APPEAL NO. 110911
FILED AUGUST 26, 2011

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 7, 2011. With regard to the three issues before him, the hearing officer determined that: (1) the appellant (claimant) reached maximum medical improvement (MMI) on October 16, 2008; (2) the claimant's impairment rating (IR) is zero percent and (3) the first certification of MMI (on October 16, 2008), and IR assigned by (Dr. H) on October 16, 2009, became final pursuant to Section 408.123.

The claimant appealed, contending that the designated doctor had not received all the medical records and that her MMI date should be February 28, 2010, with a six percent IR as assigned by her treating doctor. The claimant also contends that she timely disputed the first certification of MMI and IR assigned by the designated doctor. The respondent (carrier) responded, urging affirmance.

DECISION

Reversed and remanded.

The parties stipulated that the claimant sustained a compensable injury on (date of injury), and that Dr. H was appointed by the Texas Department of Insurance, Division of Workers' Compensation (Division) to serve as the designated doctor to determine the claimant's date of MMI and IR. In the Background Information the hearing officer states that the claimant sustained a compensable injury to her bilateral upper extremities.

FINALITY UNDER SECTION 408.123

Dr. H, the designated doctor, in a report dated December 1, 2009, certified the claimant at clinical MMI on October 16, 2008, with a zero percent IR. The evidence establishes that Dr. H's December 1, 2009, report is the first valid certification of MMI and the first valid assignment of IR. *See* Section 408.123.

Section 408.123(e) provides except as otherwise provided by this section, an employee's first valid certification of MMI and the 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. 28 TEX. ADMIN. CODE § 130.12(b) (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, including IRs related to extent-of-injury

disputes. The notice must contain a copy of a valid Report of Medical Evaluation (DWC-69), as described in Rule 130.12(c).

In evidence is a Notification of MMI/First Impairment Income Benefit Payment (PLN-3) dated December 7, 2009, addressed to the claimant. The PLN-3 states a copy of Dr. H's report is attached. At the bottom of the exhibit is a U.S. Postal Service Delivery Confirmation Receipt but neither the PLN-3 or Delivery Confirmation Receipt shows when, or even if, the forms were sent or delivered. There is no other evidence such as an affidavit, or adjuster notes to show when the forms were mailed or received. The carrier points to a medical report sent by facsimile transmission (fax) on December 9, 2009, indicating the claimant is "distraught over DD findings." That report does not, however show delivery of written notice by verifiable means.

The preamble to Rule 130.12 provides that the 90-day period "begins when that party receives verifiable written notice of the MMI/IR certification." The preamble goes on to state:

> Written notice is verifiable when it is provided from any source in a manner that reasonably confirms delivery to the party. 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 goal of this requirement is not to regulate how a system participant makes delivery of a report or other information to another system participant, but to ensure that the system participant filing the report or providing the information has verifiable proof that it was delivered. 29 Tex Reg 2331, March 5, 2004. (Emphasis added)

The hearing officer, in his Background Information writes:

> The claimant stated she received the DWC-69 from [Dr. H] in mid December 2009, i.e., December 15, 2009. The [c]laimant's testimony constitutes verifiable means of delivery. The 90-day period to dispute [Dr. H's] DWC-69 would end in mid March 2010, i.e., March 15, 2010. The [c]laimant did not dispute [Dr. H's] DWC-69 until March 30, 2010. This was a date more than 90 days after she received [Dr. H's] DWC-69.

But the claimant at the CCH testified:

> Q. Okay. Do you know about when that you received it? [The PLN-3 and attached DWC-69.]

