

APPEAL NO. 051441
FILED AUGUST 15, 2005

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 May 16, 2005. The hearing officer resolved the disputed issues by deciding that “[a]lthough the record of the [CCH] contains a preponderance of the credible evidence to establish that [appellant’s] Claimant’s compensable injury of _____, extends to and includes his left shoulder brachial plexus injury, the record does not contain compelling medical evidence to establish this fact, and the first [maximum medical improvement (MMI)] and [impairment rating (IR)] certification therefore has become final by virtue of Claimant’s failure to timely dispute it. Claimant reached [MMI] on August 27, 2003, with a [10%] whole body [IR]. . . .” The claimant appeals, disputing the determination that the first MMI/IR certification became final as well as the determination that the claimant reached MMI on August 27, 2003, with a 10% IR. The respondent (carrier) responded, urging affirmance of the disputed determinations. The claimant filed a response to the carrier’s response.

DECISION

Affirmed in part, reversed and rendered in part, and reversed and remanded in part.

Initially we note that Section 410.202 does not provide for responses to responses and therefore, we will not consider the claimant’s response to the carrier’s response.

EXTENT OF INJURY

It was undisputed that the claimant sustained a compensable injury. Although, the claimant contends in his appeal that the injury (“DIDN’T OCCUR ON _____, IT HAPPENED ON THE LAST NIGHT (MONDAY) OF WEEKEND NIGHT SHIFT...”) he does not dispute the hearing officer’s finding that the compensable injury extends to include the left shoulder brachial plexus injury. We note that one of the issues in dispute at the CCH, was whether the claimant’s compensable injury of _____, extends to and includes the left shoulder brachial plexus injury. Both parties agreed to the issue as worded. Further, the claimant testified at the CCH that he was injured in an incident that occurred at work on _____. The hearing officer was persuaded that a preponderance of evidence indicates that the claimant’s compensable injury does extend to and include the brachial plexus injury in question. The extent-of-injury issue presented a question of fact for the hearing officer to resolve. Although there is conflicting evidence on the issue of the extent of the claimant’s compensable injury, we conclude that the hearing officer’s determination that the claimant’s compensable injury includes his left shoulder brachial plexus injury is supported by sufficient evidence and

is not so against the great weight and preponderance of the evidence as to be clearly wrong and unjust. Cain v. Bain, 709 S.W.2d 175 (Tex. 1986).

FINALITY OF MMI/IR CERTIFICATION

Section 408.123(d) provides that except as provided in subsections (e), (f), and (g), the first valid certification of MMI and the first valid assignment of IR to an employee are final if the certification of MMI and/or the assigned IR is not disputed within 90 days after written notification of the MMI and/or assignment of IR is provided to the claimant and the carrier by verifiable means. Section 408.123(e) provides in pertinent part that the first certification of MMI and/or IR may be disputed after the 90-day period if: (1) there is compelling medical evidence establishing the following: (B) a clear misdiagnosis or a previously undiagnosed medical condition.

Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 130.12 (Rule 130.12), which was adopted to be effective March 14, 2004, provides in subsection (d) that the rule applies only to those claims with initial MMI/IR certifications made on or after June 18, 2003. Rule 130.12(a) provides in pertinent part that the certifications and assignments that may become final are: (1) the first valid certification of MMI and/or IR assigned or determination of no impairment. Rule 130.12(c) provides that a certification of MMI and/or IR assigned as described in subsection (a) must be on a Form TWCC-69, Report of Medical Evaluation, and that the certification on the Form TWCC-69 is valid if: (1) there is an MMI date that is not prospective; (2) there is an impairment determination of either no impairment or a percentage IR assigned; and (3) there is the signature of the certifying doctor who is authorized by the Texas Workers' Compensation Commission (Commission) under Rule 130.1(a) to make the assigned impairment determination. Rule 130.12(b)(4) provides that the first certification of MMI and/or IR may be disputed after the 90-day period as provided in Section 408.123(e).

Although there were no stipulations regarding when the claimant received notice of the certification by verifiable means or when the claimant first disputed the certification, the claimant did not contend that he disputed the certification within 90 days of its receipt. Rather, the claimant contended that the certification should not be considered final, since his previously undiagnosed brachial plexus injury constituted an exception to finality, recognized in Section 408.123(e)(1)(B).

Rule 130.12(c)(2) requires that for the certification on the Report of Medical Evaluation (TWCC-69) to be valid there must be an impairment determination of either no impairment or a percentage impairment rating assigned. Both the claimant and the carrier provided the TWCC-69 from the designated doctor, purporting to be the first certification of MMI/IR. Neither of the TWCC-69s in evidence reflect that an IR was assigned. The attached narrative provides that the designated doctor assigned a 10% IR but an IR was not provided in the TWCC-69. Rule 130.12(c) requires a certification of MMI/IR to be on a TWCC-69 and specifically requires that the certification on the TWCC-69 must have an impairment determination in order to be valid. Since the TWCC-69 from the designated doctor in evidence does not meet the requirements of a

valid certification, it cannot become final. Section 408.123(d) requires that the first certification be valid before it can become final because there was no dispute within 90 days after written notification of the certification by verifiable means. Because the certification is not valid, it cannot become final and we do not reach the issue of whether an exception to the finality of the certification applies in this case.

