

APPEAL NO. 121363
FILED AUGUST 31, 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 (CCH) was opened on April 27, 2012, with the record closing on June 7, 2012, in [City], Texas, with [hearing officer] presiding as hearing officer. The issues before the hearing officer were:

What is the date of maximum medical improvement (MMI)?

What is the appellant's (claimant) impairment rating (IR)?

Did the first certification of MMI and IR assigned by [Dr. F] on July 21, 2011, become final under Section 408.123 and 28 TEX. ADMIN. CODE § 130.12 (Rule 130.12)?

Did the respondent (carrier) have good cause for failing to meet the requirements of Rule 141.1?

Does the compensable injury of [date of injury], extend to a right hip sprain/strain; disc protrusions at L5-S1, C3-4, C4-5, C5-6, cervical radiculopathy and lumbar radiculopathy?

The hearing officer determined that: (1) the compensable injury of [date of injury], does not extend to right hip sprain/strain, disc protrusions at L5-S1, C3-4, C4-5, C5-6, cervical radiculopathy and lumbar radiculopathy; (2) the carrier met the requirements of Rule 141.1 by filing a complete Request for Benefit Review Conference (DWC-45) on October 17, 2011; (3) the first certification of MMI and assigned IR from Dr. F, on July 21, 2011, did not become final under Section 408.123 and Rule 130.12; and (4) the claimant reached MMI on March 1, 2011, with 2% IR.

The claimant appealed, disputing the hearing officer's determinations on all the disputed issues. The claimant also attached documents not submitted at the CCH but submitted for the first time on appeal regarding whether the carrier timely disputed Dr. F's first certification of MMI and assigned IR. The carrier responded, urging affirmance of the hearing officer's determinations and objecting to the alleged newly discovered evidence submitted for consideration by the Appeals Panel.

DECISION

Affirmed in part and reversed and remanded in part.

The parties stipulated that on [date of injury], the claimant sustained a compensable injury and that Dr. F is the Texas Department of Insurance, Division of Workers'

Compensation (Division)-appointed designated doctor to determine MMI and IR. The claimant testified that she sustained injuries when she fell from the third step of a ladder onto boxes and concrete flooring while at work.

In evidence, is a Notice of Disputed Issue(s) and Refusal to Pay Benefits (PLN-11) dated May 27, 2011, which states that the carrier accepts as compensable a cervical sprain/strain, a lumbar sprain/strain, a right shoulder strain, a right hip contusion and a right knee contusion.

NEWLY DISCOVERED EVIDENCE

Documents submitted for the first time on appeal are generally not considered unless they constitute newly discovered evidence. See *generally*, Appeals Panel Decision (APD) 091375, decided December 2, 2009; Black v. Wills, 758 S.W.2d 809 (Tex. App.--Dallas 1988, no writ). In determining whether new evidence submitted with an appeal or response requires remand for further consideration, the Appeals Panel considers whether the evidence came to the knowledge of the party after the hearing, whether it is cumulative of other evidence of record, whether it was not offered at the hearing due to a lack of diligence, and whether it is so material that it would probably result in a different decision. See APD 051405, decided August 9, 2005. We do not agree that the documents submitted by the claimant for the first time on appeal meet the requirements for newly discovered evidence. The documents could have been discovered prior to the CCH, were in part cumulative of other evidence admitted at the CCH, and were not so material that it would probably result in a different decision. Therefore, the documents attached to the claimant's appeal were not considered by the Appeals Panel.

EXTENT OF INJURY

The hearing officer's determination that the compensable injury of [date of injury], does not extend to right hip sprain/strain;¹ disc protrusions at L5-S1, C3-4, C4-5, C5-6, cervical radiculopathy and lumbar radiculopathy is supported by sufficient evidence and is affirmed.

GOOD CAUSE FOR FAILING TO MEET THE REQUIREMENTS OF RULE 141.1

Rule 141.1(d) provides in pertinent part that a DWC-45 shall be made in the form and manner required by the Division and shall identify and describe the disputed issue(s) and provide details and supporting documentation of efforts made by the requesting party to resolve the disputed issues. Rule 141.1(g) provides in pertinent part

¹ We note that there was no medical evidence admitted into evidence that a right hip contusion is the same condition as a right hip sprain/strain.

that if a party disagrees with the Division's determination that the DWC-45 was incomplete or if a party has good cause for failing to meet the requirements of Rule 141.1, the party may request an expedited CCH on this matter.

The issue before the hearing officer was not whether the Division had abused its discretion in denying the DWC-45 as incomplete. The issue before the hearing officer was, "[d]id [the] [c]arrier have good cause for failing to meet the requirements of Rule 141.1?"

