipt provisions of Rule 102.5 related to communications to and from the Commission. Additionally, both Section 408.123(d) and Rule 130.12(b) speak in terms of actual providing/delivery through verifiable means. No evidence was presented to indicate that the notification was provided/delivered to the claimant by verifiable means. There was no signature card, or any other verifiable evidence, indicating when the notification was provided/delivered to the claimant in evidence or even how it was sent, in short, there was no evidence as to when the claimant actually received the notification other than his testimony. There is a DRIS note in evidence that indicates on November 26, 2003, the claimant told a Commission employee that he "knew about the [treating doctor's IR] back in [August, 2003]." There is no indication as to whether the claimant gained this knowledge verbally or by written notification as is required by both the 1989 Act and Commission rules.

When the notice was provided/delivered to the claimant presented a question of fact for the hearing officer to resolve. Because there was no verifiable evidence regarding when the notification of MMI and IR was provided/delivered to the claimant, the hearing officer was free to believe the testimony of the claimant. Had there been a

signature card in evidence indicating the date of receipt, the issue would have been more easily resolved. We find that the hearing officer's determination that the claimant received written notification of the certification of MMI and assignment of IR on September 1, 2003, and that his dispute of the certification was therefore timely is not 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).

The hearing officer's decision and order are affirmed for the reasons set out herein.

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

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

_____
Daniel R. Barry
Appeals Judge

CONCUR:

_____
Elaine M. Chaney
Appeals Judge

_____
Thomas A. Knapp
Appeals Judge