APPEAL NO. 081248-s
FILED OCTOBER 3, 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 July 2, 2008. With regard to the three issues before her, the hearing officer determined that: (1) the first certification of maximum medical improvement (MMI) and impairment rating (IR) assigned by Dr. D on May 30, 2007, did not become final under 28 TEX. ADMIN. CODE § 130.12(b) (Rule 130.12(b)); (2) the respondent/cross-appellant (claimant) reached MMI on May 30, 2007; and (3) the claimant's IR is 5%.

The appellant/cross-respondent (carrier) appeals the hearing officer's finding that Dr. D's IR was not provided to the claimant by verifiable means and the hearing officer's determination that the first certification of MMI and IR assigned by Dr. D did not become final, contending that the claimant's attorney had received Dr. D's first certification which equates to delivery to the claimant and that the claimant's attorney, in the presence of the claimant, exchanged documents at a benefit review conference (BRC) held before a prior CCH, which included Dr. D's first certification of MMI and assigned IR. The claimant appealed the hearing officer's determinations on MMI and IR, contending that the date of MMI should be January 18, 2008, with a 9% IR as certified by Dr. D in a subsequent report. The parties responded to the respective appeals.

DECISION

With respect to the carrier's appeal, the hearing officer's decision on the finality issue is reversed and a new decision rendered. The claimant's cross-appeal regarding the hearing officer's determination on the MMI date and IR was not timely filed and was not considered. Therefore, the hearing officer's determinations that the claimant reached MMI on May 30, 2007, with a 5% IR are final. Section 410.169.

**UNTIMELY CROSS-APPEAL**

A written request for appeal must be filed within 15 days of the date of receipt of the hearing officer's decision, excluding Saturdays, Sundays, and holidays listed in Section 662.003 of the Texas Government Code. Section 410.202(a) and (d). Pursuant to Rule 143.3(e) an appeal is presumed to have been timely filed if it is mailed not later than the 15th day after the date of receipt of the hearing officer's decision and received by the Texas Department of Insurance, Division of Workers' Compensation (Division) not later than the 20th day after the date of receipt of the hearing officer's decision. Division records indicate that the hearing officer's decision was mailed to the claimant and to the claimant's attorney on July 24, 2008. Pursuant to Rules 102.5(d) and 143.3(d)(1), unless the great weight of evidence indicates otherwise, the claimant is deemed to have received the hearing officer's decision 5 days after it was mailed. Therefore, the deemed date of receipt of the hearing officer's decision is Tuesday, July 29, 2008. The claimant states in his appeal that he received the hearing officer's

decision on July 28, 2008; however, we will use the later deemed date of receipt of July 29, 2008, for calculating the 15 days after receipt of the hearing officer's decision. Appeals Panel Decision (APD) 050897-s, decided June 2, 2005. Accordingly, the last day for the claimant to timely file his cross-appeal was Tuesday, August 19, 2008. The claimant's cross-appeal was sent to the Division by facsimile transmission (fax) on August 22, 2008, and was received by the Division that same date. Although the cover sheet of the claimant's appeal and the certificate of service state that the appeal was originally faxed on August 14, 2008, the claimant did not attach a fax confirmation to his appeal which evidenced it was sent to the Division on any date prior to August 22, 2008. The appeal file did not contain any fax from the claimant dated August 14, 2008. The claimant's cross-appeal regarding the hearing officer's determinations on the MMI date and IR, not having been mailed or filed by August 19, 2008, is untimely and will not be considered. Therefore, the Appeals Panel does not have jurisdiction to review the hearing officer's decision regarding the claimant's cross-appeal and the MMI date and IR determined by the hearing officer have become final under Section 410.169.

## FINALITY UNDER SECTION 408.123

The parties stipulated that the claimant sustained a compensable right knee injury on _____, and that the designated doctor is Dr. D. The carrier only appeals the hearing officer's determination regarding finality of the first certification of MMI and IR assignment under Section 408.123 and Rule 130.12(b).

Dr. D. examined the claimant on May 30, 2007, and certified in a Report of Medical Evaluation (DWC-69) that the claimant reached MMI on May 30, 2007, with a 5% IR. It is undisputed that Dr. D's report is the first valid certification of MMI and first valid assignment of IR.

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.

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 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. 29 Tex. Reg. 2331, March 5, 2004.

