APPEAL NO. 042163-s
FILED OCTOBER 21, 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 August 10, 2004. The hearing officer determined that: (1) the first certification of maximum medical improvement (MMI) and impairment rating (IR) assigned by the designated doctor on December 4, 2003, did not become final under Section 408.123; and (2) the respondent/cross-appellant (claimant) reached MMI on December 4, 2003, with a 0% IR for the compensable bilateral carpal tunnel syndrome (BCTS) injury of _____. The appellant/cross-respondent (carrier) appealed the hearing officer's finality determination of the first certification of MMI and assigned IR, arguing that this determination is against the great weight and preponderance of the evidence. The claimant appealed the hearing officer's MMI and IR determination, arguing that the designated doctor did not rate the compensable BCTS injury. The carrier responded, urging affirmance of the MMI and IR determinations. The appeal file does not contain a response from the claimant.

DECISION

Affirmed, as reformed.

FINALITY OF THE FIRST CERTIFICATION OF MMI AND IR

The hearing officer did not err in determining that the first certification of MMI and IR did not become final under Section 408.123. Section 408.123(d) provides 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. What is in dispute, and is critical to the resolution of the finality issue, is the date that the claimant received written notice of the first certification of MMI and IR, along with a copy of the Report of Medical Evaluation (TWCC-69).

The claimant testified that she did not receive written notice of the first certification of MMI and assigned IR by the designated doctor in December 2003. The carrier argues that the claimant was deemed to have received written notice of the MMI and IR certification on the same date that the Texas Workers' Compensation Commission (Commission) received notice from the designated doctor. The carrier cites Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 102.4 (Rule 102.4) to support its deemed receipt argument with regard to Non-Commission Communications. Rule 102.4(l) provides, in part, that "if a written communication is required to be filed with both the Commission and another person by the Act or Commission rules, the other person shall be presumed to have received the written communication on the date the Commission received its copy." Rule 102.4(h), provides, in part, that unless the great weight of the evidence indicates otherwise, written communications shall be deemed to

have been sent on the date postmarked if sent by mail, or, if the postmark date is unavailable, the later of the signature date on the written communication or the date it was received minus 5 days. We disagree with the carrier's argument because Section 408.123 and Rule 130.12 specifically provide that written notice of the first certification of MMI and assigned IR be provided/delivered through "verifiable means." The deemed receipt provision was addressed in the preamble to Rule 130.12 by a commentator recommending "adding a provision to the rule for deemed receipt of the notice by verifiable means." The Commission responded in the preamble that it disagreed with the commentator's recommendation and stated that "[o]nce notice is provided by verifiable means the requirement of the statute and rule is met. There is no need for a deemed receipt provision. The legislature appears to have intended something different from receipt when it established the 'provided. . . by verifiable means' requirement." We recognize that Rule 130.12 was effective on March 14, 2004, however, we have interpreted that both Rule 130.12 and Section 408.123 can be read together. *See* Texas Workers' Compensation Commission Appeal No. 041241-s, decided on July 19, 2004. Rule 130.12(d) states that "[t]his section applies only to those claims with initial MMI/IR certifications made on or after June 18, 2003." Accordingly, Rule 130.12 applies to this case as the first certification of MMI and assigned IR was made on December 4, 2003.

In Texas Workers' Compensation Commission Appeal No. 041985-s, decided on September 4, 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; that this may include acknowledged receipt by the injured employee or insurance carrier, a statement of personal delivery, confirmed delivery by email, confirmed delivery by facsimile transmission (fax), or some other confirmed delivery to the home or business address. In the instant case, no evidence was presented to indicate that the notification was provided/delivered to the claimant by verifiable means. It is undisputed that the claimant acknowledges receipt of the first certification of MMI and assigned IR when her attorney was provided/delivered notice of the first certification by fax on January 14, 2004. When the notice was provided/delivered to the claimant presented a question of fact for the hearing officer to resolve. Accordingly, the evidence supports the hearing officer's determination that the claimant first received written notice of the first MMI and IR certification on January 14, 2004.

Next, the carrier argues that the claimant did not dispute the first certification of MMI and IR within 90 days. The claimant asserted that she timely disputed the first certification of MMI and assigned IR on two separate occasions. First, on February 11, 2004, the claimant requested a letter of clarification from the Commission-appointed designated doctor, and second, on April 2, 2004, she requested a benefit review conference (BRC) to dispute the first certification of MMI and assigned IR. Rule 130.12(b)(1) provides that only an insurance carrier, an injured employee, or an injured employee's attorney or employee representative under Rule 150.3(a) may dispute a first certification of MMI or assigned IR under Rule 141.1 (related to Requesting and Setting a BRC) or by requesting the appointment of a designated doctor, if one has not been

appointed. Pursuant to Rule 130.12(b)(1), the claimant timely requested a BRC to dispute the first certification of MMI and assigned IR; however, requesting a letter of clarification from the designated doctor is insufficient to constitute a dispute. Rule 130.12(b)(1) specifically provides two processes for disputing the first certification and assigned MMI, and requesting a letter of clarification is not one of the two processes. Accordingly, we strike from the hearing officer's Finding of Fact No. 8 the date of February 11, 2004, and reform Finding of Fact No. 8 to state: "Within 90 days of January 14, 2004, Claimant timely disputed on April 2, 2004, the first certification of the designated doctor."

Given that we are affirming the hearing officer's finding that the claimant received written notice of the first certification of MMI and IR on January 14, 2004, we likewise affirm the hearing officer's determination that the claimant timely disputed the first certification of MMI and IR within 90 days. We have reviewed the complained-of determination and conclude that the hearing officer's finality determination 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).

MMI AND IR

The claimant appealed the MMI and IR determinations arguing that the designated doctor did not rate the compensable BCTS injury, thus, this constituted a misdiagnosis. The claimant requests that the treating doctor's certification of MMI on May 18, 2004, with a 15% IR be adopted. The hearing officer reviewed the designated doctor's report and letter of clarification and commented that the although the claimant had a compensable BCTS injury, the designated doctor clearly found the claimant's BCTS injury was not permanent, and that the claimant did not have BCTS when he evaluated the claimant on December 4, 2003. The Appeals Panel has held that a claimant's IR, under 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), may not be based on an impairment that the claimant no longer has at the time of the designated doctor's IR examination, but the impairment must be "permanent" to be included in an IR. Texas Workers' Compensation Commission Appeal No. 030091-s, decided March 5, 2003. *See* Sections 401.011(23) and (24).

The hearing officer did not err in determining that the designated doctor certified that the claimant reached MMI on December 4, 2003, with a 0% IR and that this certification was not contrary to the great weight of the other medical evidence. The 1989 Act provides that the hearing officer is the sole judge of the weight and credibility of the evidence. Section 410.165(a). Where there are conflicts in the evidence, the hearing officer resolves the conflicts and determines what facts the evidence has established. As an appeals body, we will not substitute our judgment for that of the hearing officer when the determination is not so against the overwhelming weight of the evidence as to be clearly wrong and manifestly unjust, and we do not find it to be so in this case. Cain, *supra*.

We affirm the decision and order of the hearing officer, as reformed.

The true corporate name of the insurance carrier is **AMERICAN CASUALTY COMPANY OF READING, PENNSYLVANIA** and the name and address of its registered agent for service of process is

CT CORPORATION SYSTEM
350 NORTH ST. PAUL STREET
DALLAS, TEXAS 75201.

_____
Veronica L. Ruberto
Appeals Judge

CONCUR:

_____
Judy L. S. Barnes
Appeals Judge

_____
Robert W. Potts
Appeals Judge