APPEAL NO. 060170-s
FILED MARCH 22, 2006

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 December 14, 2005. The hearing officer resolved the disputed issues by deciding that the first certification of maximum medical improvement (MMI) and impairment rating (IR) assigned by (Dr. C) on February 21, 2005, became final under Section 408.123; that the claimant reached MMI on February 21, 2005; and that the claimant's IR is 10%. The appellant (carrier) appealed, arguing that the first report of Dr. C was in error because it was based on a rating for radiculopathy even though the narrative stated that the radiculopathy was not due to the compensable injury, therefore fitting within an exception of Section 408.123(e)(1)(A). The appeal file does not contain a response from the respondent (claimant).

DECISION

Reversed and remanded.

The parties stipulated that the claimant sustained a compensable injury on ___; that Dr. C was the Texas Department of Insurance, Division of Workers' Compensation (Division)-selected designated doctor; that Dr. C examined the claimant on February 21, 2005, and certified the claimant to be at MMI on that date with a 10% IR; that on May 21, 2005, Dr. C responded to a letter of clarification and changed the IR assigned to 0%; that the claimant received the first certification from Dr. C on March 4, 2005; that the claimant received a second Report of Medical Evaluation (TWCC-69) from Dr. C reflecting the 0% IR on May 27, 2005; and that the claimant disputed Dr. C's certification of 0% on September 12, 2005. It was undisputed that the claimant had sustained a prior back injury, which resulted in back surgery in 1985.

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 the 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: (A) a significant error on the part of the certifying doctor in applying the appropriate American Medical Association Guidelines or calculating the IR. Impairment rating means the percentage of permanent impairment of the whole body resulting from a compensable injury. Section 401.011(24).

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 the 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 Division 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). Rule 130.12(a)(4) provides that a designated doctor may provide multiple IRs if there is a dispute over the extent of injury; that whichever rating from the designated doctor applies to the compensable injury once an extent of injury (EOI) dispute has been resolved may become final if not disputed; and that an EOI dispute does not constitute a dispute of the MMI/IR for purposes of finality.

Dr. C initially examined the claimant on February 21, 2005. In the narrative attached to her TWCC-69, Dr. C noted that as provided in Rule 130.6(d)(5) she was providing multiple ratings that take into account various interpretations of the extent of injury. We note that the extent of injury was not in dispute at the CCH. However, Dr. C stated she was told the low back was compensable and according to the medical records submitted and the claimant's indication of her injury at the time of the examination, a separate indication of MMI and IR was assessed for degenerative changes to the low back, mid-back, and diabetes. Dr. C assessed a 10% IR, based on Diagnosis-Related Estimate (DRE) Lumbosacral Category III, Radiculopathy, for the compensable injury combined with disputed areas, noting specifically that the claimant's radiculopathy is related to degenerative changes, and not her injury. However, Dr. C then also assessed a 10% IR for the compensable injury only, again based on DRE Lumbosacral Category III. In response to a letter of clarification, on May 21, 2005, Dr. C amended her TWCC-69 and assessed an IR of 0%.

On appeal, the carrier acknowledges that the first certification of Dr. C was not disputed within 90 days, but argues that the 10% IR should not become final because there is compelling medical evidence establishing that Dr. C made a significant error in calculating the IR. The carrier cites to Appeals Panel Decision (APD) 050729-s, decided May 23, 2005. In that case, the Appeals Panel affirmed the determination that the IR did not become final when there was a discrepancy between the TWCC-69 and the accompanying report as to the correct IR. The hearing officer in that case found that there was compelling medical evidence of an error in calculation and contents of the certifying doctor's accompanying report. The carrier argues that compelling medical evidence establishes a significant error in calculation of the IR because the report itself is inconsistent. Dr. C notes that she does not believe that the radiculopathy is related to the compensable injury but yet assigns an IR for the compensable injury based on radiculopathy. When this fact is pointed out in a letter of clarification, Dr. C amended her assigned IR to 0%.

Even though the extent of injury was not a specific issue before the hearing officer, we have held that when the issue before the hearing officer is the IR that the extent of injury is a threshold issue. *See* APD 042154, decided October 28, 2004, and APD 992030, decided October 29, 1999. In fact we stated as follows in APD 961324, decided August 16, 1996:

> The Appeals Panel has noted in the past that the resolution of a dispute over an IR cannot proceed unless the "threshold" issue of the extent of injury is resolved either by the parties or the hearing officer, even if not expressly raised by the parties. *See* [APD] 951097, decided August 17, 1995. *See also* [APD] 941748, decided February 13, 1995.

We note that prior to the designated doctor's examination on February 21, 2005, the carrier on December 1, 2004, filed a Notice of Disputed Issue(s) and Refusal to Pay Benefits (PLN-11), disputing liability for the conditions of degenerative changes in the lumbar and thoracic spine, and diabetes. Further, the designated doctor provided multiple ratings taking into consideration an extent of injury question. Before an IR can be determined, whether or not the compensable injury extends to include radiculopathy must be decided. As previously noted, Rule 130.12 provides that whichever rating from the designated doctor applies to the compensable injury once an EOI dispute has been resolved may become final if not disputed. However, in the instant case we note that if the hearing officer determines that radiculopathy is not part of the compensable injury, an IR given based on radiculopathy would be an exception to the finality rule. In the event the hearing officer determines radiculopathy is not part of the compensable injury, compelling medical evidence exists in the record to establish a significant error on the part of the certifying doctor in applying the appropriate American Medical Association Guidelines or calculating the IR.

We reverse the hearing officer's determination that the first certification of MMI and IR assigned by Dr. C on February 21, 2005, became final under Section 408.123; that the claimant reached MMI on February 21, 2005, with a 10% IR and remand this case back to the hearing officer to decide whether or not the compensable injury extends to include radiculopathy. After making a determination regarding the extent of injury the hearing officer should then decide whether or not the first certification of MMI and IR from Dr. C on February 21, 2005, became final and determine the date of MMI and the IR.

The true corporate name of the insurance carrier is**, a political subdivision self-insured through West Texas Educational Insurance Association** and the name and address of its registered agent for service of process is

(NAME)
(ADDRESS)
(CITY), TEXAS (ZIP CODE).

_____
Margaret L. Turner
Appeals Judge

CONCUR:

_____
Thomas A. Knapp
Appeals Judge

_____
Robert W. Potts
Appeals Judge