

APPEAL NO. 120611  
FILED MAY 29, 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 2, 2012, with the record closing on February 24, 2012, in [City], Texas, with [hearing officer] presiding as hearing officer. With regard to the disputed issues before her, the hearing officer determined that: (1) the first certification of maximum medical improvement (MMI) and impairment rating (IR) assigned from [Dr. N] on July 18, 2011, did not become final under Section 408.123; (2) the date of MMI is August 16, 2011; and (3) the appellant/cross-respondent's (claimant) IR is 6%.

The claimant appealed the hearing officer's finality, MMI and IR determinations, contending that the first certification of MMI and IR assigned from Dr. N on July 18, 2011, was valid and that there are no exceptions to finality established under Section 408.123. The respondent/cross-appellant (carrier) responded to the claimant's appeal, urging affirmance on those issues for which it prevailed. The carrier cross-appealed the hearing officer's Finding of Fact No. 7 that the carrier did not dispute Dr. N's IR within 90 days after the date the rating was provided. The appeal file does not contain a response to the carrier's cross-appeal.

DECISION

Reversed and rendered.

The parties stipulated that the claimant sustained a compensable injury on [date of injury]. The claimant testified that he injured his bilateral shoulders and cervical spine while pulling a heavy pallet up a driveway while at work as a deliveryman.

The evidence established that Dr. N, a referral doctor, is a doctor selected by the claimant's treating doctor, [Dr. W] to act in place of the treating doctor to address MMI/IR. Dr. N examined the claimant on July 18, 2011, and certified that the claimant reached MMI on July 18, 2011, with 16% IR. Further, [Dr. S] is appointed by the Texas Department of Insurance, Division of Workers' Compensation (Division) as a designated doctor to address MMI/IR.

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.

Section 408.123(f)(1)(A) provides in pertinent 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 compelling medical evidence exists of a significant error by the certifying doctor in applying the appropriate American Medical Association guidelines or in calculating the IR.

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; 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.

Rule 130.12(c) provides in pertinent part that the certification on the DWC-69 is valid if:

- (1) [t]here is an MMI date that is not prospective;
- (2) [t]here is an impairment determination of either no impairment or a percentage [IR] assigned; and
- (3) [t]here is the signature of the certifying doctor who is authorized by the [Division] . . . to make the assigned impairment determination.

The hearing officer's Finding of Fact No. 6 that "Dr. [N's] assigned 16% IR was provided to the [c]laimant and the [c]arrier by verifiable means no later than [July 20, 2011]," was not appealed.

The hearing officer's Finding of Fact No. 7 (cross-appealed by the carrier) that "[the] [c]arrier did not dispute Dr. [N's] [IR] within 90 days after the date the rating was provided" is supported by sufficient evidence.

The hearing officer did not make a finding of fact on the validity of the first certification of MMI/IR by Dr. N on July 18, 2011, under Rule 130.12(c). Rather, the hearing officer found that Dr. N's certification of MMI/IR did not become final because "[c]ompelling medical evidence exists of a significant error by the certifying doctor, Dr. [N], in applying the appropriate [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)] per [Section] 408.123(f)(1)(A)." In the Background Information section of her decision, the hearing officer states this exception applies because Dr. N used the range of motion (ROM) testing performed by a technician to whom the claimant had been referred by Dr.

W, the claimant's treating doctor, rather than by Dr. N. The hearing officer further stated that the DWC-69 did not reflect on its face (in Section V of the DWC-69) whether or not Dr. W adopted the certification of MMI/IR by Dr. N. The hearing officer then found that this established an exception to finality under Section 408.123(f)(1)(A). We disagree.