We reverse the hearing officer's determination that the MMI/IR certification rendered by (Dr. E) on August 28, 2003, has become final and render a new determination that the MMI/IR certification rendered by Dr. E on August 28, 2003, has not become final.

MMI/IR

The record reflects that Dr. E examined the claimant on August 28, 2003, and opined that the claimant reached MMI on that date with a 10% IR. The 10% IR was assessed utilizing 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) based on loss of range of motion of the claimant's left shoulder. Dr. E specifically noted that there was no peripheral nerve disorder and did not provide any impairment for sensory or motor loss. On May 17, 2004, Dr. E in response to a letter of clarification acknowledged that there were medical records, which diagnosed the claimant with brachial plexopathy but noted that on the date of his prior evaluation of the claimant no records were provided to him that suggested the claimant had brachial plexopathy. Dr. E stated at the time of the examination he did not see the marked atrophy referred to by the claimant's treating doctor and that although a recent EMG showed some changes not present on the previous EMG it also showed abnormalities affecting the right side. Dr. E suggested that careful examination by a qualified neurologist or a neurosurgeon be done. The hearing officer determined and it has been affirmed on appeal that the claimant's compensable injury of _____, extends to and includes his left shoulder brachial plexus injury. The AMA Guides specifically provide how to rate a brachial plexus-related impairment. It is clear from his narrative report and his response to the letter of clarification that Dr. E did not rate the claimant's brachial plexus related injury.

Section 408.125(c) provides that the report of the designated doctor shall have presumptive weight, and the Commission shall base the IR on that report unless the great weight of the other medical evidence is to the contrary, and that, if the great weight of the medical evidence contradicts the IR contained in the report of the designated doctor chosen by the Commission, the Commission shall adopt the IR of one of the other doctors. Rule 130.6(i) provides that the designated doctor's response to a Commission request for clarification is considered to have presumptive weight as it is part of the doctor's opinion. However, the designated doctor's job is to rate the entire compensable injury. See Texas Workers' Compensation Commission Appeal No. 980996, decided June 22, 1998. In the instant case, the designated doctor did not rate the entire compensable injury and, therefore, his certification of MMI/IR cannot be

adopted. We reverse the hearing officer's determination that the claimant reached MMI on August 27, 2003, and that the claimant has a 10% IR.

There is only one other certification of MMI/IR in evidence. (Dr. M) examined the claimant and certified that he reached MMI statutorily on July 30, 2004, with a 23% IR. The 23% IR assessed was based on 21% upper extremity impairment for loss of range of motion of the left shoulder and 23% hand impairment based on sensory loss of the thumb and fingers of the left hand. It is not clear from Dr. M's report that the sensory loss rating of the left hand is a rating of the brachial plexus injury. The AMA Guides provide on page 3/53 that to rate a brachial plexus injury both sensory and motor deficits are rated for each nerve root affected. The worksheet indicates that Dr. M assigned a sensory loss rating for each digit of the left hand. Although Dr. M provided a worksheet, he does not explain in narrative form how he determined the sensory impairment for the claimant's left hand. Dr. M does not appear to have assessed or considered whether there was any impairment due to motor deficit for the brachial plexus injury, nor does the worksheet indicate impairment was assigned for each nerve root affected.

Since there is no certification of MMI/IR that rates the entire compensable injury and is in accordance with the AMA Guides, we have no choice but to remand this case back to the hearing officer. On remand the hearing officer shall: (1) ensure that the designated doctor is still qualified to act in that capacity; (2) seek clarification from the designated doctor, if the designated doctor is still qualified to act in that capacity for this matter and if he is not, appoint another designated doctor; (3) make the designated doctor aware that the claimant's compensable injury extends to include his left shoulder brachial plexus injury; (4) provide all parties with the letter of clarification to the designated doctor and the designated doctor's response and give the parties an opportunity to respond to the designated doctor's response in writing or at a hearing or both, and (5) make a determination on the claimant's MMI and IR. In the event that the designated doctor is no longer qualified or refuses to act in that capacity, the record would need to be held open for the appointment of another designated doctor and for a determination on the claimant's MMI and IR.

Pending resolution of the remand, a final decision has not been made in this case. However, since reversal and remand necessitate the issuance of a new decision and order by the hearing officer, a party who wishes to appeal from such new decision must file a request for review not later than 15 days after the date on which such new decision is received from the Commission's Division of Hearings pursuant to Section 410.202, which was amended June 17, 2001, to exclude Saturdays and Sundays and holidays listed in Section 662.003 of the Texas Government Code in the computation of the 15-day appeal and response periods.

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

**ROBIN M. MOUNTAIN
6600 CAMPUS CIRCLE DRIVE EAST, SUITE 300
IRVING, TEXAS 75063.**

Margaret L. Turner
Appeals Judge

CONCUR:

Thomas A. Knapp
Appeals Judge

Robert W. Potts
Appeals Judge