The hearing officer, in the Background Information portion of her decision, comments that the evidence established that the "first certification of MMI and IR, along with a copy of the DWC-69," was mailed to the claimant's attorney by the carrier on June 13, 2007. In evidence is a certified mail receipt showing receipt of certified mail on June 14, 2007, by the claimant's attorney. There is no evidence, or even allegation, that Dr. D's May 30, 2007, report was sent to the claimant himself. The hearing officer, in the Background Information, commented that there "was no evidence provided which indicated that the notification was delivered to the Claimant by verifiable means." At a BRC, requested by the claimant and held on June 20, 2007 (regarding disability which was addressed at a prior CCH held on October 1, 2007), one of the requested issues was "Entitlement to [Impairment Income Benefits] IIB[s] based on DD report of 05/30/2007 with 5% [IR]." The requested issue regarding IIBs is not indicative of a dispute of Dr. D's certification of MMI and assigned IR, but rather a request for payment of IIBs based on the assessed 5% IR. There is no evidence in the record as to why the carrier had not begun payment of IIBs as of the BRC request.

The evidence reflects that the claimant exchanged Dr. D's narrative report and DWC-69 both dated May 30, 2007, with the carrier at the BRC held on June 20, 2007. It is undisputed that the claimant was present at the June 20, 2007, BRC and was represented by counsel. The claimant testified that he did not know what was exchanged by his attorney at the June 20, 2007, BRC. The hearing officer commented in the Background Information, that the "[c]laimant stated he did not know when his attorney received the documents nor did he know the type of documents included in the exchange." The hearing officer further commented:

> After careful consideration of the conflicting evidence, it is determined that the evidence was insufficient to show acknowledged receipt by the injured employee on a date certain sufficient to begin the 90-day period nor was the evidence sufficient to show that Carrier had verifiable proof that the report was delivered to Claimant.

In APD 080921-s, decided August 22, 2008, the hearing officer found that the first certification of MMI and IR became final under Section 408.123 because it was not disputed within 90 days after the certification was provided to the claimant's attorney. The Appeals Panel reversed and rendered a new decision that the first certification did not become final. The evidence established that the first certification of MMI and assigned IR was delivered by verifiable means solely to the claimant's attorney, but there was no evidence of delivery of the written notification of the first certification of MMI and assigned IR to the claimant as required by Rule 102.4(b). APD 080921-s can be distinguished from the facts of this case because even though there is no evidence that the first valid certification of MMI and assigned IR was mailed to the claimant, the evidence establishes that the first valid certification was exchanged by the claimant to the carrier at the BRC held on June 20, 2007. Therefore, the first valid certification was in the claimant's possession at the time of the exchange at the June 20, 2007, BRC. We hold that the exchange of the first valid certification constitutes acknowledged receipt by the claimant. The claimant was present at the June 20, 2007, BRC at the

time the documents were exchanged. Further as previously noted, the June 20, 2007, BRC was requested by the claimant and one of the issues requested was entitlement to IIBs based on Dr. D's (the designated doctor) report of May 30, 2007, certifying MMI on that same date with the 5% IR. This is additional evidence that the claimant had a copy of the first valid certification by the June 20, 2007, BRC. (*See also* APD 042163-s, decided October 21, 2004, in which the claimant acknowledged receipt of the first certification of MMI and assigned IR when her attorney was provided/delivered notice of the first certification by fax).

There is no evidence that the claimant disputed the first valid certification of MMI and assigned IR within 90 days of delivery of written notice through verifiable means. Accordingly, we reverse the hearing officer's determination that the first certification of MMI and IR assigned by Dr. D on May 30, 2007, did not become final under Rule 130.12(b) and render a new decision that the first certification of MMI and IR assigned by Dr. D on May 30, 2007, did become final pursuant to Section 408.123 and Rule 130.12.

The true corporate name of the insurance carrier is **TRAVELERS INDEMNITY COMPANY OF AMERICA** and the name and address of its registered agent for service of process is

**CORPORATION SERVICE COMPANY**
**D/B/A CSC – LAWYERS INCORPORATING SERVICE COMPANY**
**701 BRAZOS STREET, SUITE 1050**
**AUSTIN, TEXAS 78701.**

_____
Thomas A. Knapp
Appeals Judge

CONCUR:

_____
Veronica L. Ruberto
Appeals Judge

_____
Margaret L. Turner
Appeals Judge