A. It was sometime in December. I'm not sure of the exact date.

Q. Can you estimate whether it was at the beginning or the middle?

A. It was midway December.

Q. About mid-December. And at that time, were you treating with [Dr. Washington (Dr. W)]?

A. Yes.

Q. Okay. Did you discuss this – this with him?

A. Yes.

Appeals Panel Decision (APD) 042749, decided December 21, 2004, is a similar case. In that case, the injured worker gave inconsistent and contradictory testimony about when she may have gotten written notice of the MMI certification and IR. The question then, and now, is whether the claimant's testimony acknowledging receipt of the notice, but not on a specific date, constitutes "acknowledged receipt by the injured employee" and whether the carrier "has verifiable proof that [the documents] was delivered." In this case, the hearing officer selected December 15, 2009, as the date that Dr. H's IR was provided to the claimant by verifiable means. The claimant never testified that she received the documents on December 15, 2009, and there is no evidence that December 15, 2009, is the date of receipt by verifiable means. Fairly clearly, in both the cited case and this case, the claimant acknowledged receipt of the report but equally clearly she did not know or testify to the specific date of receipt nor does the carrier have "verifiable proof that [the first certification of MMI and IR] was delivered." We hold that the claimant's testimony in this case, does not constitute an acknowledged receipt by the claimant on a date certain sufficient to begin the 90-day period of Section 408.123(d) and Rule 130.12. See also APD 101033, decided September 22, 2010.

In reviewing a "great weight" challenge, we must examine the entire record to determine if: (1) there is only "slight" evidence to support the finding; (2) the finding is so against the great weight and preponderance of the evidence as to be clearly wrong and manifestly unjust; or (3) the great weight and preponderance of the evidence supports its nonexistence. See Cain v. Bain, 709 S.W.2d 175 (Tex. 1986). Under the facts as presented in this case, the hearing officer's determination that the first certification of MMI and IR assigned by Dr. H on October 16, 2009, became final pursuant to Section 408.123 is against the great weight and preponderance of the evidence. In the instant case, there is no documentary evidence or testimony that Dr.

H's certification of MMI/IR was delivered to the claimant by verifiable means on a certain date.

We reverse the hearing officer's determination that the first certification of MMI and IR assigned by Dr. H on October 16, 2009, became final under Section 408.123 and render a new decision that the first certification of MMI and IR assigned by Dr. H on October 16, 2009, did not become final under Section 408.123.

MMI AND IR

Section 401.011(30)(A) defines MMI as "the earliest date after which, based on reasonable medical probability, further material recovery from or lasting improvement to an injury can no longer reasonably be anticipated." Section 408.1225(c) provides that the report of the designated doctor has presumptive weight, and the Division shall base its determination of whether the employee has reached MMI on the report of the designated doctor unless the preponderance of the other medical evidence is to the contrary. Section 408.125(c) provides that the report of the designated doctor shall have presumptive weight, and the 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 that 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.

Dr. H, the designated doctor appointed to determine MMI/IR, initially saw the claimant on October 16, 2008, and certified the claimant was not at MMI, explaining that the claimant's "symptoms persist and referral for hand surgeon consultation has been recommended." In her narrative dated October 16, 2008, Dr. H notes the claimant's "symptoms are not classically typical for [carpal tunnel syndrome (CTS)]." Dr. H notes that a "[c]orrect diagnosis/extent of injury should be established prior to subsequent MMI/IR evaluation."

In a second DWC-69 and narrative dated February 2, 2009, Dr. H again finds the claimant not at MMI. Dr. H notes that an appointment with a hand specialist is pending, electrodiagnostic testing has been recommended, and the claimant's diagnosis of CTS had not positively been established.

Dr. H saw the claimant a third time on June 18, 2009, and again certified that the claimant was not at MMI. In a narrative dated June 18, 2009, Dr. H noted a prolonged 15 month medical course which "appears to have had an incorrect diagnosis with the [CTS], which has possibly delayed appropriate treatment." Dr. H notes that she has not

received office notes "documenting the new diagnoses." Dr. H requested the additional documentation and stated that once they are available, the claimant's "MMI status may change."

