

APPEAL NO. 120433
FILED MAY 7, 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 February 1, 2012, in [City], Texas, with [hearing officer] presiding as hearing officer. The hearing officer resolved the disputed issues by deciding that: (1) the compensable injury of [date of injury], does not extend to cervical spine C5-6 herniated nucleus pulposus/osteophyte complex and lumbar spine disc protrusion at L4-5; (2) the date of maximum medical improvement (MMI) is May 7, 2010; (3) the appellant's (claimant) impairment rating (IR) is 10%; and (4) the first certification of MMI and assigned IR from [Dr. R] on May 7, 2010, became final under Section 408.123¹ and Rule 130.12. The claimant appealed, disputing the hearing officer's determinations on finality, MMI, IR and extent of injury. The respondent (carrier) responded, urging affirmance.

DECISION

Affirmed in part and reversed and rendered in part.

The parties stipulated that on [date of injury], the claimant sustained a compensable injury; Dr. R was appointed as the designated doctor by the Texas Department of Insurance, Division of Workers' Compensation (Division) to address MMI, IR, and extent of injury; Dr. R's certification is the first certification of MMI and assigned IR in this claim; and the statutory date of MMI is May 31, 2010. The claimant testified that he was pulling on a pallet jack at work when he injured his neck and low back. The claimant testified that he has had lumbar surgery but needs additional surgery to correct the prior back surgery. The medical records in evidence reflect that the lumbar surgery was performed at the L5-S1 level on September 3, 2009. The hearing officer's finding that Dr. R's certification of MMI and assigned IR were provided to the claimant by verifiable means on May 7, 2010, was not appealed.

**FINALITY DISPUTE UNDER RULE 141.1 PRIOR TO EFFECTIVE DATE OF
NEW BRC RULES**

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

¹ We note the issue as certified out of the benefit review conference (BRC) identified a finality issue under Section 408.123 as well as 28 TEX. ADMIN. CODE § 130.12 (Rule 130.12). However, in the hearing officer's decision, the finality issue was incorrectly referenced as Section 408.124 in listing the issues, in Conclusion of Law No. 6, and in the decision. However, in discussion of her determination on finality, the hearing officer correctly identified Section 408.123, thus the reference to Section 408.124 is a clerical error.

carrier by verifiable means. Rule 130.12(b)(1), in part, provides that a first MMI/IR certification must be disputed within 90 days of delivery of written notice through verifiable means and that:

Only an insurance carrier, an injured employee, or an injured employee's attorney or employee representative . . . may dispute a first certification of MMI or assigned IR under [Rule] 141.1 (related to Requesting and Setting a [BRC]) or by requesting the appointment of a designated doctor, if one has not been appointed.

In the Background Information section of her decision, the hearing officer stated that the claimant filed with the Division on June 14, 2010, a Request for BRC (DWC-45). The hearing officer further stated:

. . . filed a [DWC-45] that checked the box for disputing the findings of the designated doctor [Dr. R] on MMI or impairment and it was stated in the 'other' box, 'Request BRC to dispute 1st certification of MMI/IR by [Dr. R] and to stop 90 day clock.'

The hearing officer also stated that Appeals Panel Decision (APD) 111006-s, decided September 15, 2011, controlled the facts in this case. However, in APD 111006-s, the facts involved a DWC-45 filed after October 1, 2010, the effective date of the new BRC rules under Rule 141.1. Also in that case, the DWC-45 filed with the Division specifically requested that a BRC not be scheduled.

In evidence, in this case, is the DWC-45 filed by the claimant with the Division on June 14, 2010, which requests a BRC to dispute Dr. R's certification of MMI/IR. There is no request on that DWC-45 for the Division not to schedule a BRC. The claimant in his appeal contends that the hearing officer is applying the new Rule 141.1 retroactively. We agree.

Prior to October 1, 2010, Rule 141.1(b) provided in pertinent part a request for a BRC:

- (1) be made on [DWC-45], Request for Setting a [BRC];
- (2) identify and describe the disputed issue or issues; and
- (3) be sent to the [Division].

By filing his DWC-45 on June 14, 2010, with the Division, the claimant timely disputed within 90 days after delivery by verifiable means, the first valid certification of MMI/IR by Dr. R. See APD 042046, decided October 1, 2004.

Accordingly, the hearing officer's determination that the first valid certification of MMI and assigned IR from Dr. R on May 7, 2010, became final under Section 408.123 and Rule 130.12 is legal error because the claimant timely disputed the first valid certification of MMI/IR under Rule 141.1, which was in effect on June 14, 2010. We reverse the hearing officer's decision and render a new decision that the first valid certification of MMI and assigned IR by Dr. R on May 7, 2010, did not become final under Section 408.123 and Rule 130.12.

EXTENT OF INJURY, MMI, AND IR

The hearing officer's determination that the compensable injury of [date of injury], does not extend to cervical spine C5-6 herniated nucleus pulposus/osteophyte complex and lumbar spine disc protrusion at L4-5 is supported by sufficient evidence and is affirmed.

Independent of her determination on finality, the hearing officer in Finding of Fact No. 8 stated that the preponderance of the medical evidence supports Dr. R's certification of MMI and IR. This is supported by sufficient evidence. Dr. R in determining that the claimant reached MMI on May 7, 2010, with 10% IR, based his IR evaluation on a cervical and a lumbar spine injury without the consideration of the claimed extent-of-injury conditions. Therefore, although we have reversed the hearing officer's finality determination, the hearing officer's determination that the claimant reached MMI on May 7, 2010, with 10% IR is also supported by sufficient evidence and is affirmed.

SUMMARY

We reverse the hearing officer's determination that the first valid certification of MMI and assigned IR from Dr. R on May 7, 2010, did become final under Section 408.123 and Rule 130.12 and render a new decision that the first valid certification of MMI and assigned IR from Dr. R on May 7, 2010, did not become final under Section 408.123 and Rule 130.12.

We affirm the hearing officer's determination that the compensable injury of [date of injury], does not extend to cervical spine C5-6 herniated nucleus pulposus/osteophyte complex and lumbar spine disc protrusion at L4-5.

We affirm the hearing officer's determination that the claimant reached MMI on May 7, 2010, with 10% IR.

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

**CORPORATION SERVICE COMPANY
D/B/A CSC-LAWYERS INCORPORATING SERVICE COMPANY
211 EAST 7TH STREET, SUITE 620
AUSTIN, TEXAS 78701-3218.**

Cynthia A. Brown
Appeals Judge

CONCUR:

Thomas A. Knapp
Appeals Judge

Margaret L. Turner
Appeals Judge