

APPEAL NO. 071398
FILED SEPTEMBER 28, 2007

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 June 6, 2007. With regard to the two disputed issues before her, the hearing officer determined that the first certification of impairment rating (IR) did not become final under Section 408.123 and 28 TEX. ADMIN. CODE § 130.12 (Rule 130.12) since it was timely disputed and that the appellant's (claimant) IR is 9% pursuant to Dr. B report.

The claimant appealed, contending that the first certification of IR had become final because it had not been properly disputed and that the claimant's IR should be 22% as assessed by Dr. R rather than the 9% IR assessed by Dr. B. The respondent (self-insured) responded, urging affirmance.

DECISION

Affirmed in part and reversed and rendered in part.

The parties stipulated that: (1) the claimant sustained a compensable left shoulder, and cervical and thoracic spine injury on _____; (2) the "Claimant reached statutory [maximum medical improvement (MMI)] on July 26, 2006 per the report of [Dr. R], who saw the Claimant upon the referral of the Claimant's treating doctor;" (3) the first certification of MMI and IR was issued by Dr. R; (4) the self-insured received the first certification of MMI and IR on August 1, 2006; and (5) the designated doctor is Dr. B.

The language of the stipulation on MMI leaves it unclear whether July 26, 2006, is the date the claimant would reach MMI by operation of law or the date the claimant did reach MMI. In this case we read the stipulation that the claimant reached statutory MMI on July 26, 2006, to mean that the claimant reached MMI on July 26, 2006, which was the date of statutory MMI (see Section 401.011(30)(B)), because the parties treated the stipulated statutory MMI date as the date the claimant actually reached MMI. The MMI date has not been appealed and has become final pursuant to Section 410.169. It is also undisputed that the claimant had cervical spine surgery on August 16, 2006, which was after the MMI date.

FINALITY OF THE FIRST CERTIFICATION OF THE IR

The hearing officer's determination that the first certification of IR did not become final under Section 408.123 and Rule 130.12 since it was timely disputed, is supported by sufficient evidence and is affirmed.

THE IR

Dr. R assessed a 22% IR on the July 26, 2006, stipulated date of MMI. The 22% IR was based on a 15% impairment for Diagnosis-Related Estimate (DRE) Cervicothoracic Category III: Radiculopathy and 8% whole person impairment for left shoulder loss of range of motion (ROM) according to 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). Dr. R documents significant signs of radiculopathy to include diminished upper extremity deep tendon reflexes and an EMG/NCV performed on May 17, 2006, verifies C6-7 radiculopathy. Dr. R noted that the cervical spine injury requires surgical correction as recommended by another doctor. The claimant had cervical spine surgery on August 16, 2006. The claimant testified that after the surgery he had less pain and better ROM and strength in his left arm.

The self-insured filed a request for a designated doctor on October 27, 2006, and Dr. B was appointed as the designated doctor. In a Report of Medical Evaluation (DWC-69) and narrative report both dated November 14, 2006, Dr. B certified that the claimant reached MMI on July 19, 2006, which he considered to be the date of statutory MMI, and assessed a 9% IR. Dr. B assessed a 7% left upper extremity impairment for loss of ROM, which converts to a 4% whole person impairment, and 5% impairment for DRE Cervicothoracic Category II: Minor Impairment, which were combined to arrive at the 9% IR. At the CCH, the claimant contended that although Dr. B was the designated doctor, he has an "incorrect date of MMI" which was contrary to the parties stipulated date of MMI, and that the claimant's correct IR is the 22% assessed by Dr. R.

Section 408.125(c) provides that the report of the designated doctor shall have presumptive weight, and the Texas Department of Insurance, Division of Workers' Compensation (Division) shall base the IR on that report unless the preponderance of the other medical evidence is to the contrary, and that, if the preponderance of the medical evidence contradicts the IR contained in the report of the designated doctor chosen by the Division, the Division shall adopt the IR of one of the other doctors. Rule 130.1(c)(3) provides that the assignment of an IR for the current compensable injury shall be based on the injured employee's condition as of the MMI date considering the medical record and the certifying examination. The preamble of Rule 130.1(c)(3) clarifies that IR assessments "must be based on the injured employee's condition as of the date of MMI." 29 Tex. Reg. 2337 (2004). See Appeals Panel Decision (APD) 040313-s, decided April 5, 2004.

In APD 040514, decided April 28, 2004, the hearing officer adopted the IR assigned by the treating doctor that was based on an MMI date different from the stipulated date of MMI. In that case, the Appeals Panel reversed the hearing officer's IR determination because the treating doctor's certification of IR was not based upon the claimant's condition on the stipulated date of MMI, therefore the certification could not be adopted. In the instant case, the hearing officer determined that the claimant's IR is 9% as assigned by Dr. B, but it is based on a MMI date of July 19, 2006, which is

different than the July 26, 2006, MMI date stipulated by the parties. Accordingly, we reverse the hearing officer's determination that the claimant's IR is 9% as assigned by Dr. B as not being based on the claimant's condition as of the July 26, 2006, date of MMI. Since Dr. B's IR cannot be adopted we render a new decision that the claimant's IR is 22% as assessed by Dr. R and which is in accordance with the AMA Guides.

SUMMARY

We affirm the hearing officer's determination that the first certification of IR did not become final under Section 408.123 and Rule 130.12 since it was timely disputed. We reverse the hearing officer's determination that the claimant's IR is 9% as assigned by Dr. B and render a new decision that the claimant's IR is 22% as assessed by Dr. R.

The true corporate name of the insurance carrier is **(a self-insured governmental entity)** and the name and address of its registered agent for service of process is

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

Thomas A. Knapp
Appeals Judge

CONCUR:

Veronica L. Ruberto
Appeals Judge

Margaret L. Turner
Appeals Judge