The DWC-69 in evidence by Dr. N, the referral doctor, meets the requirements of Rule 130.12(c) because it provides an MMI date that is not prospective (the date of examination by Dr. N and certified MMI date is July 18, 2011); there is an impairment determination of 16%; and the DWC-69 is signed by the certifying doctor. Dr. N rated the entire compensable injury that included the bilateral shoulders and the cervical spine. Attached to the DWC-69 is the Functional Capacity Evaluation (FCE) report on the ROM measurements of the claimant's bilateral shoulders performed by a technician on July 18, 2011, and utilized by Dr. N in assigning the claimant's IR under the appropriate rating criteria of the AMA Guides. Dr. S's, the designated doctor, narrative report dated August 16, 2011, states that the claimant was referred by Dr. W, the treating doctor, for a FCE on July 18, 2011. Dr. N, the referral doctor, in completing his DWC-69 placed the claimant at clinical MMI on July 18, 2011, with 16% IR, correctly applying the rating criteria in the AMA Guides for abnormal ROM of the bilateral upper extremities (UE) and the Diagnosis-Related Estimates (DRE) Cervicothoracic Category II: Minor Impairment.<sup>1</sup> There was no evidence of an exception to finality of a clearly mistaken diagnosis or a previously undiagnosed medical condition or improper or inadequate treatment of the injury before the date of the certification or assignment that would render the certification or assignment invalid. See Section 408.123(f)(1)(B) and (C). Therefore, the hearing officer erred in finding an exception to finality. Without a timely dispute by the carrier, Dr. N's first valid certification of MMI/IR on July 18, 2011, became final under Section 408.123.

We reverse the hearing officer's determination that the first certification of MMI and IR assigned from Dr. N on July 18, 2011, did not become final under Section

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<sup>1</sup> Measurements for the left shoulder: 135° flexion yields 3% UE impairment (Figure 38, page 3/43); +38° extension yields 1% UE impairment (Figure 38); 137° abduction yields 2% UE impairment (Figure 41, page 3/44); +38° adduction yields 0% UE impairment (Figure 41); 70° internal rotation yields 1% UE impairment (Figure 44, page 3/45); and +50° external rotation yields 1% UE impairment (Figure 44). Adding percentages of 3 + 1 + 2 + 0 + 1 + 1 results in 8% UE impairment which converts to 5% whole person (WP) impairment under Table 3, page 3/20.

Measurements for the right shoulder: 118° flexion yields 4% UE impairment (Figure 38); +43° extension yield 1% UE impairment (Figure 38); 103° abduction yields 4% UE impairment (Figure 41); +34° adduction yields 1% UE impairment (Figure 41); 70° internal rotation yields 1% UE impairment (Figure 44); and +49° external rotation yields 1% UE impairment. Adding percentages of 4 + 1 + 4 + 1 + 1 + 1 results in 12% UE impairment which converts to 7% WP impairment.

UE impairment: Because both limbs are involved, WP impairments are calculated for each limb separately and then combined. Combining 7% WP impairment for the right shoulder with 5% WP impairment for the left shoulder results in 12% WP impairment for the bilateral UEs.

Cervical Spine: Placement in DRE Cervicothoracic Category II: Minor Impairment results in 5% WP impairment.

16% Assessed IR: Combining 12% WP impairment for bilateral UEs with 5% WP impairment for the cervical spine results in 16% WP IR for the compensable injury.

408.123 and render a new decision that the first valid certification of MMI and IR assigned from Dr. N on July 18, 2011, became final under Section 408.123.

The hearing officer determined that the first valid certification of MMI and IR assigned by Dr. N on July 18, 2011, did not become final and adopted the certification of MMI/IR by the designated doctor, Dr. S. Because we have reversed the hearing officer's finality determination, we reverse the hearing officer's determination that the claimant reached MMI on August 16, 2011, with 6% IR as certified by Dr. S and render a new decision that the claimant reached MMI on July 18, 2011, with 16% IR as certified by Dr. N, because Dr. N's first valid certification of MMI and IR assigned on July 18, 2011, became final.

The true corporate name of the insurance carrier is **OLD REPUBLIC INSURANCE COMPANY** and the name and address of its registered agent for service of process is

**CORPORATION SERVICE COMPANY  
211 EAST 7TH STREET, SUITE 620  
AUSTIN, TEXAS 78701-3218.**

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Cynthia A. Brown  
Appeals Judge

CONCUR:

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Thomas A. Knapp  
Appeals Judge

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Margaret L. Turner  
Appeals Judge