APPEAL NO. 120255
FILED APRIL 2, 2012

This appeal arises pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq*. (1989 Act). A contested case hearing was held on January 20, 2012, in [City], Texas, with [hearing officer] presiding as hearing officer. The hearing officer resolved the disputed issues before her by deciding that: (1) the Texas Department of Insurance, Division of Workers' Compensation (Division) did not properly appoint [Dr. S] as the designated doctor to address the appellant's (claimant) date of maximum medical improvement (MMI) and impairment rating (IR); and (2) the June 29, 2010, certification of [Dr. D] that the claimant reached MMI on June 29, 2010, with an assigned IR of 8% did become final under Section 408.123 and 28 TEX. ADMIN. CODE § 130.12 (Rule 130.12) (this issue was added at the request of the respondent (self-insured) and for good cause).

The claimant appealed, disputing the hearing officer's determinations on finality and the appointment of the designated doctor, Dr. S. The claimant contended that the evidence established an exception to finality, and that the appointment of and the evaluation by Dr. S, the designated doctor, is necessary to the resolution of the disputed issues of MMI and IR. The self-insured responded, urging affirmance.

DECISION

Reversed and rendered.

The parties stipulated that Dr. D's certification is the first certification of MMI and IR in this claim and that Dr. D's certification was provided to the claimant by verifiable means on July 9, 2010. The evidence reflects that Dr. D is a doctor selected by the treating doctor acting in place of the treating doctor.

CLERICAL CORRECTION

We note that although the hearing officer correctly referred to the provisions of Rule 130.12(c) regarding the validity of a certification of MMI and IR throughout her decision, her Finding of Fact No. 4 incorrectly referred to Rule 130.1(c). We reform Finding of Fact No. 4 to state that Dr. D's certification was valid for purposes of Rule 130.12(c).

FINALITY AND APPOINTMENT OF DESIGNATED DOCTOR

Section 408.123(e) provides that except as otherwise provided by Section 408.123, 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 Report of Medical Evaluation (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. Section 408.123(f) provides in part that an employee's first certification of MMI or assignment of an IR may be disputed after the period described in Subsection (e) if:

(1) compelling medical evidence exists of:

(A) a significant error by the certifying doctor in applying the appropriate American Medical Association guidelines or in calculating the [IR];

(B) clearly mistaken diagnosis or a previously undiagnosed medical condition; or

(C) improper or inadequate treatment of the injury before the date of the certification or assignment that would render the certification or assignment invalid; or

(2) other compelling circumstances exist as prescribed by commissioner rule.

The claimant testified that he injured his bilateral shoulders, bilateral knees, head, and right calf as a result of his fall at work on [date of injury]. The claimant further testified that he had received treatment in the form of surgery on his left shoulder. The claimant contended that Dr. D's certification of MMI and IR is not final because Dr. D only considered and rated the bilateral shoulders and left knee, which do not constitute all of his body parts injured in his work injury. The claimant further contended that the appointment of Dr. S by the Division as the designated doctor to address MMI/IR is proper and necessary to resolve the disputed issues.

In her decision in Finding of Fact No. 5, the hearing officer states that none of the Section 408.123(f) exceptions to the 90-day finality applied to this case.

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).

Dr. D examined the claimant on June 29, 2010, and certified that the claimant reached MMI on June 29, 2010, with 8% IR, using 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). In his narrative report attached to the DWC-69, Dr. D stated that he measured the range of motion (ROM) for the left shoulder, the right shoulder, and the left knee. Using his measurements, Dr. D calculated the following: for the left shoulder, an upper extremity (UE) impairment of 6%; and for the right shoulder, an UE impairment of 8%. Using the Combined Values Chart page 322, Dr. D combined the 8% UE (right shoulder) with 6% UE (left shoulder) which results in 14% UE impairment. Dr. D, using Table 3, page 3/20, converted 14% UE impairment to 8% whole person impairment. Dr. D found no abnormal ROM for the left knee and assigned 0%. Therefore, Dr. D assigned a total whole person IR of 8% for the claimant's work injury of [date of injury]. We note that Dr. D's narrative report did not contain a list of the medical records that he reviewed. *See* Rule 130.1.