We do not agree that the hearing officer resolved the issue before him as stated in the decision. Rather the hearing officer found that "[the] [c]arrier disputed Dr. [F's] [MMI] date and [IR] assignment within 90 days after the date the [MMI] date and [IR] assignment were provided by filing a complete [DWC-45] on October 17, 2011, which included a description of all efforts made to resolve the disputed issues." The hearing officer then determined that "[the] [c]arrier met the requirements of Rule 141.1 by filing a complete DWC-45 on October 17, 2011."

In evidence is a DWC-45 dated October 17, 2011, signed by the carrier; however, this document contains no date stamp establishing when or if this document was filed by the carrier with the Division. However, in evidence are Dispute Resolution Information System (DRIS) notes. DRIS Note Sequence 18 dated October 25, 2011, states "[DWC-45] [f]orm received on [October 25, 2011], and has been forwarded to dispute resolution officer . . . for processing." This DRIS note establishes that a DWC-45 was filed with the Division. There is no DRIS entry in evidence or any other evidence that establishes that any DWC-45 was filed with the Division on October 17, 2011. Accordingly, the hearing officer's finding concerning a DWC-45 filed on October 17, 2011, is not supported by the evidence admitted at the CCH.

The hearing officer's finding that the carrier disputed Dr. F's MMI date and IR assignment within 90 days after the date the MMI date and IR assignment were provided by filing a complete DWC-45 on October 17, 2011, which included a description of all efforts made to resolve the disputed issues is so against the great weight and preponderance of the evidence as to be clearly wrong and manifestly unjust. The hearing officer's determination that the carrier met the requirements of Rule 141.1 by filing a complete DWC-45 on October 17, 2011, is not supported by the evidence and we reverse by striking Conclusion of Law No. 3.

With regard to whether the carrier had good cause for failing to meet the requirements of Rule 141.1, the hearing officer does not have in evidence before him the DWC-45 that was filed with the Division on October 25, 2011. The hearing officer erred by not taking official notice of the Division's records with regard to the filing of the DWC-45 with the Division. See APD 091229, decided October 15, 2009. Because the

hearing officer failed to develop the record necessary to resolve the issue, we remand the “good cause for failing to meet the requirements of Rule 141.1” issue to the hearing officer for further action consistent with this decision.

On remand the hearing officer is to admit as a hearing officer exhibit the DWC-45 filed with the Division on October 25, 2011, because it is an essential Division form necessary to resolve the disputed issues before him; to allow the parties an opportunity to review the officially noticed DWC-45 and respond to it; and to make a finding of fact and conclusion of law regarding whether the carrier had good cause for its failure to meet the requirements of Rule 141.1.

FINALITY

The hearing officer resolved the issue of finality on two alternative theories: (1) timely filing of a dispute of the first valid certification of MMI/IR and (2) a finding of an exception under Section 408.123(f).

Timely Dispute

Section 408.123(e) provides that except as otherwise provided by this section, 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)(1) provides:

A 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 subsection (c). 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. The 90-day period may not be extended.

- (1) Only an insurance carrier, an injured employee, or an injured employee’s attorney or employee representative under [Rule] 150.3(a) may dispute a first certification of MMI or assigned IR under [Rule] 140.1 (related to Requesting and Setting a Benefit Review Conference) or by requesting the appointment of a designated doctor, if one has not been appointed.

The hearing officer erred, not only in finding that the carrier filed its DWC-45 on October 17, 2011 (as discussed above), but also by failing to make a finding on the

date that the carrier received written notice of Dr. F's first valid certification of MMI/IR through verifiable means. Without a date specific, the hearing officer cannot determine whether there was a timely dispute filed. On remand, the hearing officer may take additional evidence in his discretion in order to determine delivery by verifiable means, the time period in which the carrier had to dispute Dr. F's first certification, and the date the carrier disputed the first certification under Rule 141.1. The hearing officer is to make the appropriate findings of fact on delivery by verifiable means, the period in which to dispute, and the timeliness of any dispute filed by the carrier under Rule 141.1.

Exception to Finality under Section 408.123(f)

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 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.