Dr. H saw the claimant a fourth time on October 16, 2009, and certified that the claimant reached clinical MMI on October 16, 2008, the date the designated doctor first saw the claimant. In a narrative dated October 16, 2009, Dr. H stated the "ongoing symptoms and dysfunction [the claimant] has experienced have not been due to any work injury." Dr. H refers to "nonspecific bilateral systems and inconsistent exam findings," and that it is possible the claimant has more than one diagnosis. Dr. H also references the fact that she does not have all the medical records. Dr. H further stated:

> In conclusion, I will set this report aside for one month to allow these issues to be addressed. I would like the records outlined above to be sent to me. Specifically: therapy evaluation, electrodiagnostic results, insurance denials (if applicable), and comment by [(Dr. O)] relating [the claimant's] mechanism of injury and clinical course to specific, objectively verified diagnoses. A second opinion hand specialist consultation is appropriate if needed. If this information is not received in one month, I will conclude that the diagnoses given to [the claimant] are not related to the compensable injury for the reasons meticulously outlined above. If any work related injury actually occurred, a wrist strain may have been a more appropriate diagnosis. This finding would have very serious repercussions for [the claimant]. I would highly encourage [the claimant] and her physicians to review this report and provide the appropriate documentation.

There is no evidence that further records were provided to Dr. H and the hearing officer made no findings on the extent of injury. In this case, the evidence establishes that the designated doctor questions whether the claimant has CTS and references a possible "new diagnosis." There was no stipulation by the parties as to the extent of the compensable injury.

In APD 101539, decided December 27, 2010, the Appeals Panel stated that it has held that an extent-of-injury issue is a threshold issue that must be resolved before issues of MMI and IR can be resolved. Without a stipulated or judicially determined extent of injury, Dr. H's certification of MMI and IR cannot be adopted. See also APD 042154, decided October 28, 2004. We reverse the hearing officer's determination that the claimant reached MMI on October 16, 2008, with a zero percent IR, as being contrary to the other medical evidence and against the great weight and preponderance of the evidence.

In evidence is the report of (Dr. W), the treating doctor. In a report dated February 16, 2011, Dr. W certified MMI on February 28, 2010, based on an examination on February 6, 2011, with a six percent IR. Dr. W diagnosed bilateral CTS. We note in referencing chronic tendonitis, Dr. W creates an inconsistency in his report by using a name other than the claimant's name. As previously discussed above, because no extent of injury has been determined, Dr. W's report also cannot be adopted. We further note that Dr. W's rating for bilateral CTS does not apply 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) correctly. Dr. W failed to apply the verification techniques described on page 3/64 of the AMA Guides and failed to combine the impairments from each hand.

Because we have reversed the hearing officer's determination that the claimant reached MMI on October 16, 2008, that the IR is zero percent and that the first certification of MMI and IR assigned by Dr. H became final and there is no other certification of MMI and IR that can be adopted, we remand the case to the hearing officer for further action.

REMAND INSTRUCTIONS

On remand the hearing officer is to add an extent-of-injury issue to the disputed issues and determine the extent of the compensable injury which is supported by the evidence. Dr. H is the designated doctor. The hearing officer is to determine whether Dr. H is still qualified and available to be the designated doctor. The hearing officer is to ensure that the designated doctor has all the pertinent medical records, including those of Dr. O. If Dr. H is no longer qualified or available to serve as the designated doctor, then another designated doctor is to be appointed pursuant to Rule 127.5(c) to determine MMI, which cannot be later than the statutory date of MMI (See Section 401.011(30)) and the IR. The parties are to be provided with the hearing officer's letter to the designated doctor, the designated doctor's response, and to be allowed an opportunity to respond. The hearing officer is to add the issue of extent of injury to the disputed issues and make a determination on extent of injury, MMI, and IR consistent with this decision.

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 Division, 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. See APD 060721, decided June 12, 2006.

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

C T CORPORATION SYSTEM
350 NORTH ST. PAUL STREET
DALLAS, TEXAS 75201.

Margaret L. Turner
Appeals Judge

CONCUR:

Cynthia A. Brown
Appeals Judge

Thomas L. Knapp
Appeals Judge