Section 408.123(f)(1)(A) provides in pertinent that an employee's first certification of MMI or assignment of an IR may be disputed after the period described in Subsection (e) if compelling medical evidence exists of a significant error by the certifying doctor in calculating the IR. In the AMA Guides, page 3/66, in Section 3.1o entitled "Summary of Steps for Evaluating Impairments of the [UE]," subsection XI [regarding the shoulder region] provides:

When *both* [*UEs*] are involved, derive the whole person impairment percent for each and then *combine* both values using the Combined Values Chart (p. 322). (Emphasis in the original.)

We note these same instructions, if both limbs are involved, are contained in the UE worksheets, page 3/17.

Dr. D's medical report/narrative is compelling medical evidence establishing a significant error on his part in calculating the claimant's IR at 8% whole person IR. According to the AMA Guides, because both limbs are involved, Dr. D was required to calculate the IR by: (1) converting the 8% UE impairment (right shoulder) to 5% whole person impairment; (2) converting the 6% UE impairment (left shoulder) to 4% whole person impairment; and (3) combining, under the Combined Values Chart, 5% with 4% which results in 9% whole person IR. Dr. D incorrectly combined UE impairments and then converted the result to whole person impairment, which resulted in 8% IR.

Because the evidence established an exception to finality under Section 408.123(f)(1)(A), there is no need to address whether another exception to finality exists.

The hearing officer's determination that none of the Section 408.123(f) exceptions to the 90-day finality applied to this case is so against the great weight and preponderance of the evidence as to be clearly wrong and manifestly unjust because there is compelling medical evidence of a significant error on the part of the certifying doctor in calculating the IR. Accordingly, we reverse the hearing officer's determination that the June 29, 2010, certification of Dr. D that the claimant reached MMI on June 29, 2010, with an assigned IR of 8% did become final under Section 408.123 and Rule 130.12 and render a new decision that the June 29, 2010, certification by Dr. D that the claimant reached MMI on June 29, 2010, with an assigned IR of 8% did not become final under Section 408.123 and Rule 130.12.

The hearing officer based her determination that the Division did not properly appoint Dr. S as the designated doctor to address the claimant's date of MMI and IR on her determination that the first valid certification of MMI and IR assigned by Dr. D became final. Given that we have reversed her determination on finality, the hearing officer's determination that the evidence established that a designated doctor evaluation is not necessary to the resolution of this dispute is so against the great weight and preponderance of the evidence as to be clearly wrong and manifestly unjust. Therefore, we reverse the hearing officer's determination that the Division did not properly appoint Dr. S as the designated doctor to address the claimant's date of MMI and IR and render a new decision that the Division did properly appoint Dr. S as the designated doctor to address the claimant's date of MMI and IR.

SUMMARY

We reverse the hearing officer's determination that the June 29, 2010, certification of Dr. D that the claimant reached MMI on June 29, 2010, with an assigned IR of 8% did become final under Section 408.123 and Rule 130.12 and render a new decision that the June 29, 2010, certification of Dr. D that the claimant reached MMI on June 29, 2010, with an assigned IR of 8% did not become final under Section 408.123 and Rule 130.12.

We reverse the hearing officer's determination that the Division did not properly appoint Dr. S as the designated doctor to address the claimant's date of MMI and IR and render a new decision that the Division did properly appoint Dr. S as the designated doctor to address the claimant's date of MMI and IR.

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

CT CORPORATION
350 NORTH ST. PAUL STREET
DALLAS, TEXAS 75201.

Cynthia A. Brown
Appeals Judge

CONCUR:

Thomas A. Knapp
Appeals Judge

Margaret L. Turner
Appeals Judge