Dr. F examined the claimant on July 9, 2011, and certified that the claimant reached MMI on April 26, 2011, with 16% IR. There is an error on Dr. F's DWC-69 which states that the claimant reached MMI on April "46" 2011. Dr. F's narrative states an MMI date of April 26, 2011. Dr. F diagnosed the claimant with neck strain, lumbar strain, shoulder strain, right knee contusion and right hip strain. As previously discussed, the hearing officer determined (and we affirmed) that a right hip sprain/strain was not part of the compensable injury of [date of injury]. The 16% IR was based on the following:

1. Placing the claimant in Diagnosis-Related Estimate (DRE) Cervicothoracic Category II: Minor Impairment for 5% IR;
2. Placing the claimant in DRE Lumbosacral Category II: Minor Impairment for 5% IR;
3. Assigning 2% whole person IR for abnormal range of motion (ROM) of the right upper extremity (right shoulder);
4. Assigning 0% for ROM measurements for the right knee;
5. Assigning 4% whole person IR for abnormal ROM for the right hip; and
6. Combining 5% IR (cervical) with 5% IR (lumbar) with 2% IR (right shoulder) with 4% IR (right hip), resulting in 16% whole person IR for the claimant's compensable injury.

Finding of Fact No. 5 states:

Compelling medical evidence exists of a significant error in calculating the [IR] by Dr. [F] that would render the certification or assignment invalid in that Dr. [F] rated a right hip sprain/strain; disc protrusions at L5-S1, C3-4, C4-5, C5-6, cervical radiculopathy and lumbar radiculopathy.

The hearing officer in part found that there was compelling medical evidence of a significant error in calculating the IR by Dr. F because Dr. F rated a right hip sprain/strain, which the hearing officer determined (and we affirmed) was not part of the compensable injury. That portion of the hearing officer's finding that "[c]ompelling medical evidence exists of a significant error in calculating the [IR] by Dr. [F] in that Dr. [F] rated a right hip sprain/strain" is supported by sufficient evidence. See APD 111227, decided October 13, 2011.

However, that portion of Finding of Fact No. 5 that compelling medical evidence exists of a significant error in calculating the IR by Dr. F because Dr. F rated disc protrusions at L5-S1, C3-4, C4-5, C5-6, cervical radiculopathy and lumbar radiculopathy is so against the great weight and preponderance of the evidence as to be clearly wrong and manifestly unjust. The narrative report attached to Dr. F's DWC-69 states that Dr. F diagnosed and rated lumbar and cervical strains by placing the claimant in DRE Lumbosacral Category II: Minor Impairment and in DRE Cervicothoracic Category II: Minor Impairment. As previously noted, the carrier has accepted a cervical and lumbar sprain/strain as part of the compensable injury. In this narrative, Dr. F noted guarding and spasms which are differentiators for placement in the categories. The placement of the claimant in the DRE Lumbosacral and Cervicothoracic Categories II: Minor Impairment is in accordance with 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. F did not include the diagnoses of disc protrusions at L5-S1, C3-4, C4-5, C5-6, cervical radiculopathy and lumbar radiculopathy when assigning the claimant's IR. Therefore, we reverse by striking that portion of Finding of Fact No. 5 that compelling medical evidence exists of a significant error in calculating the IR by Dr. F that would render the certification or assignment invalid in that Dr. F rated disc protrusions at L5-S1, C3-4, C4-5, C5-6, cervical radiculopathy and lumbar radiculopathy.

Because the hearing officer found an exception to the 90-day finality rule as discussed above, we affirm the hearing officer's decision that the first certification of MMI and IR by Dr. F on July 21, 2011, did not become final under Section 408.123 and Rule 130.12.

MMI/IR

As previously noted, in evidence is a PLN-11 dated May 27, 2011, which states that the carrier accepts as compensable a cervical sprain/strain, a lumbar sprain/strain, a right shoulder strain, a right hip contusion and a right knee contusion. The hearing officer has determined (and we have affirmed) that the compensable injury of [date of injury], does not extend to right hip sprain/strain; disc protrusions at L5-S1, C3-4, C4-5, C5-6, cervical radiculopathy and lumbar radiculopathy.

There were only two certifications of MMI/IR in evidence, one by Dr. F, the designated doctor, and one by [Dr. R], the post-designated doctor required medical examination (RME) doctor. As previously discussed, the certification of MMI/IR by Dr. F, the designated doctor, cannot be adopted because he included a non-compensable condition (right hip strain) when he rated the compensable injury of [date of injury]. The only other certification of MMI/IR in evidence is by Dr. R, the RME doctor, which is adopted by the hearing officer.

Dr. R examined the claimant on January 17, 2012, and certified that the claimant reached clinical MMI on March 1, 2011, with 2% IR using the AMA Guides. Dr. R diagnosed the compensable injury as a cervical strain, low back strain and right shoulder strain (resolved). The 2% IR is based on abnormal ROM measurements obtained for the right shoulder (ROM measurements are provided in a worksheet attached to his narrative and the 4% upper extremity impairment converts to 2% whole person IR) and on placement of the claimant in DRE Lumbosacral Category I: Complaints or Symptoms (0%) and in DRE Cervicothoracic Category I: Complaints or Symptoms (0%). However, Dr. R's certification of MMI/IR cannot be adopted because he failed to rate the entire compensable injury and failed to provide a rating as provided in Rule 130.1(c)(3).

