APPEAL NO. 080301-s
FILED APRIL 16, 2008

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 February 12, 2008. With regard to the only issue before him, the hearing officer determined that the first certification of maximum medical improvement (MMI) and assigned impairment rating (IR) from Dr. M on March 12, 2007, did not become final under Section 408.123 and 28 TEX. ADMIN. CODE § 130.12(b) (Rule 130.12(b)).

The appellant (claimant) appealed, contending that the respondent (carrier) had acknowledged receipt of the first certification of MMI and assigned IR from Dr. M, which constituted delivery by verifiable means. The carrier responded, asserting the first certification of MMI and assigned IR was not sent by verifiable means and that Dr. M's IR contained a significant error in calculating the IR.

DECISION

Reversed and a new decision rendered.

The parties stipulated that the claimant sustained a compensable injury on _____. The medical records reflect that the claimant slipped and fell from a height of 15 feet sustaining a concussion, a left lower extremity injury including a fracture of the left femur, and other lacerations and contusions.

Dr. M, the treating doctor, examined the claimant on March 12, 2007, and certified in a Report of Medical Evaluation (DWC-69) that the claimant reached clinical MMI on that date with a 25% IR. Dr. M determined that the claimant had a malrotation of the femur, and using Table 64 on page 3/85 of 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) (AMA Guides) assessed an 18% whole person impairment (WPI) for that condition. Dr. M also assessed an 8% WPI for a fixed flexion contracture of the knee based on Table 41 on page 3/78 of the AMA Guides. Using the Combined Values Chart on page 322 of the AMA Guides, 18% WPI combined with 8% WPI results in a 25% IR. There is no evidence establishing how the parties received Dr. M's report. It is undisputed that Dr. M's report was the first valid certification of MMI and assignment of an IR for purposes of applying the finality provision in Section 408.123(e).

In evidence is a facsimile transmission (fax) dated March 21, 2007, from the carrier to the Texas Department of Insurance, Division of Workers' Compensation (Division) field office sending a copy of the Notification of MMI/First Impairment Income Benefit Payment (PLN-3) to the Division and stating that a "copy of the DWC-69 by the treating doctor is included in this fax." The PLN-3, dated March 21, 2007, and addressed to the claimant, states that the carrier is disputing the 25% IR certified by Dr.

M "(copy attached)" and that the carrier made a reasonable assessment of 8% impairment. Also in evidence is a copy of a fax dated June 27, 2007, from the carrier to the Division, which contains a Request for Designated Doctor (DWC-32) to dispute the 25% IR and to determine the IR. The hearing officer made an unappealed finding that the "[c]arrier disputed the certification [of] MMI/[IR] on June 27, 2007."

Section 408.123(e) provides that except as otherwise provided by this section, 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 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. Rule 130.12(b)(1) provides that only an insurance carrier, an injured employee, or an injured employee's attorney or 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 Benefit Review Conference) or by requesting the appointment of a designated doctor, if one has not been appointed. *See* Appeals Panel Decision (APD) 041903-s, decided September 22, 2004.

In 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 fax, or some other confirmed delivery to the home or business address.

The hearing officer, in the Background Information portion of the decision, comments that there is evidence the carrier had Dr. M's report by March 21, 2007, when it sent the claimant a PLN-3 "but this does not show the date the certification was received." The hearing officer noted the preamble to Rule 130.12 which states that written notice is verifiable when it is provided from any source and that this "may include acknowledged receipt by the . . . insurance carrier . . . ." The hearing officer clearly believed that the carrier had Dr. M's DWC-69 when it sent the claimant a PLN-3, but finds that having the report "does not show the date the certification was received." We disagree. The PLN-3 dated March 21, 2007, notified the claimant that the carrier was disputing Dr. M's 25% IR, stating a copy of Dr. M's report was attached, and made a reasonable assessment of an 8% IR. Also the fax dated March 21, 2007, from the carrier to the Division stated that the treating doctor's DWC-69 is included in the fax.

The hearing officer believed the carrier had Dr. M's DWC-69 by March 21, 2007, and the evidence reflects that the carrier did have Dr. M's DWC-69 by March 21, 2007. Therefore, we hold that the carrier's reference to Dr. M's report in the PLN-3 and sending a copy of Dr. M's DWC-69 to the Division establishes acknowledged receipt of

the first valid certification of MMI and assignment of the IR. We reverse the hearing officer's finding that the carrier did not receive the certification of MMI/IR by verifiable means and therefore "the 90-day period did not begin before they disputed Claimant's rating." We render a new determination that the carrier received the first certification of MMI/IR through verifiable means, based on the carrier's acknowledged receipt on March 21, 2007, of the first valid certification of MMI and assignment of an IR. In that the carrier acknowledged receipt of Dr. M's DWC-69 on March 21, 2007, the carrier therefore had received delivery of written notice through verifiable means no later than March 21, 2007. To timely dispute Dr. M's certification of MMI and IR assignment the dispute must be filed by the 90th day after March 21, 2007, which was June 19, 2007. The carrier did not dispute the first certification of MMI and IR assignment in accordance with Rule 130.12(b)(1) until it filed a DWC-32 requesting a designated doctor on June 27, 2007, which was after the 90-day period to dispute had expired. *See* APD 041903-s, *supra*. Therefore, the first valid certification of MMI/IR became final unless compelling medical evidence exists of an exception under Section 408.123(f), which would allow a dispute after the 90-day period to dispute.

The carrier, in its response (and at the CCH), also asserts that even if the carrier received written notification through verifiable means, the first certification of MMI/IR would still not become final based on a misapplication of the AMA Guides in calculating the IR. *See* Section 408.123(f)(1)(A). The hearing officer noted in his decision that the carrier was disputing the IR because it alleges the rating was miscalculated, however, the hearing officer made no finding regarding whether there was compelling medical evidence of a significant error by Dr. M in applying the AMA Guides or in calculating the IR. The hearing officer's decision is based solely on his finding that the carrier did not receive the first certification of MMI/IR by verifiable means.

In support of its assertion regarding a significant error by Dr. M in calculating the IR the carrier references two peer review reports by Dr. B. As explained in Dr. M's response to a letter of clarification there was no significant error in calculating the IR. We hold that Dr. B's record review reports do not constitute compelling medical evidence of a significant error by Dr. M in calculating the IR necessary to establish an exception to finality of the first certification of MMI/IR under Section 408.123(f)(1)(A).

SUMMARY

We reverse the hearing officer's decision that the first certification of MMI and assigned IR by Dr. M on March 12, 2007, did not become final under Section 408.123 and Rule 130.12(b) and render a new decision that the first certification of MMI and assigned IR by Dr. M on March 12, 2007, became final under Section 408.123 and Rule 130.12(b).

The true corporate name of the insurance carrier is **EMPLOYERS MUTUAL CASUALTY COMPANY** and the name and address of its registered agent for service of process is

DONALD WEISE
2505 NORTH PLANO ROAD, SUITE 2000
RICHARDSON, TEXAS 75082.

_____
Thomas A. Knapp
Appeals Judge

CONCUR:

_____
Veronica L. Ruberto
Appeals Judge

_____
Margaret L. Turner
Appeals Judge