In certifying an MMI date and assigning an IR, Dr. R does not consider or rate a right hip contusion or right knee contusion. See APD 111237, decided October 21, 2011. Therefore, the hearing officer's finding that the March 1, 2011, date of MMI and 2% IR certified by Dr. R is supported by a preponderance of the evidence is so against the great weight of the evidence as to be so clearly wrong and manifestly unjust and the certification of MMI/IR by Dr. R cannot be adopted.

There are no other certifications of MMI/IR in evidence. We reverse the hearing officer's decision that the claimant reached MMI on March 1, 2011, with 2% IR and remand the issues of MMI and IR to the hearing officer for further action consistent with this decision.

SUMMARY

We reverse by striking the hearing officer's decision that the carrier met the requirements of Rule 141.1 by filing a complete DWC-45 on October 17, 2011, and remand the issue of did the carrier have good cause for failing to meet the requirements of Rule 141.1 to the hearing officer for further action consistent with this decision.

We affirm the hearing officer's decision that the compensable injury of [date of injury], does not extend to right hip sprain/strain; disc protrusions at L5-S1, C3-4, C4-5, C5-6, cervical radiculopathy and lumbar radiculopathy.

We affirm the hearing officer's decision that the first certification of MMI and IR assigned by Dr. F on July 21, 2011, did not become final under Section 408.123 and Rule 130.12.

We reverse the hearing officer's decision that the claimant reached MMI on March 1, 2011, with 2% IR as certified by Dr. R and remand the issues of MMI and IR to the hearing officer for further action consistent with this decision.

REMAND INSTRUCTIONS

On remand, the hearing officer is to admit as a hearing officer exhibit the DWC-45 filed with the Division on October 25, 2011, because it is an essential Division form necessary to resolve the disputed issues before him; to allow the parties an opportunity to review the officially noticed DWC-45 and respond to it; make a finding of fact and conclusion of law whether the carrier had good cause for its failure to meet the requirements of Rule 141.1.

On remand, the hearing officer may take additional evidence in his discretion in order to determine delivery by verifiable means, the time period in which the carrier had to dispute Dr. F's first certification, and the date the carrier disputed the first certification under Rule 141.1. The hearing officer is to make the appropriate findings of fact on delivery by verifiable means, the period in which to dispute, and the date the carrier filed a dispute of the first certification under Rule 141.1.

Dr. F is the designated doctor in this case. On remand, the hearing officer is to determine whether Dr. F is still qualified and available to be the designated doctor. If Dr. F is no longer qualified or available to serve as the designated doctor, then another designated doctor is to be appointed to determine MMI/IR for the compensable injury of [date of injury].

The hearing officer is to advise the designated doctor that the compensable injury of [date of injury], includes a cervical sprain/strain, a lumbar sprain/strain, a right

shoulder strain, a right hip contusion, and a right knee contusion (as accepted and/or agreed to by the parties). Furthermore, it has been administratively determined by the Division that the compensable injury of [date of injury], does not extend to right hip sprain/strain; disc protrusions at L5-S1, C3-4, C4-5, C5-6, cervical radiculopathy and lumbar radiculopathy.

The hearing officer is to advise the designated doctor that Rule 130.1(c)(3) provides that the doctor assigning the IR shall: (A) identify objective clinical or laboratory findings of permanent impairment for the current compensable injury; (B) document specific laboratory or clinical findings of an impairment; (C) analyze specific clinical and laboratory findings of an impairment; and (D) compare the results of the analysis with the impairment criteria and provide the following: (i) [a] description and explanation of specific clinical findings related to each impairment, including [0%] [IRs]; and (ii) [a] description of how the findings relate to and compare with the criteria described in the applicable chapter of the AMA Guides. The doctor's inability to obtain required measurements must be explained.

The designated doctor is then to be requested to give a certification of MMI/IR for the claimant's compensable injury of [date of injury], based on the injured employee's condition as of the MMI date, which can be no later than the date of statutory MMI, considering the claimant's medical record and the certifying examination.

The parties are to be provided with the hearing officer's letter to the designated doctor and the designated doctor's response. The parties are to be allowed an opportunity to respond. The hearing officer is then to make a determination on MMI/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 **ACE AMERICAN INSURANCE COMPANY** and the name and address of its registered agent for service of process is

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

Cynthia A. Brown
Appeals Judge

CONCUR:

Thomas A. Knapp
Appeals Judge

Margaret L. Turner
Appeals Judge